In the District Court of Appeal
Fourth District of Florida

CASE NO. 4D15-2538
(Lower Tribunal Case No. 12-32021(11)

ALS-RVC, LLC,
Appellant,

VS.

Julian K.D. Garvin,
Appellee.

ON APPEAL FROM THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF

Respectfully Submitted,

/s/ Evan M. Rosen
Law Offices of Evan M. Rosen, P.A.
12 SE 7th Street, Suite 805
Fort Lauderdale, FL 33301
754-400-5150 (phone)
Fla. Bar 120103
Attorney for Appellant
Designated E-mail for Service: eservice@evanmrosen.com

TABLE OF CONTENT

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 4

STANDARD OF REVIEW 6

I. Appellant's Failure to Comply with the Servicemember Civil Relief Act (SCRA) resulted in failure to prove conditions precedent and damages 6

A. SCRA prevents acceleration of principal which is a condition precedent to foreclosing a mortgage 7

i. Appellee did not waive condition precedent defense 10

B. Failure to comply with SCRA means that Appellant failed to prove damages 11

C. Under the "tipsy coachman" doctrine, dismissal was still appropriate due to Appellant's failure to prove that the breach letter was actually mailed 15

II. APPELLANT FAILED TO PROVE STANDING BECAUSE IT APPARENTLY TRANSFERRED ALL OF ITS RIGHTS AND INTERESTS IN THE NOTE AND MORTGAGE TO MAXIM AND DID NOT PROVE ANY OF THE CONDITIONS WHICH ALLOWED IT TO ENFORCE 16

A. The Assignments of mortgage do not reflect a proper chain of assignment 17

B. The terms of the Agreement express Appellant's intent to transfer all of its rights and interests to the Note and Mortgage, prior to filing this action 19

i. The Agreement did not expressly preserve Appellant's rights as holder 22

ii. The Agreement did not implicitly preserve Appellant's rights as holder....24

C. This Court cannot draw inferences as argued by Appellant....26

D. Mortgage, in equity, does not follow the Note when there is clear intent otherwise....28

CONCLUSION.... 29

CERTIFICATE OF SERVICE.... 29

CERTIFICATE OF COMPLIANCE.... 30

TABLE OF AUTHORITIES

Cases

Auto-Owners Ins. Co. v. Anderson,
756 So. 2d 29 (Fla. 2000)..25

Berwick Corp. v. Kelinginna Inv. Corp.,
143 So. 2d 684 (Fla. 3d DCA 1962)..12

Boone v. Lightner,
319 U.S. 561 (1943)..8

Carnell v. Carnell,
398 So. 2d 503 (Fla. 5th DCA 1981)..25

Correa v. U.S. Bank, N.A.,
118 So. 3d 952 (Fla. 2d DCA 2013)..14

Deutsche Bank Nat. Trust Co. v. Huber,
137 So. 3d 562 (Fla. 4th DCA 2014)..6

E & Y Assets, LLC v. Sahadeo,
180 So. 3d 1162 (Fla. 4th DCA 2015)..13

Elston/Leetsdale, LLC v. CWCapital Asset Mgmt. LLC,
87 So. 3d 14 (Fla. 4th DCA 2012)..19

Emerald Pointe Property Owners' Ass'n, Inc. v. Commercial Const. Industries, Inc., 978 So. 2d 873 (Fla. 4th DCA 2008)..14

Fed. Home Loan Mortg. Corp. v. Beekman,
174 So. 3d 472 (Fla. 4th DCA 2015)..10

Florida Recycling Services, Inc. v. Greater Orlando Auto Auction, Inc,
898 So. 2d 129 (Fla. 5th DCA 2005)..25, 27

Florida Ventilation Awning Co. v. Dickson,
67 So. 2d 215 (Fla. 1953)...12

Holt v. Calchas,
155 So. 3d 499 (Fla. 4th DCA 2015) 16

Johns v. Gillian,
184 So. 140, 143 (Fla. 1938)..28

Lacombe v. Deutsche Bank Nat'l Trust Co.,
149 So. 3d 152 (Fla. 1st DCA 2014) 14

Lawyers Title Ins. Co., Inc. v. Novastar Mortg., Inc.,
862 So. 2d 793 (Fla. 4th DCA 2003) 21

Lloyd v. Bank of New York Mellon,
160 So. 3d 513 (Fla. 4th DCA 2015) 16

Peuguero v. Bank of. Am., N.A.,
169 So. 3d 1198 (Fla. 4th DCA 2015) 13

Robertson v. State,
829 So. 2d 901 (Fla. 2002)...15

Russell v. Aurora Loan Services, LLC,
163 So. 3d 639 (Fla. 2d DCA 2015) 17

Salmon v. Foreclosed Asset Sales and Transfer Partnership,
162 So. 3d 1142 (Fla. 4th DCA 2015) 21

Santana-Archivald v. Banco Popular De Puerto Rico,
CIV. 11-1627 JAG, 2012 WL 2359432 (D.P.R. 2012) 8,9

Sas v. Fed. Nat. Mortg. Ass'n,
12 So. 3d 778 (Fla. 2d DCA 2013) 13

Sea World of Florida v. Ace American Ins. Companies, Inc.,
28 So. 3d 158 (Fla. 5th DCA 2010) 12

Security First Federal Sav. & Loan Ass'n v. Jarchin,
479 So. 2d 767 (Fla. 5th DCA 1985) 25

