**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

PLAINTIFF-APPELLEE'S ANSWER BRIEF

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INTRODUCTION

This case presents a straightforward and simple foreclosure action. Because Plaintiff-Appellee ("PNC Bank") has standing to enforce the subject Note, which carries with it the Mortgage, facts it established plainly and on the record, the lower court's decision should be affirmed.

Appellants executed the Note and Mortgage that are the subject of this foreclosure suit. [RP 00001, 00006-00010]. There is no legitimate dispute that PNC Bank is the successor-in-interest to the original lender who is identified in those documents. [RP 00002, 00006-000030, 000047-000054, 000279-000289]. As such, PNC Bank was the proper party to bring suit here. Moreover, this Court's recent decision in *Flagstar Bank, FSB v. Licha*, No. 33,150, 2015-NMCA-___, clarifies the framework for establishing standing in a foreclosure action and rejects several of the arguments Appellant raises. For these reasons, more fully explained below, this Court should affirm the District Court's decision and uphold the entry of summary judgment in PNC Bank's favor.

LEGAL ARGUMENT

I. PNC Bank Established Standing as Required by *Bank of New York v. Romero* and as clarified in *Flagstar Bank, FSB v. Licha.*

Appellants' primary argument rests on the erroneous assertion that PNC Bank failed to satisfy the requisite elements for standing under *Bank of New York v. Romero*, 2014-NMSC-007, 320 P.3d 1. [Brief in Chief at 8-12.] To advance their point, Appellants rely on the statement that "proof of standing in a foreclosure action is quite rigorous," [*id.* at 8,] to ignore that the necessary elements are clear and straightforward. Indeed, this Court has recently explained that a foreclosure plaintiff need only demonstrate that it had "the right to enforce the note and mortgage at the time that they filed the foreclosure suit." *Licha*, 2015-NMCA-___, ¶ 13 (citing *Romero*, 2014-NMSC-007, ¶ 17).

In the proceedings below, PNC Bank established its standing to bring suit either as the holder of bearer paper or as the successor-in-interest to National City Bank of Indiana ("NCBI"), National City Bank ("NCB"), and National City Mortgage Co. ("NCMC"). The copy of the Note that PNC Bank attached to the Complaint shows that the original lender was National City Mortgage a division of NCBI. [RP 000006]. When PNC Bank later produced the original of the Note to the First Judicial Court, the original at that time showed indorsement of the Note to NCMC and that NCMC had further indorsed the Note in blank. [RP 000156].

The original payee and holder of the Note is PNC's predecessor, NCBI. [RP000281]. It would be incorrect to state that "National City Mortgage" is the original holder. To the contrary, the Note plainly identifies the holder as "National City Mortgage *a division* of National City Bank of Indiana," not a separate entity called National City Mortgage. [RP 000156 (emphasis added)]. "Division," as used at NCB and PNC refers to an internal unit, not a legal entity. [RP 000291-

000293]. For that matter, National City Mortgage is referred to in the indorsements on the Note as a "division" of NCBI, while NCMC (which is a separate legal entity) is referred to as a "subsidiary" of NCBI, illustrating the difference between a division and entity. [RP 000156]; *see also Merriam-Webster's Collegiate Dictionary* 340 (10th ed. 1993) ("division . . . . 7b: an administrative or operating unit of a governmental, business, or educational organization.").

NCBI merged into NCB on or about July 22, 2006. [RP 000050, 000292]. NCMC merged into NCB on or about October 1, 2008. [RP 000146-000147, 000293, 000295-305]. NCB merged into PNC on or about November 6, 2009. [RP 000049, 000293].

In addressing standing to foreclose, *Romero* acknowledged that

> [t]he UCC defines the first type of "person entitled to enforce" a note—the "holder" of the instrument—as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." NMSA 1978, §55-1-201(b)(21)(A) (2005); *see also*, Frederick M. Hart & William F. Willier, *Negotiable Instruments Under the Uniform Commercial Code*, § 12.02(1) at 12-13 to 12-15 (2012) ("The first requirement of being a holder is possession of the instrument. However, possession is not necessarily sufficient to make one a holder. . . . The payee is always a holder if the payee has possession. Whether other persons qualify as a holder depends upon whether the instrument initially is payable to order or payable to bearer, and whether the instrument has been indorsed." (footnotes omitted)). Accordingly, a third party must prove both physical possession and the right to enforcement through either a proper indorsement or a transfer by negotiation. *See* NMSA 1978, § 55-3-201(a) (1992) ("'Negotiation' means a transfer of

> possession . . . of an instrument by a person other than the issuer to a person who thereby becomes its holder.").

