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COURT OF APPEALS OF NEW MEXICO
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**IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO**

Ct. App. No. 33,394

PNC MORTGAGE, A DIVISION OF PNC BANK, N.A. SUCCESSOR BY MERGER TO NATIONAL CITY MORTGAGE, A DIVISION OF NATIONAL CITY BANK FKA NATIONAL CITY BANK OF INDIANA,

Plaintiff-Appellee,

vs.

DANA ROMERO and **EUGENE ROMERO**,

Defendants-Appellants.

Appeal from the State of New Mexico
First Judicial District Docket, County of Santa Fe,
The Honorable Sarah Singleton, No. D-101-CV-2010-03002

DEFENDANTS-APPELLANTS' REPLY BRIEF

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G) NMRA, we certify that this brief complies with the type-volume limitation of Rule 12-213(F)(3). This brief utilizes Times New Roman typeface in 14 point type, and according to Microsoft Office Word for Mac 2011, the body of the brief contains 3,363 words and thus complies with NMRA 12-213(F)(3).

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Plaintiff-Appellee's claim that "[i]t is fundamentally irrelevant that the copy of the Note attached to the 2010 Complaint showed no indorsements, while the Note now does," (Answer Brief at 12); that the previously unindorsed "original Note now has indorsements does not change that [Plaintiff-Appellee] has and had standing because, regardless of when those indorsements were added, [Plaintiff-Appellee] could still enforce the Note," (Answer Brief at 6); and that "there is no reading of the evidence under which [Plaintiff-Appellee] cannot enforce the Note," (Answer Brief at 4), taken as a whole and as separate "givens", not only is incorrect but also begs the central question of this appeal: it is precisely the question of Plaintiff-Appellees standing that is in doubt so as to defeat its grant of summary judgment in the court below.

ARGUMENT

I. THE TIMING OF INDORSEMENTS AND CORPORATE COMBINATIONS DEFEATS THE PRIMA FACIE CLAIM OF STANDING

Standing is a jurisdictional prerequisite to filing suit, which "may not be waived and may be raised at any stage of the proceedings, even sua sponte by the appellate court." *Bank of New York v. Romero*, 2014-NMSC-007, ¶ 15, 320 P.3d 1 (citation and quotation marks omitted). Under the Commercial Code ("UCC") as in force in New Mexico (NMSA 1978, § 55-3-101 *et seq.* (1992)), a plaintiff "is required to demonstrate…that it had standing to bring a foreclosure action at the

time it filed suit." *Bank of New York v. Romero*, 2014-NMSC-007, ¶ 17 (citing NMSA 1978, § 55-3-201(a) (1992) (emphasis added)). In addition, the plaintiff "has the burden of establishing timely ownership of the note and the mortgage to support its entitlement to pursue a foreclosure action." *Id.* (emphasis added and citation omitted). Furthermore, "[i]n order to establish standing to foreclose, a lender must show that, at the time it filed its complaint for foreclosure, it had: (1) a right to enforce the note, which represents the debt, and (2) ownership of the mortgage lien upon the debtor's property." *Deutsche Bank Nat'l Trust Co. v. Beneficial N.M. Inc.*, 2014-NMCA-90, ¶ 8, *cert. granted*, 2014-NMCERT-____ (No. 34,726, Aug. 29, 2014).

In its Answer Brief, Plaintiff-Appellee offers an explanation of how a negotiable instrument, such as the subject Note, could be enforceable under applicable statutes and case law (Answer Brief at 1-7), citing primarily to the National Bank Act (12 U.S.C. § 38 *et seq.*); however, a plausible scenario such as that suggested by Plaintiff-Appellee must yield when the actual facts contradict that story. A timeline of events relevant to this case illustrates the point:

(1) On May 2, 2006, Defendants-Appellants executed the subject Note (Complaint ¶ 3 and Exh. A) [RP 001, 006] and Mortgage (Complaint ¶ 4 and Exh. B) [RP 02, 010];

