

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL
CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA,

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE
Plaintiff,

Case No.: 07-24338-CACE
DIVISION: 02

vs.

JAMES DELIA, MARIA CENTENO a/k/a MARIA
DELIA, CITIBANK, FSB, UNKNOWN TENANT(S)
IN POSSESSION #1 AND #2 et al
Defendants.

DEFENDANT'S EMERGENCY MOTION TO VACATE JUDGMENT

Comes now the defendant, JAMES DELIA, PRO SE DEFENDENT, 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 has committed a fraud upon this court which has only become apparent to the Defendant within the last day, upon discovery that the "lender" bank and others have engaged in a pattern of fraud and deception across the country and the state of ----- in attempting to foreclose residential properties AFTER it has already been paid in full PLUS a fee for standing for an undisclosed lender.**

3. *Plaintiff's allegations that the Plaintiff has not been paid are false is easily ascertainable by the 10k and 8k filings with Plaintiff's sworn filings with the SEC,* wherein the description of the instant loan transaction fits exactly with ALL loans that were securitized and eventually sold in shares to investors around the world. It was not until the last day that Defendant consulted with a knowledgeable consultant and attorney who informed him and demonstrated the fraud. Defendant assumed that because the Plaintiff refused to accept payment that the allegation they were making was that they had not received any payment on the note, when in fact, they had

already been paid in full long before this action was commenced and contemporaneously with the loan closing. **Plaintiff did not disclose that the loan had been paid, and did not disclose that the true holder in due course and the parties in possession of indorsement or the note itself have long since been owners of these mortgage documents, and in fact mislead this Defendant and the Court to believe the contrary.** Defendant was only able to discover this fact upon consulting with an expert who advised me that the pattern and policy of Plaintiff was to treat ALL loans in this manner and that **by granting Plaintiff the right to foreclose the court was essentially giving Plaintiff the money AND the property.**

4. In fact, based upon the sworn filings of the Plaintiff with a Federal Agency under the Securities and Exchange Act of 1933, **Plaintiff admits payment** and it is clear that Payment occurred either PRIOR to the loan closing or within days after the loan closing took place. According to those filings full payment PLUS a fee of 2.5% was paid to Plaintiff by a mortgage aggregator, the "lender" never entered the loan on its balance sheet or in its filings with the FDIC, or any regulatory agency or even to its shareholders, because the transaction was classified as a service transaction represented solely on Plaintiff's income statement.
5. **In plain language, Plaintiff has been paid in full and wants the real property too and is about to get it unless this court allows the case to be tried on its merits.**
6. In plain language, the Plaintiff's own confusion as to what role they play is apparent in the names of entities used in the complaint, only one of which received judgment. This confusion is easily understood.
7. Plaintiff filed the foreclosure action and now is intent on taking title to the property in addition to having been paid in full PLUS a fee for standing in for the mortgage aggregator, who was the real lender, unregistered in the State of Florida to do business as an investment bank.
 - 7.1. The aggregator took title as Trustee of a mortgage pool to which many loans were assigned, not necessarily all real estate.
 - 7.2. The aggregator purportedly assigned but did not record some interest in the note and mortgage in the instant action to a Special Purpose Vehicle which was owned and operated by an investment bank.
 - 7.3. The SPV was established by a CDO (collateralized debt obligation) manager employed by the investment bank.
 - 7.4. The CDO manager established what are known as tranches within the SPV and assigned parts of each pool to each tranche within the SPV.
 - 7.5. The hierarchy of tranches guarantees and requires a misapplication of funds out of and contrary to compliance with the terms of the subject mortgage security instrument and note.
 - 7.6. The subject pieces of the pool, that includes pieces of the subject mortgage and note, were then pledged to the buyers of certificates of debt instruments that were backed by and in substance convertible into equity shares of ownership of the subject mortgage and note.

