In the District Court of Appeal
Fourth District of Florida

CASE NO. 4D15-1087
(Lower Tribunal Case No. 13-4386(11))

MARLENE RATTIGAN and ERROL RATTIGAN,
Appellants,

VS.

CENTRAL MORTGAGE COMPANY,
Appellee.

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

APPELLANTS' INITIAL BRIEF

Respectfully Submitted,

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PRELIMINARY STATEMENT

All references in this Brief to the Record on Appeal are designated by the symbol "R" followed by the volume and page numbers [R. __/__ - __].

The Index to the Record on Appeal contains copies of the Exhibits that were admitted during trial. All references to the Index are designated by the symbol "I" followed by the page numbers [I. __ - __].

All references to the Trial Transcript are designated as "Trial" followed by the page(s) and line numbers [Trial, P. __ Ln.__]. The Trial Transcript can be found at [R. II/297-384].

STATEMENT OF THE CASE AND FACTS

The Initial Loan

In 2006, Defendants/Appellants, Marlene and Errol Rattigan, purchased a home in Miramar, Florida. To purchase the home the Rattigans obtained a loan for $650,000 from GL Financial Services, LLC and executed a Note in their favor. [I. 3-8]. Along with the Note, Marlene and Errol also executed a Mortgage. [I. 10-24]. The Note was an interest only note for the first ten years, with a fixed interest rate until November of 2011. Additionally, in section 3(D) of the Note, the terms specifically state that "unpaid Principal can never exceed a maximum amount equal to 115% of the Principal amount I originally borrowed." In order to comply with this provision, the Ratitigans' principal could never exceed $747,500. However, at trial, Plaintiff/Appellee, Central Mortgage Company (CMC), sought and was granted $760,323.46 in principal.

The Loan Modification

After the Note and Mortgage were executed in 2006, Mr. and Mrs. Rattigan timely made their full monthly payments for many years. However, the evidence presented at trial shows that on or about May of 2011, at a time when the Rattigans were still current on their payments, CMC and the Rattigans reached an agreement to modify the terms of the loan. Although the terms of the Modification are unknown and unproven, it appears – from the Payment History admitted in evidence at trial – that the Modification, at the very

least, altered and superseded the monetary terms of the 2006 Note, as CMC increased the principal by $12,484.03. [I. 31].

The Foreclosure Action

On February 19, 2013, CMC filed a foreclosure action against Mr. and Mrs. Rattigan alleging failure to make the August 1, 2012 payment "and all subsequent payments." [R. I/1-30]. CMC also alleged that it had satisfied all conditions precedent to the filing of the foreclosure action and had accelerated the debt. It then requested $760,323.46 in damages, as the amount of principal due on the note. CMC attached to the Complaint the 2006 Note and Mortgage and an alleged Default Letter dated October 2, 2012. The 2011 Modification was neither attached to the Complaint nor even mentioned as part of the allegations.

In the Rattigans' Second Amended Answer and Affirmative Defenses, they admit that a default occurred under the 2006 Note and Mortgage attached to the Complaint but were without knowledge as to the date of the last payment. [R. I/65-67]. They denied that CMC complied with the condition precedent to foreclosure, as CMC failed to provide the notice required by Paragraph 22 of the Mortgage contract. Mr. and Mrs. Rattigan were also without knowledge as to the total amount due. Additionally, they raised five affirmative defenses, including failure of condition precedent and standing.

The Trial

Trial was finally held on January 8, 2015[1]. In preparation for trial, CMC filed eight[2] Witness and Exhibits Lists, however, none ever listed the Modification between the parties. At trial, CMC elicited testimony from one witness, Natalie McClendon, Foreclosure Supervisor for CMC. Through this witness, CMC admitted that there is a written loan modification to the Note and that **damages were sought based on that Modification.**

> Q. And the **loan has actually been modified**, correct?
> A. According to my notes that I have written down in my folder here, this loan has been –there's a modification.

[Trial, P. 48 Ln. 14-18]

> Q. . . . we talked in the pay history about the loan mod – and that's **in writing** when there's a loan mod in this case, right?
> **A. Yes.**

[Trial, P. 55 Ln. 21-25]

[1] As the case progressed, it was set and re-set for trial numerous times. On one occasion, trial was set for August 21, 2014. However, on that day, CMC had still not provided the Rattigans with the payment history intended for use at trial, despite the Rattigans' multiple notices requesting that all trial exhibits be made available as per the trial orders. As a result, the Rattigans moved to strike the payment history but instead the lower court ordered sanctions of $500 and allowed CMC ten days to produce it. [R. I/153]. CMC ignored the court order and on September 16, 2014, the Rattigans filed a Motion to Dismiss based on CMC's multiple violations. Still, CMC did not produce the payment history until four business days before the hearing on the Rattigans' Motion to Dismiss.