St. Clair v. U.S. Bank Nat. Ass'n,
173 So. 3d 1045 (Fla. 2d DCA 2015) 23

Teca, Inc. v. WM-TAB, Inc.,
726 So. 2d 828 (Fla. 4th DCA 1999) 13-14

Van Der Noord v. Katz,
481 So. 2d 1228 (Fla. 5th DCA 1985) 14

Withers v. Sandlin,
18 So. 856 (Fla. 1896) 23

Zimmerman v. JPMorgan Chase Bank, N.A.,
134 So. 3d 501 (Fla. 4th DCA) 16

Statutes & Rules

FLA. STAT. §45.0315 12

FLA. STAT. §671.102(2)(a) 17, 20

FLA. STAT. §673.3011(1) 20

50 U.S.C.A §3902 8

50 U.S.C.A. §3937(a) 1, 7, 8, 14

50 U.S.C.A. §4042 7

Fla. R. Civ. P. 1.190(b) 10

PRELIMINARY STATEMENT

All references in this Brief to the Record on Appeal are designated by the symbol "R" followed by the page number [R. __].

All references to Appellant's Initial Brief are designated as "I.B." followed by the page number [I.B. __].

The trial transcript will be referenced by the page number as it appears in the Record followed by the line number(s) [R. ___ Ln. ___ - ___].

STATEMENT OF THE CASE AND FACTS

On or about March 13, 2009, Appellee, Julian K. Garvin, was called to active duty by the United States Army for one year, to begin on March 22, 2009. On March 26, 2009, Mr. Garvin informed his mortgage servicer, JPMorgan Chase Bank, N.A., that he had been called to serve. He provided a copy of his deployment order and asked them to reduce his interest rate, as required by federal law. No such adjustments were made. While on active duty, and for 11 months after his return, Mr. Garvin continued to make his full monthly payments. Then, for reasons not relevant to this appeal, Mr. Garvin was unable to continue to pay.

On November 14, 2012, ALS-RVC, LLC, ("Appellant") filed this action to enforce the subject Note and Mortgage. After trial, the case was involuntary dismissed, in part, because of Appellant's failure to adjust the interest rate as required by the Servicemember Civil Relief Act (SCRA). 50 U.S.C.A §3937. Appellant concedes in its Initial Brief that the SCRA "applies to this situation, and Appellee's loan payments should have been credited with a reduced interest rate during his active duty…" [I.B. 25]. Appellant also points out that, "Subsection (e) of 527 is entitled 'Penalty' and reads, 'Whoever knowingly violates subsection (a) shall be fined as provided in title 18, United States Code, imprisoned for not more than one year, or both.' 50 U.S.C.A § 3937(e)." [I.B. 26]. Yet, rather than trying to

cure this admitted, jailable offense committed against a member of the United States Army, Appellant pursued this appeal.

At trial, Appellant admitted three assignments specifically assigning the Note and Mortgage at issue. The assignments are as follow, in chronological order:

> **October 7, 2011** - Collateral Assignment of Note, Mortgage, and Other Loan Documents ("Agreement") from Appellant to Maxim Credit Corp. ("Maxim"). [R. 349]
>
> **November 4, 2011** - Assignment of Mortgage from JPMorgan Mortgage Acquisition Corp. to Appellant. [R. 347]
>
> **February 1, 2012** – Assignment of Mortgage from Mortgage Electronic Registration Systems, Inc. ("MERS") to JPMorgan Mortgage Acquisition Corp. ("JPMorgan"). [R. 348]

In the Agreement with Maxim, Appellant transferred all of its rights and interests in the subject Note and Mortgage (i.e. the Collateral Documents), including the right to enforce, in exchange for a $1,500,000.00 loan from Maxim. Once the loan is repaid in full, Maxim agrees to assign and transfer the Collateral Documents back to Appellant. Maxim can also request, in writing, that Appellant enforce the note. At trial, the Agreement with Maxim was introduced but there was no evidence that the loan was repaid in full nor that Maxim requested Appellant to enforce.

After the close of Appellant's case-in-chief, Appellee moved for involuntary dismissal which was granted based on insufficient evidence to demonstrate standing

and failure to comply with ***all*** conditions precedent. As to standing, the Trial Court's Order states in part that "the record evidence is insufficient to demonstrate ALS-RVC, LLC had standing to foreclose the mortgage at the time the complaint was filed." As to the failure to comply with all conditions precedent, the Trial Court held that "[s]pecifically the breach letters…dated May 2, 2011, do not reflect any reduction in the interest rate when Defendant was on active military status." [R. 502]. As to damages, the court held that the "payment history does not reflect any reduction in the interest rate as required by the [SCRA]." [R. 502]. Given all of the evidence submitted, the Trial Court concluded that "[u]nder the circumstances of this case, this Court finds the evidence insufficient to demonstrate Plaintiff had standing to foreclose the mortgage at the time the complaint was filed and further that Plaintiff complied with all conditions precedent." [R. 502].

SUMMARY OF THE ARGUMENT

Appellant Failed to Prove Conditions Precedent and Damages by Failing to Comply with the SCRA

Service members, because of their great sacrifices to the nation, enjoy certain privileges in our community. One of those privileges is the forgiveness of interest in excess of six percent and the reduction of that forgiven interest from their monthly mortgage payments, while they are on active duty and for one year thereafter. This provision is to be applied retroactively and prevents acceleration.

In the current action, at the time Appellant allegedly sent its breach letter, it was prevented from accelerating due to its admitted failure to comply with the SCRA. Furthermore, its failure to comply with the Act rendered the breach letter incorrect. Had Appellant followed the law, Appellee would not have even been in breach at the time the breach letter was allegedly issued. Therefore, the breach letter failed to substantially comply with paragraph 22 of the mortgage contract, which is a condition precedent to acceleration. Additionally, even if the breach letter was compliant, there was no evidence at trial that the letter was mailed as required by paragraph 15 of the mortgage contract. As such, involuntary dismissal was appropriate and should be affirmed.