(2) In 2006, a securitized trust, GSAA 2006-14, was formed. This trust is the owner of the Note and Mortgage, according to a letter to Defendants-Appellants from Plaintiff-Appellee (in response to a Qualified Written Request), dated September 27, 2012 (the "Servicer Letter") [RP 131, 196]. With very few exceptions (which would not cover the subject Note), such mortgage-backed trusts only accept the deposit of assets (such as the Note) during a brief, usually ninety-day, window after the trust is formed;[1]

(3) On or about July 22, 2006, a series of corporate combinations (among entities related to the original payee on the Note) commenced. (Answer Brief at 5) [RP 050, 292]. Those combined entities merged into Plaintiff-Appellee and/or its corporate parent on or about November 6, 2009. [RP 049, 293], and the original lender thereupon ceased to exist as a separate legal entity;

(4) On August 23, 2010, Plaintiff-Appellee filed a foreclosure complaint [RP 001] against Defendants-Appellants, attached to which was a copy of a Note, payable to "National City Mortgage a division of National City Bank of Indiana", bearing no indorsements [RP 006];

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[1] *See Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, Professor Kurt Eggert: 35 Creighton L.Rev. 503, 538-539 (2002).

(5) On November 19, 2012, Plaintiff-Appellee filed its Motion for Summary Judgment, with an Affidavit from one Courtney Ely in support of same, affirming that the "true and correct copy" of the note was attached to the Complaint as Exhibit A, the unendorsed version of the Note; and

(6) On April 3, 2013, in its Reply to Defendants-Appellants' Response to the motion for summary judgment below [RP 153], Plaintiff-Appellee submitted a second version of the "original" Note, now bearing two indorsements, one special and one in blank. Neither of the indorsements was dated.

The evidence on record, as summarized above, indicates that the mortgage loan was extended to Defendants-Appellants in 2006 by the original lender, and was sold to a third-party, the securitized trust, in 2006 or 2007, at the latest. In accordance with the statutory procedures for selling negotiable instruments such as the Note (the UCC, codified in NMSA 1978, § 55-3-201 *et seq.* (1992)), the payee on the Note would have indorsed that instrument on its face at the time of negotiation, and certainly before the filing of this foreclosure case in 2010. Yet, the Note attached to the 2010 Complaint bears no indorsements. And the second version of the Note, submitted by Plaintiff-Appellees in 2013, bears two indorsements.

Plaintiff-Appellee has offered no evidence or authority to show that the Note could be negotiated other than by indorsement in accordance with the UCC. One can assume, therefore, that there is no such evidence or authority. *Flagstar Bank v. Licha*, 2015-NMCA-___, ¶ 29, No. 33,150 (February 18, 2015), citing *Curry v. Great Nw. Ins. Co.*, 2014-NMCA-031, ¶ 28, 320 P.3d 482, *cert. denied*, 2014-NMCERT-003, 324 P.3d 375 ("Where a party cites no authority to support an argument, we may assume no such authority exists.")

If the original lender was not required to place any indorsements on the Note, by virtue of its merger with successor companies and pursuant to the National Bank Act, the only logical reason it would need to indorse is because the Note got transferred to an entity outside the chain of successorship at some point. Nowhere is there any claim or evidence that these indorsements were there at the time of filing the Complaint; on the contrary, Plaintiff-Appellee claims that these expected indorsements were subsequent changes to the Note after filing of Complaint. (Answer Brief at 13: "The evidence of record is that at one point the Note showed no indorsements and that at a later point it did show indorsements. That, of course, is exactly what would happen in the course of taking a note and adding indorsements to it."). And that *ex post* indorsement of a Note that was sold years before those indorsements are presented to the Court is, of course, exactly what

muddies and causes "confusion in what is a very simple process." (Answer Brief at 8).

Was Plaintiff-Appellee hoping to keep the inconvenient truth of having transferred the Note to a 2006 Trust a continued secret? To what end?