[2] CMC filed exhibit lists on April 10, 2014, June 10, 2014, June 12, 2014, July 2, 2014, July 29, 2014, September 16, 2014, December 19, 2014 and January 2, 2015.

> Q. And the amount on the judgment and the amount on the pay history for principal that's being sought is $760,323.46, correct?
> A. Yes
> **Q. And that's because there's a loan modification, correct?**
> **A. Yes.**

[Trial, P. 63 Ln. 9-15].

Yet, no modification was admitted at trial to show the terms of the agreement between the parties. As such, no evidence was introduced to support CMC's claim to have the right to collect $760,323.46 in principal – an amount which violates the terms of the 2006 Note admitted into evidence. CMC also admitted a Payment History which appears to show that a Modification occurred in May of 2011 which resulted in a $12,484.03 increase in the Rattigans' principal balance, but no evidence was admitted at trial to prove that this was, in fact, the agreement between the parties. As a result of all of CMC's failures during trial, the Rattigans moved to involuntarily dismiss the action but the motion was denied and Final Judgment was entered in CMC's favor. Thereafter, this appeal ensued.

SUMMARY OF ARGUMENT

CMC Failed to Admit the Contract

During trial, CMC's witness testified that the Rattigans' loan had been modified, in writing, and that the reason CMC was seeking an amount that violated the terms of the 2006 Note was because those terms had been modified. Further, CMC's Payment History shows that the Modification allegedly altered the Rattigans' indebtedness by increasing

the principle by $12,484.03. However, the Modification was never attached to the Complaint as required by Florida Rules of Civil Procedure 1.130(a) nor was it introduced into evidence in violation of Florida Statute §90.952, and was not surrendered, as required of all promissory notes. As such, Final Judgment for CMC should not have been entered because CMC failed to prove the terms of the contract between the parties. The Modification allegedly contained a different amount of agreed upon principal and could have further modified any number of terms, including CMC's right to enforce or accelerate. Therefore, the Final Judgement could only have been entered based on speculation and not based on evidence.

ARGUMENT

Standard of Review of Denials of Motion for Involuntary Dismissal

The standard of review for a motion for involuntary dismissal is de novo. *Deutsche Bank Nat'l Trust Co. v. Clarke*, 87 So. 3d 58, 60 (Fla. 4th DCA 2012). A motion for involuntary dismissal under Florida Rule of Civil Procedure 1.420(b) in a non-jury trial can be equated to a motion for directed verdict in a jury trial. *Deutsche Bank Nat'l Trust Co. v. Huber*, 137 So. 3d 562, 563 (Fla. 4th DCA 2014). "When an appellate court reviews the grant of a motion for involuntary dismissal, it must view the evidence and all inferences of fact in a light most favorable to the nonmoving party, and can affirm a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party." *Id*. (*citing Deutsche Bank Nat. Trust Co. v. Clarke*, 87 So.

3d 58, 59 (Fla. 4th DCA 2012)). In the current action, even in the light most favorable to the CMC, there can be no doubt that CMC failed to meet its prima facie case. To establish its entitlement to foreclose, CMC needed to prove the agreement between the parties, a breach of that agreement, that CMC properly accelerated the debt to maturity, and the amount due. *Ernest v. Carter*, 368 So. 2d 428 (Fla. 2d DCA 1979). As a result of CMC's failure to introduce the operative contract, as modified, it failed to meet its burden and, as such, no competent substantial evidence existed to support the entry of Final Judgment in CMC's favor.

I. CMC FAILED TO PROVE THE TERMS OF THE AGREEMENT BY FAILING TO ADMIT THE MODIFIED NOTE

The lower court erred in denying the Rattigans' Motion for Involuntary Dismissal because CMC failed to admit the operative modified contract between the parties. Although CMC alleged that the operative contract between the parties was the 2006 Note and Mortgage admitted at trial, CMC's own witness contradicted this by admitting that 1) there had been a modification of the terms of the contract and 2) CMC sought to recover damages based on those modified terms.