Appellant Failed to Prove its Standing to Enforce the Note and Mortgage

At trial, Appellant introduced an Agreement between itself and a third party, Maxim, which evidenced that Appellant transferred all of its rights and interest to Maxim prior to filing this action. However, under certain circumstances, Appellant could still enforce the subject Note and Mortgage. None of those circumstances were proven at trial. While possession of a Note endorsed in blank is enough to show standing as a holder, the Uniform Commercial Code allows parties to vary any provision by agreement, including the provision defining who is entitled to enforce. Here, Appellant and Maxim varied the UCC by entering into an agreement which,

except for limited circumstances, gave all enforcement rights in the subject Note and Mortgage to Maxim.

Furthermore, even if Appellant was entitled to enforce the Note under the UCC, it still did not prove it can foreclose the mortgage. The common adage "the mortgage follows the note" may be inapplicable in this case, according to the very case which is so commonly cited for this proposition. The exception to this rule is that the mortgage does not follow the note when parties express their intentions to the contrary, as is the case here. The Agreement with Maxim clearly expressed the intention of Appellant and Maxim to give all right in the Note and Mortgage to Maxim, barring certain conditions. Therefore, even if Appellant could enforce the note as a holder, it cannot foreclose the mortgage unless it proved at least one of the applicable contractual conditions were met. For this reason, the Trial Court's ruling should not be disturbed.

STANDARD OF REVIEW

The standard of review for a motion for involuntary dismissal is de novo. *Deutsche Bank Nat. Trust Co. v. Huber*, 137 So. 3d 562, 563 (Fla. 4th DCA 2014).

ARGUMENT

I. Appellant's Failure to Comply with the Servicemember Civil Relief Act (SCRA) resulted in failure to prove conditions precedent and damages

The SCRA provides caps on the mortgage interest rates for military members while the service member is on active duty *and* for one year thereafter. 50 U.S.C.A.

§3937(a).[1] Appellant incorrectly argues that the SCRA does not provide a condition precedent to foreclosure and that the Trial Court erroneously found that Appellant failed to comply with this condition precedent. However, the SCRA does provide a condition precedent and the Trial Court's actual finding was that Appellant "failed to prove compliance with *all* conditions precedent,"[2] including the failure to provide a proper acceleration letter as required by paragraph 22 of the mortgage.

Furthermore, Appellant's failure to comply with the SCRA means that the payment history admitted into evidence was incorrect and, therefore, Appellant failed to prove damages. Finally, Appellant also failed to submit competent substantial evidence that the breach letter was actually mailed and for these reasons, the involuntary dismissal should be affirmed.

A. SCRA prevents acceleration of principal which is a condition precedent to foreclosing a mortgage

The stated purpose of the SCRA is:

> (1) to provide for, strengthen, and expedite the national defense through protection extended by this Act to servicemembers of the United States **to enable such persons to devote their entire energy to the defense needs of the Nation;** and
> (2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may

[1] Contrary to Appellant's erroneous claim, the SCRA specifically provides a private right of action in §4042 titled "Private right of action." When reading this section, it is important to know that 50 U.S.C.A §3937 was previously found at 50 U.S.C.A. §527.

[2] (*emphasis added*) [R. 501]

> adversely affect the civil rights of servicemembers during their military service.(*emphasis added*).

50 U.S.C.A §3902. Because of its importance, Courts have held that when interpreting the various sections, "the Act must be liberally construed in favor of those 'who dropped their affairs to answer their country's call.' " *Santana-Archivald v. Banco Popular De Puerto Rico*, CIV. 11-1627 JAG, 2012 WL 2359432, at *2 (D.P.R. 2012)(*citing Boone v. Lightner,* 319 U.S. 561, 575 (1943)).

The Act provides that for active service members, mortgage interest rates shall not exceed six percent during the period of active military service *and* for one year thereafter. 50 U.S.C. §3937(a)(1). Any interest over six percent, that would be otherwise incurred, shall be forgiven. 50 U.S.C. §3937(a)(2). Subsection (a)(3), titled **Prevention of acceleration of principal**, states that:

> The amount of any *periodic payment due* from a servicemember under the terms of the instrument that created an obligation or liability covered by this section ***shall be reduced*** by the amount of the interest forgiven under paragraph (2) that is allocable *to the period for which such payment is made.(emphasis added).*

50 U.S.C. §3937(a)(3). When liberally interpreting this section in the light most favorable to Mr. Garvin, the title of the subsection shows that failure to adjust the interest, as specified, prevents acceleration. It should require no citation to support the position that without acceleration or maturity, Appellant cannot foreclose the mortgage.

In the current action, Appellant conceded that it failed to reduce the interest rate in 2009 and, at the time of trial, this had not been corrected. [I.B. 25]. Because "the interest rate cap applies retroactively and is effective as of the date on which the servicemember is called to military service," Appellant's 2011 breach letter and acceleration were prohibited. *Santana-Archivald v. Banco Popular De Puerto Rico*, CIV. 11-1627 JAG, 2012 WL 2359432, at *2 (D.P.R. 2012)(*internal quotations omitted*).