Here, the National Bank Act would be a helpful explanation only if the original lender and its successors continued to hold the Note internally, as Plaintiff-Appellee seems to imply as the basis for why the Note, produced years into the lawsuit, would now bear indorsements that are nowhere on the version of the Note attached to the Complaint. However, that explanation is specious at best, and misrepresentation at worst. Defendants-Appellants submit that the only reason a Note with indorsements was produced was because they raised the issue of material fact in their Response to MSJ, that according to Plaintiff-Appellee's own letter, the Note was in a 2006 Trust. It is more than inconvenient to Plaintiff-Appellee's "simple" proof of its standing that a different version of the Note, now one with an indorsement in blank, was not submitted to the court below until Defendants-Appellants pointed out this glaring break in the chain of title. Of significance is that nowhere in the Answer Brief is there any mention of the 2006 Trust, nor of how or when the Note got into the trust. This one essential fact, which is undisputed, negates Plaintiff-Appellee's arguments to the contrary, and renders its story as to a clean chain of title implausible, at best.

The further problem with the "explanation" of subsequently applied indorsements is that those indorsements were seemingly applied by entities that no longer existed legally at the time of filing the 2010 Complaint (by virtue of the 2009 merger completion), let alone three years later when the indorsed Note was entered as evidence by Plaintiff-Appellee. That discrepancy was also never explained by Plaintiff-Appellee. It further offers no explanation as to why a different version of the Note, with indorsements which, if present on the version attached to the Complaint would establish standing, was not proffered with its Motion for Summary Judgment, but only in the Reply.

In its pleadings below and in its Answer Brief here, Plaintiff-Appellee explains the chain of corporate combinations, the changing indorsements on the Note and the timing of the foreclosure suit in a way that, absent the evidence of the sale to a 2006 Trust, could make a convincing proof of its standing. However, the plausible showing of standing by Plaintiff-Appellee cannot be read apart from that inconsistent event.

As indicated in Plaintiff-Appellee's own document (the Servicer Letter), the Note and Mortgage was sold to a 2006 Trust, in furtherance of which the Note attached to the Complaint should have borne indorsements that reflected that sale. The fact that it does not—and the fact that Plaintiff-Appellee has not offered evidence as to how and when the Note and Mortgage were negotiated to that 2006

Trust—raises a genuine issue of material fact, sufficient to defeat the grant of summary judgment in favor of Plaintiff-Appellee. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 242 P.3d 280 (citing *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 150 P.3d 971 (internal quotation marks and citations omitted)). "A fact is material for the purpose of determining whether a motion for summary judgment is meritorious if it will affect the outcome of the case." *Id.* (citing *Parker v. E.I. Du Pont de Nemours & Co.*, 121 N.M. 120, 124, 909 P.2d 1 (N.M. App., 1995)), and "[o]n review, [the appellate courts] examine the whole record for any evidence that places a genuine issue of material fact in dispute, …view[ing] the facts in a light most favorable to the party opposing the motion and draw[ing] all reasonable inferences in support of a trial on the merits." *Handmaker v. Henney*, 1999-NMSC-043, ¶ 18, 992 P.2d 879 (internal quotation marks and citation omitted; emphasis added).

Production of an original note entitles the holder to a presumptive right to enforce the instrument, which presumption is rebuttable under New Mexico's Rules of Evidence. "In a civil case, unless a state statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally." NMRE 11-301.

The standard for rebuttal is not high. *See, e.g., Ohio Citizens Bank of Toledo v. Venture Metal Prods. Co.*, 622 N.E.2d 758 (Ohio Ct. App. 1993). "Under California law, virtually any admissible evidence that the holder of the note is not the owner is sufficient to rebut the presumption. *(cites omitted)* ('[W]hen the party against whom . . . a presumption [affecting the burden of production] operates produces some quantum of evidence casting doubt on the truth of the presumed fact, the other party is no longer aided by the presumption.')." *Oakmore Ranch Mgmt. v. Donnell,* 337 B.R. 222 at 228 (9th Cir. 2006).

