



**IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT**

CASE No.: 5D14-1379

ABDALLAH BOUMARATE AND JENNIFER BOUMARATE,

Appellants,

v.

HSBC BANK USA, N.A., ETC., ET AL.,

Appellees.

ON APPEAL TO THE FIFTH DISTRICT COURT OF APPEAL
FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

APPELLANTS' INITIAL BRIEF

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the instant appeal pursuant to Florida Rule of Appellate Procedure 9.030(b)(1)(A). Venue is proper in this Court pursuant to section 35.043, Florida Statutes. The Final Judgment of Foreclosure was entered on March 17, 2014. (R. Vol. 1 at 215-218). The Appellants timely filed a Motion for Rehearing pursuant to Florida Rule of Civil Procedure 1.530 on March 26, 2014. (R. Vol. 1 at 219-227). The trial court granted the motion in part and denied the motion in part on March 31, 2014. (R. Vol. 1 at 239-240). The Notice of Appeal was timely filed on April 15, 2014. (R. Vol. 1 at 241-242). Accordingly, jurisdiction lies in this Honorable Court. FL. R. APP. P. 9.110(b).

STATEMENT OF THE CASE AND FACTS

A. PROCEDURAL POSTURE

This residential foreclosure case is before this Court for a second time. The Appellants, Abdallah and Jennifer Boumarate (“the Boumarates”), first appealed after the trial court granted summary judgment in favor of the Appellee, HSBC Bank (“the Bank”). This Court reversed and held that the Bank was not entitled to judgment because it failed to carry its burden of

proving its right to enforce the lost note. According to this Court's opinion ("*Boumarate I*"), that burden required the bank to explain how it obtained the note from Novelle Financial Services, Inc., and the circumstances surrounding its alleged loss. *Boumarate v. HSBC Bank USA, N.A.*, 109 So. 3d 1239, 1239 (Fla. 5th DCA 2013) (citing *Beaumont v. Bank of New York Mellon*, 81 So. 3d 553, 554-555 (Fla. 5th DCA 2012)).

On remand, the case proceeded to a bench trial. The trial court once again entered judgment in favor the Bank. The Boumarates appeal for a second time because once again, the Bank failed to carry its burden of demonstrating its right to enforce the lost note as of the date of the trial, including how it obtained the Novelle note and the circumstances of its loss.

B. TRIAL

According to its Complaint, the Bank was not in possession of the note when the Complaint was filed. (R. Vol. 1 at 5). At trial, however, the Bank claimed it possessed the note when it filed suit and introduced a copy of the purportedly lost note into evidence. (R. Vol. 2 at 37). The copy of the Novelle note introduced at trial bears no endorsement or any other indicia of a legal or equitable transfer to the Bank. *Id.* at 65-66.

To prove its entitlement to enforce the lost note at trial, the Bank did not call any of its own representatives. Instead, its lone witness was Sandra Tramble, a “loan analyst” for the servicer of the loan, Ocwen Financial (“Ocwen”). *Id.* at 9-10. Although she worked for Ocwen - not the Bank or Novelle – the Bank selected Ms. Tramble to review its business records and testify at trial. *Id.* at 11.

At the time of trial, Ms. Tramble had worked for Ocwen for “over a year and a half.” *Id.* at 25. She had no familiarity with the Boumarates or any of their loan documents until a week before she testified at trial. *Id.* Ms. Tramble reviewed “all of the documents, payment history, loan, the note, the mortgage, and all of the details” in the Boumarates’ file for the exclusive purpose of testifying at trial. *Id.* at 16.

Yet, when counsel for the Bank asked Ms. Tramble whether she was “aware of the time or circumstances surrounding the loss or destruction” of the note, she did not understand the question. *Id.* at 39. Counsel clarified: “Do you know how it was lost?” Ms. Tramble responded, “No, I don’t.” *Id.*

On cross-examination, Ms. Tramble testified that she did not know which individual lost the note, which entity lost the note, or when the note

was lost. *Id.* at 42-43. Ms. Tramble also testified that she knew of no document which established that the Bank was entitled to enforce Novelle’s note, such as an endorsement or assignment. *Id.* at 65-66.

Based on that testimony, the Boumarates moved for a directed verdict in their favor. *Id.* at 67, 71. The Boumarates argued that pursuant to section 673.3091, Florida Statutes, as well as this Court’s opinion in *Boumarate I*, the Bank failed to carry its burden of establishing its entitlement to enforce the note¹. *Id.* at 44-45. The trial court disagreed and ruled that the Bank has “possession of the note, and that’s all they need” to prove entitlement to enforce the lost note. *Id.* at 46.

SUMMARY OF THE ARGUMENT

This Court’s opinion in *Boumarate I* made crystal clear that the Bank had the burden of proving its entitlement to enforce the lost note. That burden required the Bank to explain: (1) how it obtained the Novelle note;

¹ Counsel for the Boumarates presented *Boumarate I* to the trial court. Although it is not entirely clear from the record, it appears the trial court did not understand that *Boumarate I* was the result of an appeal in the same case before him. The judge attempted to distinguish the facts of *Boumarate I* and after hearing the Boumarates’ argument and reading the case said: “I don’t think this changes my mind a bit.” (R. Vol. 2 at 56).

and (2) the circumstances of its loss. The Bank failed to make either showing.