Additionally, because the adjustments were never made, the amounts listed as due and owing on the breach letter were wrong. Had Appellant followed the rule of law and forgiven any interest in excess of six percent and applied the forgiven amount to the monthly payments over the preceding 23 months, Mr. Garvin would not have even been in default. As a result, the breach letter was substantially non-compliant with paragraph 22 of the mortgage contract, which also prevents acceleration. Since acceleration of a note and mortgage which has not yet reached maturity is required to foreclose a mortgage, the Trial Court's ruling is correct. When making its findings, the Trial Court held that Appellant "failed to prove compliance with ***all*** conditions precedent." (*emphasis added*) [R. 501]. "Specifically the breach letters… do not reflect any reduction in the interest rate when Defendant was on active military status." [R. 502]. As such, the Trial Court's involuntary dismissal should be affirmed.

i. Appellee did not waive condition precedent defense

Finally, Appellant's argument that Appellee failed to assert condition precedent as a defense is incorrect. As discussed above, the Trial Court found that Appellant failed to comply with all conditions precedent, including paragraph 22. Paragraph 22 was specifically denied by Appellee in its Amended Answer and was included as an affirmative defense. [R. 213-217].

The SCRA was tried by consent pursuant to Florida Rule of Civil Procedure 1.190(b) which states, in part, that:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, *even after judgment*, but failure so to amend shall not affect the result of the trial of these issues. (*emphasis added*).

This Court has held that "[a]n issue is tried by consent 'when there is no objection to the introduction of evidence on that issue.'" *Fed. Home Loan Mortg. Corp. v. Beekman*, 174 So. 3d 472, 475 (Fla. 4th DCA 2015). At trial, Appellant provided the letter from Mr. Garvin regarding his deployment and the SCRA and then stipulated to its admission into evidence. [R. 447 Ln. 10 - 448 Ln. 20]. The letter was admitted during Appellant's case-in-chief as exhibit 8 without objection. [R. 448 Ln. 2-6]. Appellant's witness was cross-examined on the letter. [R. 448]. Finally, during

closing arguments, Appellee argued the SCRA, within the context of his argument regarding Appellant's failure to comply with the condition precedent and damages. [R. 471 Ln. 7 – 472 Ln. 5]. Appellant did not object nor argue waiver, instead it merely argued that reduction would be appropriate. [R. 479 Ln. 11-19].

The key test to determining if an issue is tried by consent is by determining "(a) whether the opposing party had a fair opportunity to defend against the issue and (b) whether the opposing party could have offered additional evidence on that issue if it had been pleaded." *Id.* at 475. Here, Appellant provided the SCRA letter to Appellee pre-trial in an e-mail dated April 20, 2015, titled in part, "TRIAL EXHIBIT." The body of the e-mail stated, "Please see the attached exhibits we will use at trial." They listed this exhibit as a "letter from you[r] client." Appellant not only had a fair and ample opportunity to defend against this issue, they intended to introduce this damning evidence in their case in chief. Appellant was well aware of this issue and could have presented additional evidence. Instead, Appellant has 1) admitted that it failed to comply with the SCRA, 2) admitted that this is an offense which includes imprisonment as part of its penalty, and 3) now, for the first time on appeal, asked for another chance to get this right. [I.B. 25-26].

B. Failure to comply with SCRA means that Appellant failed to prove damages

In its Order dismissing the action, the Trial Court found that "[t]he outstanding balance was calculated from the payment history" but that "the payment history does

not reflect any reduction in the interest rate as required by the [SCRA].” [R. 502]. Appellant admitted its failure to comply with this important Federal statute – despite being provided written notice and a copy of the deployment order in 2009. [I.B. 25]. This admission alone is enough to affirm involuntary dismissal as Appellant failed to prove damages.

“It is well established that before damages may be awarded, there must be evidence authorizing or justifying the award of a definite amount.” *Berwick Corp. v. Kelinginna Inv. Corp.*, 143 So. 2d 684 (Fla. 3d DCA 1962)(*citing Florida Ventilation Awning Co. v. Dickson*, 67 So. 2d 215 (Fla. 1953). In all breach of contract cases, the complaining party has the burden of presenting evidence “sufficient to satisfy the mind of a prudent, impartial person,” as to the amount of awardable damages. *Sea World of Florida v. Ace American Ins. Companies, Inc.*, 28 So. 3d 158 (Fla. 5th DCA 2010). Presenting evidence to justify the award of a definite amount is essential to preserving a homeowner’s right of redemption pursuant to Florida Statute §45.0315. The right of redemption affords homeowners one final opportunity to save their home by “paying the amount specified in the judgment.” FLA. STAT. §45.0315. It is only equitable that Appellant be required to present proper documentation of the amount due and owing, in conformance with the evidentiary code, §45.0315, and here, the SCRA.

Appellant incorrectly argues that to remedy this, it should be given a second chance to prove damages and cites to *Peuguero*[3] and *Sas.*[4] These cases are distinguishable from the current action. In both *Peuguero* and *Sas*, the courts entered final judgment for the plaintiff, the Appellate Courts then remanded to allow for the introduction of evidence to support the amount awarded. Here, judgment was not entered for Appellant as Appellant failed to prove its damages. This Court has previously affirmed an involuntary dismissal "[w]here a foreclosure plaintiff fails to prove the amount due at trial…" *E & Y Assets, LLC v. Sahadeo*, 180 So. 3d 1162, 1163 (Fla. 4th DCA 2015). This Court has also held, *en banc,* that when judgment is entered for the plaintiff when there was no proof at trial of the *correct* measure of damages, the proper outcome is judgment for defendant. *Teca, Inc. v. WM-TAB, Inc.*, 726 So. 2d 828 (Fla. 4th DCA 1999) (*Emphasis added*).