II. WHETHER THE ENFORCEABILITY OF THE MORTGAGE IS INDEPENDENT OF, OR ANCILLARY TO, THE NOTE DOES NOT PROVE STANDING

Plaintiff-Appellee's reference to the Servicer Letter in the section of its Answer Brief dealing with the Mortgage (Answer Brief at 8-9), but not in the key section dealing with its standing with respect to the Note (*see* Answer Brief at 1-7), misses the point and the evidentiary import of that Servicer Letter. As discussed in Section I. *supra*, the letter clearly shows not only that the Note was owned by a third-party entity as of the date of the letter (September 27, 2012), but also that such entity had owned it since at least early in 2007, given the date of the 2006 Trust.

As cited above, our Supreme Court has set the standard for foreclosure on a secured promissory note, and expanded on its holding in *Bank of N.Y. v. Romero*,

by saying that the foreclosing party must show evidence of both the right to enforce the note and the ownership of the security interest. *Deutsche Bank v. Beneficial*, 2014-NMCA-90, ¶ 8 (holding that the bank lacked standing to foreclose for failure to satisfy both elements). This Court, in a recent decision, focused on the second element of the standing test. *Flagstar Bank, FSB v. Licha*, 2015-NMCA-___, ¶¶ 17-18 (clarifying that "in order to demonstrate standing to bring a mortgage foreclosure action, the plaintiff must establish that it had the right to enforce the note at the time it filed suit and that the note was secured by a mortgage—the plaintiff need not additionally establish that the mortgage was formally assigned because the right to enforce the mortgage automatically follows the right to enforce the note." (citations omitted).

Plaintiff-Appellee's reliance on this Court's recent decision in *Licha*, to support its claim that it does not need to show how (or whether) the Mortgage was assigned to it in order to enforce that Mortgage against Defendants-Appellants' property, is misplaced. In *Licha*, this Court held that, if a plaintiff can show standing with respect to an underlying note, then it need not separately prove standing with respect to the attendant Mortgage, in order to foreclose on the collateral that is the subject of the Mortgage's granted security interest. *Id.* This Plaintiff-Appellee has not made such an uncontroverted showing of standing to

enforce the Note, and the invocation of *Licha*'s holding does not help it in that regard.

Whether we follow the guidance of *Romero* and *Beneficial* (that requires a foreclosing party to validly hold both the Note and the Mortgage), or the clarification in *Licha* (that so long as a plaintiff can prove that it validly holds the note it need not separately or additionally prove its ownership of the attendant mortgage), Plaintiff-Appellee has not met its burden, and does not remove doubt as to its standing by dismissing the issue of an assignment of mortgage as irrelevant.

III. THE ELY AFFIDAVIT DOES NOT MEET STANDARDS OF ADMISSIBILITY

The *Romero* Court held that the trial court "erred in admitting the testimony of [the affiant] as a custodian of records under the exception to the inadmissibility of hearsay for business records that are made in the regular course of business and are generally admissible at trial under certain conditions," because (i) "it is clear that the business records exception requires some form of document that satisfies the rule's foundational elements to be offered and admitted into evidence and that testimony alone does not qualify under this exception to the hearsay rule" and (ii) "testimony regarding the contents of business records, unsupported by the records themselves, by one without personal knowledge of the facts constitutes inadmissible hearsay." *Bank of N.Y. v. Romero*, 2014-NMSC-007, ¶ 33, quoting *State v. Cofer*, 2011-NMCA-085, ¶ 17, 150 N.M. 483, 261 P.3d 1115 (internal

quotation marks omitted). And Rule 1-056(E) NMRA requires in connection with affidavits submitted in connection with a motion for summary judgment, that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." (*See also, Bank of America v. Quintana*, No. 33,611, ¶ 24 (N.M. Sup. Ct. Feb. 27, 2014 (non-precedential).)

