

IN THE CIRCUIT COURT OF THE
XXXXXXXXXX JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA,
IN AND FOR XXXXXXXXX COUNTY

WELLS FARGO....

Plaintiff,

Case No.: XX-CA-XXXXX

V.

NAME OF HOMEOWNERS

Defendants.

_____ /

DEFENDANT'S MOTION TO VACATE JUDGMENT

Comes now the defendant, [insert Defendant name], by and through undersigned counsel, and hereby files their motion to vacate foreclosure judgment, pursuant to Rules 1.540(b) Fla. R. Civ. P., states:

1. Florida Rule of Civil Procedure 1.540(b) provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons:... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court.

2. The plaintiff's complaint fails to contain sufficient facts to establish who the plaintiff is and its relationship to the defendant and to the claim for foreclosure of a promissory note, including the date of the alleged assignment of the mortgage and note, and the identity of the owner of the subject promissory note. The complaint fails to sufficiently identify who the plaintiff is and fails to allege facts sufficient to determine the standing of the plaintiff.

3. Florida Rule of Civil Procedure 1.130(a) provides in pertinent part: "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."

4. Plaintiff attaches documents to its complaint that conflict with the allegations of material facts in the complaint in which the plaintiff claims that it "owns the Note" and Mortgage by virtue of an unrecorded assignment that does not allege when the assignment occurred. These allegations conflict with the mortgage attached to the complaint that identifies [name original mortgagee], as the lender with the security interest. These allegations therefore constitute serious misrepresentations and could be construed as a fraud upon the court.

5. Additionally plaintiff makes allegations in its complaint that conflict with the documents attached thereto as to who owned the subject note at the time the note was allegedly lost.

6. When exhibits are inconsistent with the plaintiff's allegations of material fact as to whom the real party in interest is, such allegations cancel each other out. Fladell v. Palm Beach County Canvassing Board, 772 So.2d 1240 (Fla. 2000); Greenwald v. Triple D Properties, Inc., 424 So. 2d 185, 187 (Fla. 4th DCA 1983); Costa Bella Development Corp. v. Costa Development Corp., 441 So. 2d 1114 (Fla. 3rd DCA 1983).

7. Florida Rule of Civil Procedure 1.130(b) provides in pertinent part: "Any exhibit attached to a pleading shall be considered a part thereof for all purposes." Because the facts revealed by Plaintiff's exhibit are inconsistent with Plaintiff's allegations as to its ownership of the subject note and mortgage, those allegations are neutralized and Plaintiff's complaint is rendered objectionable. Greenwald v. Triple D Properties, Inc., 424 So. 2d 185, 187 (Fla. 4th DCA 1983).

8. Florida Rule of Civil Procedure 1.210(a) provides in pertinent part:
"Every action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought."

9. The Plaintiff in this action meets none of those criteria. Because the exhibit attached to Plaintiff's complaint is inconsistent with Plaintiff's allegations as to ownership of the subject promissory note and mortgage, Plaintiff has failed to establish itself as the real party in interest and has failed to state a cause of action.

10. In Florida, the prosecution of a foreclosure action is by the owner and holder of the mortgage and the note. Your Construction Center, Inc. v. Gross, 316 So. 2d 596 (Fl. 4th DCA 1975)

11. The Defendants recognize the precedent set in WM Specialty Mortgage, LLC v. Salmon, 874 So.2d 680 (Fla 4th DCA 2004) regarding the assignment of a mortgage. However as the Second District Court of Appeals noted, standing requires that the party prosecuting the action have a sufficient stake in the outcome and that the party bringing the claim be recognized in the law as being a real party in interest entitled to bring the claim as of the date of the commencement of the action. The plaintiff's failure to meet the standing requirements as of the commencement of this foreclosure action renders the complaint fatally defective and, therefore constitutes misrepresentation as to who the Plaintiff really is. The assignment cannot post date the filing of this action if assignment does not relate back to the commencement of the litigation. Progressive Express Insurance Company v. McGrath Community Chiropractic, 913 So.2d 1281 (Fla. 2nd DCA 2005).

12. The Plaintiff, in its complaint alleges that it "owns the Note and Mortgage" however it has failed to produce any material evidence to support its claim. In the absence of

this evidence the Plaintiff is clearly misrepresenting themselves as the real party in interest and the holder in due course with legal standing to bring this cause of action against the defendant.

13. The Plaintiff alleges that it is the holder in due course on the subject mortgage and note yet it is the belief of the Defendant that the note was part of larger securitization process and sold to several un-named parties and beneficial owners and any claims by Plaintiff, in the absence of the original note endorsed to Plaintiff, are a clear misrepresentation of the actual facts.

14. It is the position of the Defendant that if the courts were to allow a Plaintiff to bring a cause of action in a scenario where the Plaintiff alleges that it owns a certain note and mortgage but fails to provide any evidence to the courts that this, in fact true, the courts would open the door to incredible harm to any homeowner whose home is secured by a mortgage.

15. If the court were to allow the Plaintiff in this case to prevail in light of serious misrepresentation and fraud upon the court, it would result in a major injustice to the Defendant. The Court cannot be in a position of enabling Plaintiff and its attorneys to commit material misrepresentation or felony crimes.

WHEREFORE, Defendant requests this court grant Defendant's motion for vacating judgment and for all other relief to which these defendants prove themselves entitled.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via regular U.S. Mail to: OPPOSING LAWYER, ADDRESS on this XXth day of XXXXX, 2008.

Shannon M. Houk
Attorney' for the Defendant
ADDRESS
Phone
Fax

SHANNON M. HOUK, ESQ.