- 7.7. Each buyer received a share of the subject mortgage and note along with a share of thousands of other mortgages and notes.
- 7.8. Each buyer was shown a AAA securities rating, insurance from AMBAC or similar entity and a credit default swap that guaranteed payment of the revenue flow.
- 7.9. Thus co-obligors were created, which Plaintiff failed to disclose at any time to this Defendant or this Court and failed to plead that the holder of the note had not been paid despite overcollateralization of the negotiable instruments and the creation of a reserve pool to make payment, insurance, guarantees, and credit default swaps.
8. This motion is filed because Defendant verily believes he will and should prevail on the merits, that the Plaintiff has been paid, that the holder in due course has been paid, and that the affidavits and representations of counsel were false, known to be false when made, and have been found to be false repeatedly in other cases around the country.
 - 8.1. Defendant intends to file affirmative defenses for set off violations to the Truth in Lending Act, and a counterclaim for damages for RICO, TILA violations, usury, fraud in the inducement and fraud in the execution, damages for appraisal fraud, quiet title, and malicious abuse of process among other causes of action.
9. The failure to disclose the real parties, and all the fees paid to the undisclosed parties is a violation on the face of TILA, the contract between the parties, the Good Faith Estimate provided to Defendant, and fair dealing, in addition to a breach and in fact total abdication of the fiduciary duty owed by a lender to its borrower in which underwriting standards were reduced to zero because the nominal lender did not perceive itself to be at risk.
 - 9.1. This includes the undisclosed purchase of insurance that qualifies as mortgage insurance, credit default swaps that qualify as mortgage insurance, and guarantees from third parties, including but not limited to the mortgagors whose negotiable instruments were also assigned to tranches that had lower priority than that which the subject loan transaction was assigned, and the payments made by Defendant were in fact allocated and given not to the holder in due course of the subject mortgage and note, but to the CDO manager for allocation to tranches and securities which held a higher place in the hierarchy of the tranches within the SPV.
9. The entire scheme was intended to trick investors into investing their capital into securities that were unregistered and unregulated, using the Defendant's signature as the issuer of the negotiable instrument which was perceived to give an inflated value to the derivative security purchased by those victimized investors.
 - 9.9. This inflation of value was an exact reflection of the inflation of value that Plaintiff and its co-conspirators paid for when they hired an appraiser for the loan closing. Thus the borrower and the investor, the only real parties in

interest to the transaction were both tricked, cheated and now, to add insult to injury, are being sued as the villains in someone else's scheme.

10. 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.

11. 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.”

12. 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
13. 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 MERITAGE MORTGAGE CORPORATION, as the lender with the security interest. These allegations therefore constitute serious misrepresentations and could be construed as a fraud upon the court.
14. 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.
15. 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).
16. 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.”
17. 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).
18. 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.”**

19. 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, and because the allegations and exhibits are inconsistent with sworn filings with a Federal Agency (SEC), Plaintiff has failed to establish itself as the real party in interest and has failed to state a cause of action.
20. In Florida, the prosecution of a foreclosure action is by the owner and holder of
21. the mortgage and the note. *Your Construction Center, Inc. v. Gross*, 316 So. 2d 596 (Fl. 4th DCA 1975)
22. 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.
- 23.1. **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.**
- 23.2. Further, the failure to join indispensable and necessary parties, those being the real holders in due course of the subject loan documents, Citi wishes to place the borrower and innocent third parties in untenable situations:
 - 23.2.1. The borrower can AGAIN be sued on the same note by a third party who has not been given notice of this lawsuit (John Does 1-1000)
 - 23.2.2. The borrower has no proper entity against which he can assert affirmative defenses and claims regarding predatory loan practices, fraud and other causes of action.
 - 23.2.3. If the note was separated from the mortgage then the mortgage is unenforceable by definition. If the mortgage is unenforceable by definition then any "foreclosure sale" is either void or voidable. Thus a cloud on title exists even in the presence of the Court's Judgment to the contrary.
 - 23.2.4. Bidders and third parties without notice could easily be sued in foreclosure by the real holders in due course thus either encumbering their property with the mortgage which the Court had intended to extinguish through the foreclosure sale, or losing the property for which they paid out of their own funds or through the lending and mortgage of yet another financial institution who will also be subject to losing its security and suffer a partial or complete loss on a loan where the risks were not apparent because of the fraud of Citi.
24. **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). where there is no assignment document presented and the indorsement is**

suddenly produced during litigation without a date, it must be presumed that the indorsement was made after the attempt to enforce the instruments in the subject loan transaction, or at the very least that the burden falls on the Defendants to allege and prove that the indorsement was timely made with proper authorization, that the assignor had title to the instruments, and that the assignee retained title to the instruments.

24.1. In short, Citi must allege that it is a holder in due course, an allegation which Plaintiff already knows to be untrue and inconsistent with Citi's sworn filings with the Securities and Exchange Commission in its 10K and 8K filings.

25. 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.
26. The Plaintiff alleges that it is the holder in due course on the subject mortgage and note Defendant has learned, as aforesaid, that this is inconsistent with Citi's sworn disclosures to the contrary with the SEC, to wit: that the note was part of larger securitization process and sold to several 6-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.
27. 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.
28. 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.

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: POPKIN AND ROSALER, P.A., Attorney for the Plaintiff, 1701 West Hillsboro Boulevard Suite 302, Deerfield Beach, FL. 33442 on this 29th day of August, 2008.

JAMES DELIA
Pro Se Defendant
2234 Thomas St