In *Teca*, a breach of contract action, the plaintiff submitted evidence of damages and judgment was entered in its favor. *Id*. On appeal, this Court found that although plaintiff presented evidence of damages, the damages were not correct. *Id*. As such, this Court found that reversal and entry of judgment for defendant was proper because plaintiffs should not be allowed "a second bite at the apple when

---

[3] *Peuguero v. Bank of. Am., N.A.*, 169 So. 3d 1198 (Fla. 4th DCA 2015).
[4] *Sas v. Fed. Nat. Mortg. Ass'n*, 112 So. 3d 778 (Fla. 2d DCA 2013).

there has been no proof at trial concerning the correct measure of damages." *Id*. at 830.

Similarly, in the current action, although Appellant submitted a payment history, the payment history did not reflect the correct measure of damages. As such, Appellant should not be given a second bite at the apple to correctly measure damages. Further, the excess interest rate cannot simply be reduced from the total amount due. As discussed previously, the SCRA requires not only forgiveness of any amount in excess of six percent, it also requires that the forgiven amount be reduced from any periodic payment that is allocable to the period for which such payment is made. 50 U.S.C.A. §3937(a)(3).

Furthermore, Appellant had over two years to correct its payment history before trial and has been aware of the need for reduction for over six years prior to trial, yet appellant still chose to appear at trial unprepared. Appellant now should not be given a "second bite at the apple." *Teca, Inc. v. WM-TAB, Inc.*, 726 So. 2d 828 (Fla. 4th DCA 1999); *Lacombe v. Deutsche Bank Nat'l Trust Co*., 149 So. 3d 152 (Fla. 1st DCA 2014); *Van Der Noord v. Katz*, 481 So. 2d 1228, 1230 (Fla. 5th DCA 1985)*; Emerald Pointe Property Owners' Ass'n, Inc. v. Commercial Const. Industries, Inc*., 978 So. 2d 873, 879-880 (Fla. 4th DCA 2008); *Correa v. U.S. Bank, N.A*., 118 So. 3d 952, 956-957 (Fla. 2d DCA 2013). For these reasons, the Trial Court's order should be affirmed.

C. Under the "tipsy coachman" doctrine, dismissal was still appropriate due to Appellant's failure to prove that the breach letter was actually mailed

Even if the above arguments are somehow incorrect, dismissal is still proper as Appellant failed to prove that it complied with paragraph 22 because there was no evidence that the breach letter was actually mailed. Ultimately, the Trial Court reached the right result and its ruling should be affirmed. "This longstanding principle of appellate law, sometimes referred to as the "tipsy coachman" doctrine, allows an appellate court to affirm a trial court that reaches the right result, but for the wrong reasons so long as there is any basis which would support the judgment in the record. *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002)(*internal quotations omitted*).

To meet its burden of proving compliance with the condition precedent of paragraph 22 of the mortgage, Appellant needed to provide evidence of a compliant breach letter and evidence that it was mailed in accordance with paragraph 15 of the Mortgage Contract. Paragraph 15 of the Mortgage Contract states:

> **15. Notices.** All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice given to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. . . .

This Court has addressed the failure to prove that the breach letter was mailed. In *Holt*, a mortgage foreclosure action, this Court reversed judgment for the plaintiff and remanded for dismissal due, in part, to the fact that there was no evidence that a letter was mailed in compliance with paragraph 22. *Holt v. Calchas*, 155 So. 3d 499 (Fla. 4th DCA 2015). Similarly, in the current action, proof of mailing is essential to complying with the condition precedent. However, Appellee provided no evidence of this. The breach letter was made by Chase. [R. 334-336]. Appellant's witness was Appellant's employee and admitted to never having worked at Chase and never having mailed letters for or on behalf of Chase. [R. 442 Ln. 13-24]. Appellant also failed to provide any other evidence of mailing such as a return receipt or proof of regular business practice. As such, because this issue in itself is dispositive, involuntary dismissal should be affirmed.

II. APPELLANT FAILED TO PROVE STANDING BECAUSE IT APPARENTLY TRANSFERRED ALL OF ITS RIGHTS AND INTERESTS IN THE NOTE AND MORTGAGE TO MAXIM AND DID NOT PROVE ANY OF THE CONDITIONS WHICH ALLOWED IT TO ENFORCE

"A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose." *Lloyd v. Bank of New York Mellon*, 160 So. 3d 513 (Fla. 4th DCA 2015); *Zimmerman v. JPMorgan Chase Bank*, N.A., 134 So. 3d 501 (Fla. 4th DCA). "A plaintiff alleging standing as a holder must prove it is a holder of the note and mortgage both as of the

time of trial **and also** that the (original) plaintiff had standing *as of the time the foreclosure complaint was filed*." *Russell v. Aurora Loan Services, LLC*, 163 So. 3d 639, 642 (Fla. 2d DCA 2015)(*Emphasis added*). While standing can be proven with evidence that a plaintiff had possession of an original Note, indorsed in blank, at the time of filing suit and at trial, the Uniform Commercial Code (UCC) provides an exception when parties choose to vary the code by agreement. FLA. STAT. §671.102(2)(a).

In this case, Appellant and Maxim chose to vary the code by agreement. The Agreement, *entered into prior to filing suit*, is titled "Collateral Assignment of Note, Mortgage and Other Loan Documents. [R. 349-362]. Maxim agreed to loan Appellant $1,500,000 and in exchange, Appellant transferred all of its rights in the subject Note and Mortgage to Maxim. *Id.* As per the Agreement, Appellant only has the right to enforce if 1) Maxim requests it to do so, in writing, or 2) Appellant pays off the loan. Appellant did not prove either condition at trial. Further, none of Appellant's cited case law holds that a copy of a Note, indorsed in blank, is sufficient to convey standing when there is evidence that the UCC has been varied by agreement.