"In order to prevail in a suit on a note and mortgage, the original note and mortgage must be introduced into evidence or a satisfactory reason must be given for failure to do so." *Fair v. Kaufman*, 647 So. 2d 167, 168 (Fla. 2d DCA 1994). Additionally, under Rule 1.130(a) of the Florida Rules of Civil Procedure, CMC was required to attach the Modified Note to the Complaint, but failed to do so. Florida Rule of

Civil Procedure 1.130(a) states in relevant part: "**Instruments Attached.** All bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, **shall be incorporated in or attached to the pleading.**" (*emphasis added*). Further, under the Florida evidence code, CMC was required to surrender and admit the original Modified Note into evidence in order to prove the contract and the contents thereof. FLA. STAT. §90.952; *Deutsche Bank Nat. Trust Co. v. Huber*, 137 So. 3d 562 (Fla. 4th DCA 2014).

a. The Best Evidence Rule Requires the Admission of the Modified Note in Order to Prevail at Trial.

Florida Statute §90.952, known as the Best Evidence Rule, unequivocally states that " . . . an original writing, recording, or photograph is ***required*** in order to prove the contents of the writing, recording, or photograph." The word "original" in §90.952 means "the writing or recording itself." FLA. STAT. §90.951. As such, in order for CMC to prove the contractual terms agreed to by the parties, it was required to admit "the writing itself" that controlled the agreement between the parties and not merely the testimony of its witness. Because the subject Note and Mortgage were modified, in writing, the Best Evidence Rule required that the Modification be admitted as evidence of the terms between the parties. *J.H. v. State*, 480 So. 2d 680, 682 (Fla. 1st DCA 1985)("[A]side from making appellate review difficult, [plaintiff's] failure to introduce the agreement into evidence also constituted a violation of the best evidence rule.").

The Best Evidence Rule has been the governing law in Florida long before it was codified in the evidence code and continues to govern evidentiary requirements today. The Florida Supreme Court has held that:

> 'Undoubtedly the best evidence of the contents of a written instrument consists in the *actual production of the instrument itself*, and the general rule is that **secondary evidence of its contents can not be admitted** until the non-production of the original has been satisfactorily accounted for. *(emphasis added)*

Firestone Serv. Stores of Gainesville v. Wynn, for Use & Benefit of Home Ins. Co., N. Y., 179 So. 175, 178 (Fla. 1938). Following the rule of law, this Court has held that "[i]f a section 90.954 excuse cannot be shown, the testimony of a witness ... about the contents of the original is inadmissible." *T.D.W. v. State*, 137 So. 3d 574, 576 (Fla. 4th DCA 2014); C. Ehrhardt, Florida Evidence §952.1 (2015 Edition). "The original writing is required because oral testimony may be inaccurate, fraud may result, and *when a dispositive instrument such as a contract is offered, a slight variation of words can result in a significant difference in rights*." C. Ehrhardt, Florida Evidence §952.1 (2015 Edition)(*emphasis added*). In the current action, CMC provided no §90.954 excuse at trial.[3] Therefore, based on §90.952 and binding precedent from the Florida Supreme

[3] Section 90.954 states: "The original of a writing, recording, or photograph is not required, except as provided in s. 90.953, and other evidence of its contents is admissible when:
(1) All originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith.
(2) An original cannot be obtained in this state by any judicial process or procedure.

Court and this Court, any testimony regarding the contents of the modified agreement is inadmissible.

Without the admission of the Modification, there is no evidence of the agreement of the parties, including the amount due[4] or any other terms that could affect the foreclosure action. All we know from Ms. McClendon is that the modification changed the monetary terms of the contract to an unknown amount, however, we do not know if the Modification changed the acceleration requirements or any other terms which could affect CMC's right to enforce.[5] As such, the trial court committed harmful error in denying the Rattigans' Motion for Involuntary Dismissal and the Final Judgment should be reversed. This Court has previously held when the basis for a claim is an agreement,

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(3) An original was under the control of the party against whom offered at a time when that party was put on notice by the pleadings or by written notice from the adverse party that the contents of such original would be subject to proof at the hearing, and such original is not produced at the hearing.
(4) The writing, recording, or photograph is not related to a controlling issue."

[4] Without the missing evidence, "the record does not provide competent substantial evidence demonstrating the essential element of [damages]." *A.S. v. State*, 91 So. 3d 270, 271 (Fla. 4th DCA 2012). Because the Note, and possibly Mortgage, were modified and no Modification was admitted, there is no evidence of what the Rattigans actually agreed to pay.