The *copy* of the Novelle note the Bank introduced into evidence contained no endorsements or assignments transferring it to the Bank. Likewise, Ms. Tramble testified there were no endorsements, assignments or any other documents in the Bank's possession which would reflect a transfer to the Bank from the original mortgagee and payee, Novelle. Thus, the Bank failed to carry its burden of explaining how it obtained the Novelle note.

In addition, Ms. Tramble testified unequivocally that she had no knowledge of the circumstances surrounding the loss of the note. Pursuant to *Boumarate I*, Ms. Tramble's testimony on this issue is dispositive. The Bank is not entitled to enforce the note because it failed to adduce evidence explaining its loss. This Court must reverse and vacate the trial court's final judgment of foreclosure.

This Court should also remand with instructions that the trial court enter judgment in favor of the Boumarates, because the Boumarates motion for directed verdict should have been granted. Even if the Boumarates had

not moved for a directed verdict, the Bank does not deserve another bite at the apple. After six years of litigation and after receiving clear guidance from this Court regarding the evidence it needed to show entitlement to enforce the note, the Bank once again failed to carry its burden. This Court should remand and instruct the trial court to enter judgment in favor of the Boumarates.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE TRIAL COURT IGNORED THIS COURT’S PREVIOUS OPINION IN THIS CASE AND ERRED WHEN IT RULED THE BANK PROVED ITS ENTITLEMENT TO ENFORCE THE LOST NOTE.

A. Standard of Review

“The standard of review on appeal of the trial court’s ruling on a motion for directed verdict is *de novo*.” *Martin County v. Polivka Paving, Inc.*, 44 So. 3d 126, 131 (Fla. 4th DCA 2010); *see also Andrews v. Direct Mail Express, Inc.*, 1 So. 3d 1192 (Fla. 5th DCA 2009).

Whether the trial court applied the correct test to determine the Bank’s entitlement to enforce the lost note should be reviewed *de novo*. *Ondrejack v. Ondrejack*, 839 So. 2d 867, 870 (Fla. 4th DCA 2003) (“[w]here a trial judge fails to apply the correct legal rule...the action is erroneous as a matter

of law”) (quoting *Kennedy v. Kennedy*, 622 So. 2d 1033, 1034 (Fla. 5th DCA 1993)).

As to the issue of the sufficiency of the evidence regarding the Bank’s entitlement to enforce the lost note, this Court should review the record to determine whether the trial court’s findings are supported by competent, substantial evidence. *C.M. v. Department of Children and Families*, 823 So. 2d 182, 183 (Fla. 5th DCA 2002).

B. Argument on the Merits

Pursuant to *Boumarate I*, the Bank had the burden of proving its right to enforce the note, “including how it obtained the Novelle Financial Services note and the circumstances of its loss.” *Boumarate*, 109 So. 3d at 1239 (citing *Beaumont v. Bank of New York Mellon*, 81 So. 3d 553, 554-555 (Fla. 5th DCA 2012)). The trial court failed to enforce this Court’s ruling.

Instead, the trial court ruled that the Bank was only required to show it had possession of the note to establish its entitlement to enforce the note. (R. Vol. 2 at 46). This was error. *See, e.g., Brunner Enterprises, Inc. v. Department of Revenue*, 452 So. 2d 550 (Fla. 1984) (holding that the

decision of an appellate court in an earlier proceeding in the same case is binding on the parties and the court as the law of the case).

It is well-settled in Florida that to be entitled to final judgment in this instance, the party seeking foreclosure must either “tender the *original* promissory note to the trial court or seek to reestablish the lost note under section 673.3091, Florida Statutes.” *Servedio v. U.S. Bank Nat. Ass’n*, 46 So. 3d 1105, 1107 (Fla. 4th DCA 2010) (emphasis added); *see also Perry v. Fairbanks Capital Corp*, 888 So. 2d 725, 727 (Fla. 5th DCA 2004) (holding that a “promissory note is clearly a negotiable instrument within the definition of section 673.1041(1), and either the original must be produced, or the lost document must be reestablished” under section 673.3091). Here, the Bank tendered merely a copy of the note. Consequently, the Bank had to establish compliance with 673.3091.

Section 673.3091(1) provides:

(1) A person not in possession of an instrument is entitled to enforce the instrument if:

(a) The person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;

(b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and

(c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

FLA. STAT. 673.3091(1). Section 673.3091(2) specifically requires the party seeking to reestablish the lost note to prove “the person’s right to enforce the instrument” under section 673.3091(1).

At trial, the Bank failed to present any competent evidence proving it was entitled to enforce the Novelle note under section 673.3091(1)(a). As to its obligation to explain the circumstances surrounding the loss of the note, the Bank did not simply fall short of meeting its evidentiary burden. Rather, the Bank’s sole witness testified unequivocally that she did not know *anything* about how the note was lost, when it was lost, or who lost it. (R. Vol. 2 at 39-43). According to *Boumarate I*, Ms. Tramble’s testimony is fatal to the Bank’s right to foreclose. The trial court should have granted the Boumarates motion for directed verdict and entered judgment in their favor.