A. The Assignments of Mortgage do not reflect a proper chain of assignment

Appellant incorrectly argues that the "First" and "Second" Assignments of Mortgage show a proper chain of assignment to Appellant. What Appellant fails to

state is that the Assignments they reference are not really the "First" or "Second." Appellant deliberately left out the dates of the Assignments in order to give the false appearance of a proper chain of assignment. In reality the assignments are as follows, chronologically:

Document Date	**Document and Assignor - Assignee**	**Referenced by Plaintiff as . . .**	**Initial Brief**
Oct. 7, 2011	Collateral Assignment of Note, Mortgage, and Other Loan Documents from ALS-RVC to Maxim Credit Corp.	Improperly referenced by Appellant as "Final" AOM	I.B. 10
Nov. 4, 2011	Assignment of Mortgage from JPMorgan Mortgage Acquisition Corp. to ALS-RVC.	Properly referenced by Appellant as "Second" AOM	
Feb. 1, 2012	Assignment of Mortgage from Mortgage Electronic Registration Systems, Inc. to JPMorgan Mortgage Acquisition Corp.	Improperly referenced by Appellant as "First" AOM	

Even at first glance it is easy to see that there are major problems with the assignments. The Agreement assigned *all* of Appellant's rights over to Maxim, barring certain circumstances. This alone could invalidate the two preceding assignments as Maxim was apparently the owner of all rights as of October 7, 2011. The November 4, 2011 assignment from JPMorgan to ALS-RVC appears to be invalid because there is no record evidence that JPMorgan had any rights to the Note or Mortgage at the time it purported to assign them. Instead, *three months after* this assignment, MERS apparently attempted to confer these rights onto JPMorgan; however, at that time MERS seemingly had nothing to assign because ALS-RVC,

purported holder of the Note endorsed in blank, assigned the Note and Mortgage to Maxim well before the assignment to JPMorgan. As such, it seems the only valid assignment of the Note and Mortgage was the assignment from Appellant to Maxim before suit was filed.

B. The terms of the Agreement express Appellant's intent to transfer all of its rights and interests to the Note and Mortgage, prior to filing this action

Appellant claims that "the assignee of the mortgage as collateral security is the real party in interest, as it holds legal title to the mortgage and note." [I.B. 18]. It then incorrectly contends that it is entitled to foreclose, citing to Florida Rule of Civil Procedure 1.210(a) and *Elston/Leetsdale, LLC v. CWCapital Asset Mgmt. LLC*, 87 So. 3d 14 (Fla. 4th DCA 2012). Appellee agrees that, in general, a plaintiff can bring an action on behalf of the real party in interest; but the real party in interest must confer authority on the plaintiff to enforce. This is what this Court held in *Elston* when it found that the plaintiff did not to have standing due to the lack of evidence showing its right to enforce on behalf of the real party in interest. *Id*. Similarly, in the current action, there is no evidence that the apparent real party in interest, Maxim, ever conferred the right to enforce upon Appellant.

Normally, possession of an original Note endorsed in blank confers standing on the holder as provided by the UCC and as codified in Florida Statute

§673.3011(1).[5] Section 673.3011(1) states that a "holder" is a "person entitled to enforce" an instrument. However, the UCC can be varied by agreement. FLA. STAT. §671.102(2)(a)("Except as otherwise provided in this code, the effect of provisions of this code may be varied by agreement."). In this case, the UCC was varied by Appellant's Agreement with Maxim. While Appellant appears to have transferred all its rights to enforce the Note and Foreclosure the mortgage, it may still have such rights under certain conditions. One, if Maxim requests, in writing, that Appellant enforce as per Paragraph 4. [R. 351]. Two, if Appellant pays of the loan, the Agreement is cancelled and, as per Paragraph 12, all the collateral documents are returned to Appellant and Maxim "shall file an appropriate assignment...back to [Appellant]." [R. 355]. At trial, Appellant did not prove either condition was met.

Appellant incorrectly argues that the Agreement, when viewed as a whole, did not modify the UCC. Starting with paragraph 2 of the Agreement, which unequivocally states that Appellant:

> hereby **irrevocably and absolutely assigns, transfers grants and sets over unto the [Maxim]**, its successor, participants and assigns, as collateral for all obligations due and owing from Assignor to Assignee, **<u>all</u> of [Appellant's] <u>present</u> <u>and future right</u>, title, and interest in and to the Collateral Documents, and any and all amendments thereto…** (*emphasis added*).

[5] The UCC was adopted by Florida and codified in Chapters 668-688 of the Florida Statutes.

[R. 350]. Paragraph 4 specifically states that Appellant "*intends* and *does* relinquish to [Maxim] its right to be paid and/or collect and enjoy the profits…" of the Collateral Documents. [R. 351]. While paragraph 4 then goes on to give Appellant permission to collect the profits, it also states that those profits belong to Maxim and *shall* be promptly paid to Maxim upon its request. *Id*. Paragraphs 8(g) and 14 prevent Appellant from enforcing any Collateral Documents without Maxim's express written request. [R. 353 & 355]. However, at trial, there was no evidence that Maxim requested, in writing, that Appellant enforce the Collateral Documents at issue.