However, trial courts need not been unduly concerned with the form of supporting evidence at the summary judgment stage, so long as the substance of such evidence is of the type that would be admissible at trial. *Flagstar v. Licha*, 2015-NMCA-___, ¶ 20 (giving the example that "hearsay . . . is not generally admissible at trial, so affidavits or depositions containing hearsay are not sufficient evidence of a fact." (internal quotation marks and citation omitted)).

In the affidavit submitted by Plaintiff-Appellee in connection with its motion for summary judgment below, the affiant, Ms. Courtney Ely, referred to documents that were not attached to the affidavit or submitted at the same time. One of the documents she refers to, in an attempt to authenticate it, is the unindorsed Note attached to the Complaint. Even if it were acceptable to cite to documents already in the record, the veracity and probative value (namely, the "substance" that benefits from the exception to the hearsay rule for business records) are contradicted by another "original" note that subsequently came into the record. Therefore, the Affidavit fails the admissibility standard and not incidentally fails

the purpose for which it was intended—to prove the standing of Plaintiff-Appellee to bring the foreclosure suit.

IV. THE UNINDORSED NOTE, IN LIGHT OF THE PRIOR SALE OF THE LOAN, RAISES A MATERIAL ISSUE OF FACT SUFFICIENT TO DEFEAT SUMMARY JUDGMENT

Section IV. of the Answer Brief overlaps with Section I. thereof (in that they both deal with the central question of standing), but in the interest of completeness, it will be addressed separately in this Reply.

By focusing on the curiosity of the "dueling Notes" (Answer Brief at 13), in that a later "original" instrument contains indorsements that did not appear on an earlier "original" instrument, Plaintiff-Appellee again misses the point. While it is certainly true that, in the ordinary course of business, the valid holder of a negotiable instrument might indorse a note (even one that is in default, as is alleged here) with a view to disposing of that asset (*see, e.g., Flagstar v. Licha*, 2015-NMCA-___, ¶ 16), it is not the later indorsed Note that Defendants-Appellants are questioning. If that Note had been attached to the Complaint in 2010, then it would have been consistent with the story that the Note and Mortgage were sold to a third-party securitized trust in 2006 or 2007.

Rather, it is the inconsistency between the unindorsed 2010 Note, supposedly genuine, and the 2006/07 sale to the trust (which sale would have required such Note to bear indorsements on its face) that needs explaining. By

continuing to focus on the generalities of corporate combinations under the National Bank Act, and not addressing the history of negotiation of the Note in the context of the prior sale of that asset, Plaintiff-Appellee has perpetuated doubt and intensified the question as to which "facts" are facts and which "facts" are fabrications. And these issues are not merely incidental to Plaintiff-Appellee's case, they are material and go to the heart of whether it has standing to bring the suit.

V. CONCLUSION

Plaintiff-Appellee only had the right to foreclose on Defendants-Appellants' property at time of filing suit if it, or the original lender, had not already transferred the Note to another party. But for Defendants-Appellants' Qualified Written Request seeking information about the owner of the Note, this information would never have been disclosed to anyone, including the Court. Plaintiff-Appellee would have continued under the guise of never having transferred the Note, and asserted its continued legal right to foreclose as successor to the original lender (as it continues to maintain, even before this Court). The fact that a 2006 Trust was disclosed as the owner of the Note only on the initiative of Defendants-Appellants, taken together with the description of how and when these transfers to a mortgage-backed securitized trust are legally required to occur, points to the inescapable conclusion that the Note was transferred to the 2006 Trust sometime in 2006 or

2007. Why then, was there no indorsement, in blank or specific, shown on the Note attached to the Complaint? This contradiction in the evidence supplied by Plaintiff-Appellee, at a minimum preserves a genuine issue of material fact sufficient to defeat the grant of summary judgment in Plaintiff-Appellee's favor.

Respectfully submitted:
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the following parties listed below by email on this 1st day of May, 2015.

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