The Bank also failed to show how it acquired the note from Novelle. Although the Bank secured a clerk's default against the Boumarates, the Bank still had the burden of proving it was entitled to enforce the note. *Boumarate*, 109 So. 3d at 1239 (citing *Beaumont v. Bank of New York Mellon*, 81 So. 3d 553, 554-555 (Fla. 5th DCA 2012); see also *Venture Holdings & Acquis. Group, LLC v. A.I.M. Funding Group, LLC*, 75 So. 3d 773 (Fla. 4th DCA 2011).

If the note does not name the plaintiff as the payee, the note must bear a special endorsement in favor of the plaintiff or a blank endorsement. *Riggs v. Aurora Loan Servs., LLC*, 36 So. 3d 932, 933 (Fla. 4th DCA 2010). Alternatively, the plaintiff may submit evidence of an assignment from the payee to the plaintiff to prove its status as a holder of the note. *Verizzo v. Bank of N.Y.*, 28 So. 3d 976 (Fla. 2d DCA 2010). Thus, despite the default, the Bank still had an obligation at trial to adduce competent evidence demonstrating how it was entitled to enforce the lost note through proof of an endorsement, assignment, or some equitable document demonstrating a

transfer of the note and mortgage from the original mortgagee, Novelle, to the Bank².

The Bank introduced no such evidence. The Bank did not introduce any sort of valid endorsement or assignment transferring Novelle's interest to the Bank. The *copy* of the purported lost note contains no endorsements to the Bank. (R. Vol. 2 at 65-66). Ms. Tramble admitted the Bank was not the original Mortgagee and that she was unaware of any endorsements, assignments, or other documents which showed an equitable transfer of the subject note from Novelle to the Bank. *Id.* at 63-66. No such documents were introduced at trial, and Ms. Tramble conceded she did not know whether any such documents existed when the note was lost. *Id.* at 58-61. Therefore, even if the Bank was in possession of the note at the time the loss occurred, or any time up to trial, the Bank still would not be entitled to enforce it.

The trial court erred by denying the Boumarates' motion for directed verdict because the Bank failed to make the basic showings required by section 673.3091(1)(a). As a result, this Court should reverse and remand

² Both the trial court and counsel for the Bank recognized this burden at the outset of trial. (R. Vol. 2 at 8).

with instructions that the trial enter judgment in favor of the Boumarates. Under no circumstances, however, should this Court afford the Bank another chance to prove its entitlement to enforce the lost note. The Second District Court of Appeal's opinion in *Correa v. U.S. Bank N.A.* is instructive.

In *Correa*, the trial court held a non-jury trial on U.S. Bank's entitlement to enforce a lost note. *Correa*, 118 So. 3d 952, 953-954 (Fla. 2d DCA 2013). As in this case, U.S. Bank's lone witness was an employee of the servicer of the loan. *Id.* at 954. The employee testified that he had no knowledge regarding the loss of the note. *Id.* As in this case, U.S. Bank introduced no evidence of an assignment or endorsement showing that it had authority to enforce the lost note. *Id.* As in this case, the trial court found the employee's testimony sufficient to reestablish the lost note and entered a final judgment of foreclosure. *Id.*

The Second District Court of Appeal reversed because the employee "admitted that he had no idea how or when the note was lost, and he did not know if the loss occurred while [the servicer] was in possession of it." *Id.* at 955. The appellate court also held that the Bank should not be afforded a "second bite at the apple." *Id.* at 956. The court noted that the case had

“languished” for over four years. *Id.* More importantly, counsel for U.S. Bank “should have been fully aware of its burden to reestablish the lost note and fully prepared to meet that burden, yet it made minimal effort to address this issue even after prodding by the trial court.” *Id.* at 957. Consequently, the Second District Court of Appeal saw “no reason to afford [U.S. Bank] a second opportunity to prove its case” and reversed and remanded with directions that the trial court enter an involuntary dismissal of the complaint. *Id.*

The same result should obtain here. The Bank in this case was even more “fully aware of its burden to reestablish the lost note,” given this Court’s explicit instruction in *Boumarate I*. In addition, where the Bank in *Correa* had over four years to prove its case, the Bank in this case had over six. This Court should reverse and instruct the trial court to enter judgment in the Boumarates’ favor.

CONCLUSION

The Bank failed to sustain its burden of proving its right to enforce the lost note at the time of trial. The Bank’s sole witness admitted that no endorsements, assignments, or documents showing any sort of transfer of the

lost note to the Bank existed. Thus, the Bank failed to carry its burden of explaining how it obtained the Novelle note. Likewise, the Bank's witness testified that she knew nothing of the circumstances surrounding the loss of the note. Through Ms. Tramble's testimony, the Bank conclusively established its inability to comply with *Boumarate I* and to meet the requirements of section 673.3091. This Court should reverse and remand with instructions that the trial court enter judgment in favor of the Boumarates.

DATED this 28th day of August, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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