Given the language of the Agreement, it is clear that Appellant transferred its rights to Maxim and could only foreclose if certain conditions were met. *Salmon v. Foreclosed Asset Sales and Transfer Partnership*, 162 So. 3d 1142 (Fla. 4th DCA 2015)(Plaintiff's assignment of the note and mortgage to a third party prior to filing for foreclosure created a question of fact as to standing); *Lawyers Title Ins. Co., Inc. v. Novastar Mortg., Inc.,* 862 So. 2d 793, 798 (Fla. 4th DCA 2003)("It is well-established that an assignment transfers to the assignee all the interests and rights of the assignor in and to the thing assigned."). Therefore, as discussed further below, the entry of involuntary dismissal was proper.

i. The Agreement did not expressly preserve Appellant's rights as holder

Appellant incorrectly argues that paragraph 4 and 8 of the Collateral Agreement explicitly preserves its right to enforce as a holder. Paragraph 4 states:

> This Assignment ***shall*** be ***present***, ***absolute***, ***and unconditional assignmen***t **and *shall*, *immediately* upon execution give [Maxim] the right to collect any and all amounts due pursuant to the terms of the Collateral Documents** and to apply them in payment of the Obligations. Notwithstanding the foregoing, so long as no Event of Default on the part of [Appellant] has occurred and is continuing under the terms, covenants or provisions of this Assignment, the Maxim Note, and any other agreement between [Maxim] and [Appellant], [Maxim] hereby grants permission to [Appellant] to **collect, subject to the provisions of this Assignment, the Profits** as they respectively become due . . .

[R. 351]. The first sentence above unequivocally emphasizes that the Agreement is absolute and unconditional and that it "shall immediately" give Maxim the right to collect any and all monies. Appellant points to the second sentence, incorrectly arguing that because Maxim granted Appellant permission to collect "profits," by extension, Maxim must have also wanted Appellant to have the right to enforce. This argument fails for three reasons.

First, if Maxim intended for Appellant to have the right to enforce, it could have explicitly stated this in the Agreement. *Second*, the right to collect profits may just mean that Appellant was acting as a servicer. Servicers do not automatically have the right to enforce and nothing in the above provision gives Appellant the right

to keep the profits. *See St. Clair v. U.S. Bank Nat. Ass'n*, 173 So. 3d 1045, 1047-48 (Fla. 2d DCA 2015), *reh'g denied* (Aug. 14, 2015) ("We cannot, as advocated by U.S. Bank, presume standing simply because it serviced the loan. Longstanding case law prevents us from doing so. *See Withers v. Sandlin,* 36 Fla. 619, 18 So. 856 (1896)."). This is evidenced by paragraph 4 of the Agreement, which states:

> Further, by this Assignment, **[Plaintiff] intends to and does hereby relinquish to [Maxim] its right to be paid and/or collect and enjoy the Profits** and other benefits **at any time accruing by virtue of the Collateral Documents** to be applied against all present and future Obligations. . . . Any Profits received by [Appellant] after notice has been given by [Maxim] ***shall*** be received by [Appellant] as trustee for [Maxim] and ***shall*** promptly be paid to [Maxim]. (*emphasis added*).

[R. 351]. *Third*, Appellant itself points to paragraph 8(g) which specifically prevents Appellant's enforcement without Maxim's allowing it:

> In the event of the Property Owner's default under the collateral Documents, [Appellant] shall, **at [Maxim's] request**, enforce, at [Appellant's] sole cost and expense, all remedies available to [Appellant] under the Collateral Documents . . .

[R. 353]. Despite Appellant's argument, the fact that Appellant would have to sustain its own costs and expenses is insignificant; this is just what the parties bargained for. It does not invalidate the explicit language requiring permission from Maxim to enforce. Paragraph 14 then states that "[a]ll notices, demands, requests and other communications provided for or permitted under this Assignment shall be

in writing. . . ." [R. 355]. Yet at trial, Appellant provided no evidence that it had written permission from Maxim to enforce. Finally, the facts that the provision states that Appellant shall enforce all remedies available to it under the collateral documents, is not significant. This is in line with the current law which allows any person to enforce and bring an action on behalf of another, *if permission is granted* by the real party in interest. Therefore, according to the Agreement and the evidence introduced at trial, Plaintiff did not prove it had the right to initiate or maintain an action to enforce.

ii. The Agreement did not implicitly preserve Appellant's rights as holder

Appellant argues that it is only required to assign all of its rights in the event of a default under the Agreement with Maxim, citing only to one "Whereas" clause in the contract.

> **WHEREAS**, [Maxim] has required as security and collateral for the Maxim Loan, that [Appellant] assign all of Assignor's right, title and interest in and to the Collateral Documents, including without limitations the right to collect payments due under the Collateral Documents and/or foreclose on the Property in the event of a default under the Maxim Loan until such time as all amounts due and owing under the Maxim Loan have been paid in full.

[R. 350]. However, as stated by Appellant, "the intention of the parties must be determined from examination of the whole contract, and not from the separate phrases or paragraphs." [I.B. 19]. When reading this clause along with the whole

contract, it becomes clear that this clause means that Maxim is requiring Appellant to surrender all of its rights so that, in the event of a default on this $1,500,000.00 loan, Maxim can take any and all actions including collecting payments from the Collateral Documents and foreclosing on properties. Maxim retains all rights and interests "until such time as all amounts due and owing under the Maxim Loan have been paid in full." [R. 350].

Contracts are construed in accordance with their plain language, as bargained for by the parties. *See Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). "A party is bound by the language it adopts in an agreement, no matter how disadvantageous that language later proves to be." *Security First Federal Sav. & Loan Ass'n v. Jarchin*, 479 So. 2d 767, 770 (Fla. 5th DCA 1985) (*citing Carnell v. Carnell*, 398 So. 2d 503 (Fla. 5th DCA 1981), *review denied*, 407 So. 2d 1102 (Fla. 1981)). If the provisions of a contract are unambiguous, the court may not violate the clear meaning of the words in order to create an ambiguity, and certainly a court may not rewrite the contract. *Florida Recycling Services, Inc. v. Greater Orlando Auto Auction, Inc*, 898 So. 2d 129 (Fla. 5th DCA 2005). Here, the plain language of the Agreement is clear and unambiguous. Appellant intended to relinquish all of its rights to Maxim in exchange for $1,500,00.00, until such time as the entire loan was paid off. This Agreement was reached before filing suit. As such, the evidence before

the Court is insufficient to prove Appellant had standing to enforce the Note and Mortgage and for these reasons the involuntary dismissal should be affirmed.