[5] Additionally, the Modification may have demonstrated that the condition precedent was not properly met and that the damages were incorrect based on multiple misapplied payments in 2011 which Ms. McClendon admitted to at trial and which do not appear to have been credited properly to the Rattigans' account. Without the Modification in evidence, there is no way for the Rattigans, or the Court, to know if the Payment History accurately reflects the agreement between the parties or if all the conditions precedent were satisfied.

failure to introduce the agreement requires reversal. *J.H. v. State*, 480 So. 2d 680, 682 (Fla. 1st DCA 1985)(Reversing an order of adjudication and a disposition order where plaintiff, in violation of the best evidence rule, failed to introduce the agreement between the parties into evidence.); *In re Forfeiture of 1978 Cadillac 4-Door, VIN No. 6D69S8E648768*, 451 So. 2d 1054, 1055 (Fla. 4th DCA 1984).

b. The Rattigans' Motion for Involuntary Dismissal Should Have Been Granted Due to CMC's Failure to Surrender the Original Modified Note at Trial.

In addition to the requirement of admitting a promissory note and mortgage into evidence, the Florida District Courts have held that the original promissory note must be surrendered before the issuance of a final judgment. *Deutsche Bank Nat. Trust Co. v. Huber*, 137 So. 3d 562, 564 (Fla. 4th DCA 2014); *Perry v. Fairbanks Capital Corp.*, 888 So. 2d 725, 727 (Fla. 5th DCA 2004). The admission and surrender of the original promissory note is so crucial to a plaintiff's case that in *Huber* this Court affirmed defendant's motion for involuntary dismissal **even though the plaintiff admitted a copy of the promissory note** into evidence. *Deutsche Bank Nat. Trust Co. v. Huber*, 137 So. 3d 562, 564 (Fla. 4th DCA 2014). This Court held that:

> ". . . possession of the original note is a significant fact in deciding whether the possessor is entitled to enforce its terms." Clarke, 87 So.3d at 61 (citing *Riggs v. Aurora Loan Servs., LLC*, 36 So.3d 932, 933 (Fla. 4th DCA 2010)). Because a promissory note is a negotiable instrument, a plaintiff seeking to foreclose on a defendant must produce the original note (or provide satisfactory explanation of the failure to produce) and surrender it to the court or court clerk before the issuance of a

> final judgment in order to take it out of the stream of commerce.

Id. On appeal, plaintiff further argued that it had surrendered the note in a package submitted to the clerk after trial and requested that the court make a "logical and equitable" presumption that the original note was in the package surrendered to the court. *Id*. However, this Court pointedly dismissed the argument holding that the "**court does not make "logical and equitable" leaps of faith, as it cannot (and should not) make any such determination *unsupported by the record before it.***" *Id*.[6] Similar to *Huber*, in the current action, CMC failed to surrender the original Modified Note which it sought to enforce. However, the facts in the current action are even stronger in support of involuntary dismissal than those in *Huber* because CMC made no attempt at even admitting a copy of the original Modified Note. As such, according to this Court, since the trial court should have granted the involuntary dismissal based on CMC's failure to meet its burden, Final Judgment should be reversed.

[6] Compare this to *Deutsche Bank Nat. Trust Co. v. Clarke*, 87 So. 3d 58, (Fla. 4th DCA 2012) which was distinguished by the Fourth District in the *Huber* case. In *Clarke*, this Court reversed involuntary dismissal of the plaintiff's case even though the original note was not admitted into evidence because the original had already been surrendered to the Court at the time of trial. Like in *Huber*, the current action is completely distinguishable from *Clarke*. In the current action, CMC completely failed to surrender and admit the original Modified Note into evidence prior to the entry of Final Judgment, therefore motion for involuntary dismissal should have been granted based on this Court's own precedent.

II. CONCLUSION

For the reasons and legal authorities set forth above, the Rattigans respectfully request that this Honorable Court reverse the Final Judgment of Foreclosure entered in favor of CMC and remand the action to the lower court for entrance of an order granting the Rattigans' Motion for Involuntary Dismissal.

Dated August 19, 2015.

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Shaib Y. Rios, Esquire, Brock & Scott, PLLC, 1501 N.W. 49th Street, Suite 200, Fort Lauderdale, FL 33309 via email at FLCourtDocs@brockandscott.com; Bank of America, N.A., c/o Mark D. Smith, Esquire, 2001 W. Kennedy Blvd, Tampa, FL 33606 via email at foreclosure@vlgfl.com; Sunset Falls Homeowners Association, Inc., c/o Samuel Landol, Esquire, 150 South Pine Island Road, Suite 540, Plantation, FL 33324 via email at mtgfcl@assoc-law.com on this 19th day of August, 2015.

/s/ Evan M. Rosen
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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
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