Id. at ¶ 21. In *Romero* the note before the Court bore inconsistent, undated indorsements by the same indorser – one showing indorsement to a specific party and another converting the instrument into bearer paper. *Id.* at ¶ 10. Considering those facts, the *Romero* Court stated "[a]lthough we agree with the Bank that if the Romeros' note contained only a blank indorsement from Equity One, that blank indorsement would have established the Bank as a holder because the Bank would have been in possession of bearer paper, that is not the situation before us." *Id.* at ¶ 26; *see also Bank of Am. v. Quintana,* Supreme Court Case No. #33,611, 2014 N.M. Lexis 60, at ¶ 20 (adopting same analysis) (unpublished). Instead, because it was not possible to tell from the face of the note in that case whether the blank indorsement came before or after the specific indorsement, which ran to a party other than plaintiff, it was possible that the specific indorsement superseded the blank indorsement and precluded plaintiff's standing. *Id.* While plaintiff still had the option of proving the order of indorsement through other competent evidence, it was unable to do so there. *See id.* at ¶¶ 29–36.

That, however, is not the situation at hand because there is no reading of the evidence under which PNC cannot enforce the Note. The copy of the original Note attached to the August 2010 Complaint shows that it is payable to NCBI and has no indorsements. [RP 000006]. PNC Bank is and NCB was a national bank, [RP

000149-000150,] governed by the National Bank Act, 12 U.S.C. § 21 *et seq. See* 12 C.F.R. § 7.2000(a) ("A national bank proposing to engage in a corporate governance procedure shall comply with applicable Federal banking statutes and regulations . . . ."). With regard to mergers, the National Bank Act specifically provides:

> The corporate existence of each of the merging banks or banking associations participating in such merger shall be merged into and continued in the receiving association and such receiving association shall be deemed to be the same corporation as each bank or banking association participating in the merger. All rights, franchises, and interests of the individual merging banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the receiving association by virtue of such merger without any deed or other transfer. The receiving association, upon the merger and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises, and interests, including appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, and committee of estates of lunatics, and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the merging banks or banking associations at the time of the merger, subject to the conditions hereinafter provided.

12 U.S.C. §215a(e).

Accordingly, as a matter of federal law, PNC Bank had NCBI's right to enforce the Note as of November 2009, which was prior to the date it filed the Complaint. PNC Bank was entitled to enforce the Note, with no indorsements, as of the date it filed the Complaint by virtue of the NCBI into NCB 2006 merger and the 2009 NCB into PNC merger. [RP 000149, 000292-000293].

That the original Note now has indorsements does not change that PNC Bank has and had standing because, regardless of when those indorsements were added, PNC Bank could still enforce the Note. The Note now shows indorsement from NCBI to NCMC and from NCMC in blank. [RP 000156]. That renders the Note bearer paper. *See Romero* at ¶ 24 ("A blank indorsement, as its name suggests, does not identify a person to whom the instrument is payment but instead makes it payable to anyone who holds it as bearer paper."). Appellants were advised that PNC Bank was in possession of the original Note during the course of discovery, [RP 000142,] and PNC Bank need not establish any additional facts if the Note was indorsed in blank when PNC Bank filed suit. *See id.* In addition, PNC Bank is the successor-by-merger to NCMC [RP 000292-000293], such that regardless of when the indorsements were placed on the Note, and even if there after 2009 when the Note was only specifically indorsed to NCMC, PNC Bank still had standing to enforce that instrument. 12 U.S.C. §215a(e).

The Supreme Court's holding in *Romero* was recently echoed by this Court in the *Licha* decision. There, the Court evaluated whether the plaintiff bank had presented sufficient evidence demonstrating that it had the right to foreclose on the subject note and mortgage. *Id.* at ¶ 15. When filing its complaint, the bank had attached a copy of the note showing specific indorsement in the bank's favor. *Id.* Given that fact, the court had no difficulty concluding that the bank had standing at the time it filed the foreclosure action. *Id.* At the summary judgment phase, the bank produced a copy of the note adding an indorsement in blank to the previously apparent indorsements. *Id.* at ¶ 16. Defendant there attempted to argue—as Appellants do here – that the second version of the note created "conflicting indorsement[s]," and precluded entry of summary judgment in the bank's favor. *Id.* This Court flatly rejected that assertion and concluded that because the bank had the right to foreclose at the time it filed the complaint, "the blank indorsement on the note it continues to hold has no effect" for purposes of the bank's standing. *Id.*

For all of these reasons, regardless of what is the order in which the indorsements were made and whether some, all, or none of the indorsements were on the Note at the time the Complaint was filed, PNC Bank was entitled to enforce the Note and had standing herein when it filed the Complaint. Under any reading, PNC satisfies the requirements of *Romero* and *Licha* and may enforce the Note.