C. This Court cannot draw inferences as argued by Appellant

As discussed above, possession of the original Note indorsed in blank is irrelevant because the UCC was varied by agreement here. However, Appellant asks this Court to draw inferences regarding possession despite the plain language of the Agreement. For the following three reasons, all of Appellant's arguments fail.

First, Appellant erroneously argues that because Maxim knew the Collateral Documents where in default, this somehow infers Maxim intended for Appellant to remain holder of the Note in order to enforce or, alternatively, that Appellant did surrender the original Note to Maxim but that Maxim sent it back to Appellant in order to enforce. Both inferences fail because the Agreement specifically requires Maxim to make a *written request* for Appellant to enforce. However, no such written request was admitted into evidence.

Second, Appellant incorrectly places import on paragraph 5 and 12. But both paragraphs only further strengthen Appellee's argument. Paragraph 5 states:

> *Limitation of Liability*. This Agreement shall not operate to make the Assignee [Maxim] responsible or liable for the care or control of the Collateral Documents or for carrying out the terms and provisions of the Collateral Documents.

[R. 351]

Paragraph 12 gives context to paragraph 5, stating:

> *Return of Collateral Documents*. Once the Maxim Loan is paid in full, [Maxim] shall return all of the original Collateral Documents to [Appellant], and shall file an appropriate assignment of the Collateral Documents back to back to [sic] [Appellant].

[R. 355]. As suggested by the titles, paragraph 12 yet again shows that it was the intent of the parties that Appellant relinquish all rights and deliver the Collateral Documents to Maxim. Paragraph 5 merely relieves Maxim of liability in the event the Collateral Documents are lost or destroyed by Maxim.

Third, and most important, the Agreement plainly and unequivocally states in paragraph 2 and 4, respectively, that Appellant "irrevocably and absolutely assigns, transfers grants . . . all of [Appellant's] present and future right, title, and interest in and to the Collateral Documents, and any and all amendments thereto. . . ." [R. 350]. And that this "shall be a present, absolute, and unconditional assignment . . . ." [R. 351]. The words "present," "absolute," "unconditional" and "irrevocable," as well as "right," "title," and "interest" have significant legal meaning. Given this clear and unambiguous language, Appellant's argument that paragraph 5 "could very reasonably be interpreted to mean the parties intended for [Appellant to possess and enforce on behalf of Maxim]" is an inference this Court cannot make. [I.B. 23] If the provisions of a contract are unambiguous, the court may not violate the clear meaning of the words in order to create an ambiguity, and certainly a court may not rewrite the contract. *Florida Recycling Services, Inc. v. Greater Orlando Auto*

Auction, Inc, 898 So. 2d 129 (Fla. 5th DCA 2005). As such, Appellant did not prove it had standing to pursue this action and the Trial Court's involuntary dismissal should be affirmed.

D. Mortgage, in equity, does not follow the Note when there is clear intent otherwise

Finally, even if the UCC was not varied by agreement, Appellant cannot foreclose the Mortgage because, in this case, the Mortgage may not have automatically followed the Note. Normally, the mortgage follows the note because the mortgage is an incident to the debt. *Johns v. Gillian*, 184 So. 140, 143 (Fla. 1938). The seminal case on this issue is the Florida Supreme Court case *Johns v. Gillian*. There the Court held that:

> a mortgage is but an incident to the debt, the payment of which it secures, and its ownership follows the assignment of the debt. If the note or other debt secured by a mortgage be transferred without any formal assignment of the mortgage, or even a delivery of it, the mortgage in equity passes as an incident to the debt, ***unless*** **there be some plain and clear agreement to the contrary, if that be the intention of the parties.** *(emphasis added).*

Id. For all of the reasons argued in this brief, the contract with Maxim provides a plain and clear agreement. Unless the Maxim loan is paid off or a written request for Appellant to enforce was made, Appellant assigned all the rights to the Mortgage to Maxim. Barring those conditions, the intention of the parties is that the Mortgage does not follow the Note. As such, even if Appellant could enforce the Note as a

holder, it did not prove it can foreclose the Mortgage and is therefore prevented from taking Mr. Garvin's property.

CONCLUSION

For the reasons and legal authorities set forth above, Appellee respectfully requests that this Honorable Court affirm the Trial Court's Order Granting Involuntary Dismissal and Final Order of Dismissal.

Dated March 30, 2016.

Respectfully Submitted,

/s/ Evan M. Rosen

Evan M. Rosen, Esquire
Law Offices of Evan M. Rosen, P.A.
12 SE 7th Street, Suite 805
Fort Lauderdale, FL 33301
754-400-5150 (phone)
Fla. Bar 120103
Attorney for Appellant
Designated E-mail for Service:eservice@evanmrosen.com

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Heidi J. Bassett, Esq. & Travis Beal, Esq., Robertson, Anschutz & Schneid, P.L., 6409 Congress Avenue, Suite 100, Boca Raton, FL 33431 via email at hbassett@rasfla.com, tbeal@rasflaw.com, and mail@rasflaw.com on this 30th day of March, 2016.

/s/ Evan M. Rosen

Evan M. Rosen, Esq.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the font requirements set for in Rule 9.210(a)(2), Fla. R. App. P.

/s/ Evan M. Rosen
Evan M. Rosen, Esq.