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' REPLY BRIEF

Respectfully Submitted,

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ARGUMENT

I. CMC DID NOT MEET ITS BURDEN, EVEN BY A PREPONDERANCE OF THE EVIDENCE, AND DID NOT SURRENDER THE CORRECT NOTE.

The issue presented to the Court is straight forward and simple. The parties to this action entered into a contract in 2006 and subsequently modified that contract in 2011 – by admission of CMC's own witness and by the evidence found in CMC's Payment History. As such, in order for Appellee to prevail at trial, it needed to plead and prove the terms of the operative contract between the parties. Although the operative contract was no longer the 2006 contract, CMC incorrectly alleges that it met its burden of proof by a preponderance of the evidence simply because it admitted the old contract.

When carefully reading Appellee's Answer Brief, it is evident that CMC does not deny the existence of the 2011 Modification. Instead, it attempts to sweep it under the rug by erroneously arguing that there is no mention of a "Modified Note" in the record. However, CMC admits that its sole witness at trial "testified that there was a modification, which explained the payments and how each was classified within the payment history." [A.B. P. 10]. In other words, CMC admits the existence of the Modification but is seemingly taking issue with its classification as a "Modified Note." Regardless, the evidence is clear; there was a

written modification in this case, which was not plead nor admitted into evidence, and which, at the very least, modified the amount of principal due on the Note.

> 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].

> 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]. The Payment History further shows that the Modification allegedly increased the principal by $12,484.03 in May of 2011. [I. 31].

Additional evidence of this is found in Appellee's request of $760,323.46 in principal, when the 2006 Note's "dragnet clause" specifically capped principal at $747,500. [R. I/5]. According to Appellee's witness, this violation of the dragnet clause was due to the fact that the amount of damages sought was based on a modification of the original Note. [Trial, P. 63 Ln. 9-15]. <u>While it seems Appellee tries to obscure this fact, ultimately, the parties agree that there is a written</u>

modification. What *is* still left unknown is what additional terms, if any, were altered or superseded by the Modification, as bargained for by the parties.

a. Best Evidence Rule was Not Satisfied Because the Evidence Proved that Another Contract, Which Was Not Admitted at Trial, Controlled the Agreement Between the Parties.

Even though Appellee admits that the Modification exists, it incorrectly argues that it did not need to admit the Modification because the basis of its foreclosure action was the old contract between the parties not the Modification. This is not only incorrect, it is contrary to contract law.

First, while the pleaded basis of the foreclosure action was the 2006 Note, on cross examination, it became apparent that Appellee was seeking damages based on the 2011 Modification, which it never plead, admitted, nor proved. [Trial, P. 63 Ln. 9-15]. Second, the basis of any foreclosure action is the operative contract between the parties, not an old contract that the parties have elected to alter. *Kuehlman v. Bank of America, N.A.*, 5D14-2131, 2015 WL 6554555 (Fla. 5th DCA October 30, 2015)(Holding that "[l]ender could only foreclose by alleging and proving a breach of the modification agreement" and not the original contract.).

If Appellee's argument is to be adopted, then modifying a contract would be worthless, as any aggrieved party could simply ignore a modification and bring suit based on an old contract. This is unacceptable, just as it is unacceptable to allow a party to avoid a contract freely entered into simply because, in retrospect, it turns

out to be disadvantageous. *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 288 (Fla. 1st DCA 2003).

It is axiomatic that "freely negotiated contracts should be given full effect." *Crastvell Trading Ltd. v. Marengere*, 90 So. 3d 349, 353 (Fla. 4th DCA 2012)(*citing M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)). Here, the operative contract between the parties cannot be given full effect because it was never plead nor introduced into evidence, violating Rule of Civil Procedure 1.130 and the Best Evidence Rule. Further, it is harmful reversible error to enter judgment without admitting the operative contract into evidence.

b. The Modified Note May Have Needed to Be Surrendered.

Appellee incorrectly argues that it met its burden of surrendering the Note by surrendering the original of the 2006 Note. However, this was not the correct or operative contract between the parties. As discussed above, the evidence reveals that the 2006 Note was modified, in writing. If the terms of that modification do not destroy the pillars of negotiability,[1] the Modified Note would still be a negotiable instrument that must be taken out of the stream of commerce before judgment can be entered. *Deutsche Bank Nat'l Trust Co. v. Huber*, 137 So. 3d 562, 564 (Fla. 4th DCA 2014)("Because a promissory note is a negotiable instrument, a plaintiff seeking to foreclose on a defendant must produce the original note . . . and

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[1] *See* FLA. STAT. §673.1041

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.) Although the *Huber* case is not factually identical to the current action – as the current action seems to be a case of first impression in Florida – in *Huber,* this Court emphasized the importance of surrendering a negotiable instrument. Therefore, for the same reasons found in *Huber*, should the trial court have found that the operative modified agreement between the parties was a negotiable instrument, that written agreement, in its entirety, should have been surrendered at trial.[2]

II. CONCLUSION

The lower court caused harmful reversible error by entering Final Judgment without the admission of the correct and operative modified agreement between the parties. As such, Final Judgment should be reversed and Appellants' Motion for Involuntary Dismissal should be granted.

Dated November 11, 2015.

Respectfully Submitted,

/s/ Evan M. Rosen
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[2] Appellants recognize this is a slightly different position than what they took in their Initial Brief. Upon further reflection, without knowing the terms of the modification and its possible impact on negotiability, ultimately, this Court cannot address whether or not surrender is appropriate. However, surrender may very well be required, which is another important reason why admission of the modified agreement is a necessity.

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 11th day of November, 2015.

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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.

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