II. Because the Mortgage Follows the Note, PNC Bank May Enforce the Mortgage Regardless of Any Assignment or Sale.

Appellants' claim that PNC Bank was required to show assignment of the mortgage from it to a trust and then back to it in order to have standing to enforce, [Brief in Chief at 17–18,] is an incorrect statement of law designed to create confusion in what is a very simple process. *Licha* has clarified that, under *Romero*, "where the foreclosing plaintiff establishes the right to enforce the note, the plaintiff automatically has the right to foreclose the mortgage that secures the note." *Id.* at ¶ 17 (citing *Romero* at ¶ 35). Specifically, "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." *Id.* at ¶ 18 (emphasis added). That conclusion is unambiguous and dismantles Appellants' claim that PNC Bank was required to demonstrate assignment of the mortgage in order to bring its foreclosure action.

Appellants' contention that the "Servicer Letter" [RP 000193] created a material dispute of fact as to standing is wholly dispensed with under the aforementioned language from *Licha*. In particular, Appellants point to language in the Servicer Letter stating that "PNC mortgage is the servicer of your loan," [RP000193] as evidence that PNC Bank is unable to demonstrate an effective assignment of mortgage and therefore lacks standing. [*See* Brief in Chief at 4–6]. Even assuming that the Servicer Letter has some significance in the context of a mortgage assignment—which it does not—the clear language from *Licha* demonstrates that any such assignment is entirely irrelevant because PNC Bank is unquestionably entitled to enforce the Note, which carries the Mortgage with it. *Licha*, at ¶ 18.

III. The Ely Affidavit Was Properly Considered.

Initially, Appellants' argument that the Ely Affidavit should have been stricken fails because Appellants did not move to strike the affidavit.[1] *See Chavez v. Ronquillo*, 1980-NMCA-069, ¶¶ 19-20, 94 N.M. 442 (requiring a motion to strike an affidavit for such to be properly before the trial court). Appellants did not move to strike the Ely Affidavit and cannot argue against admissibility of the affidavit now.

Even had Appellants properly put the issue before the trial court, the affidavit would still be appropriately considered. Appellants complain that the affidavit contains legal opinion and hearsay. [*See* Brief in Chief at 12–13]. First, an affidavit is not properly stricken because it contains legal opinion. To the contrary, Rule 1-056(E) NMRA allows the submission of affidavits in support of motions for summary judgment so long as the affidavit is based on "personal knowledge," sets forth "facts as would be admissible in evidence," and shows" "affirmatively that the affiant is competent to testify to the matters stated therein."

[1] Although not pressed strongly in the Brief in Chief, Appellants nonetheless contend that "the affidavit and its contents are inadmissible and should be stricken." [Brief in Chief at 13.] Accordingly, PNC Bank addresses Appellants' assertion in full.

For that matter, witness testimony on opinions, even including the ultimate issue in the matter, is admissible. Rules 11-701, 11-704 NMRA. The trial court, of course, could choose to accept or to ignore such opinion testimony. Here, there is no evidence that the trial court did accept that opinion testimony, but even if it chose to, there would be no basis to strike an affidavit for containing such opinion.

In any event, the affidavit does not contain legal opinion. To the contrary, what Appellants characterize as legal opinion is merely the affiant's restatement of what the plain language of Note and Mortgage requires. [RP 000104-000106.] Even if legal opinion was properly excluded from evidence, this is not such legal opinion and the affidavit would not be subject to exclusion because of it.

Appellants' argument that the Affidavit contained hearsay because it did not attach referenced exhibits is incorrect. [*See* Appellant's Docketing Statement, RP 000199.] The Affidavit in Support of Appellee's Motion for Summary Judgment was adequate to support that motion pursuant to Rule 1-056(E) NMRA, which requires that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." This is not a case like *Romero* or *Quintana*, where the moving party sought to prove its standing based solely on "business records," which those parties then did not put before the Court, and an affiant who tried to opine to points known only through those undisclosed records. *Romero*, 2014-NMSC-007, ¶¶ 32-33; *Quintana*, 2014 N.M. Lexis 60, ¶¶ 23-24. Here, the only documents the Ely Affidavit relies are those "documents referred to in this Affidavit," and the only documents referred to therein are the Note and Mortgage. [RP 000104-000105.] That the Note and Mortgage were not attached to the Ely Affidavit does not make them hearsay, where both documents are elsewhere within the record. [*See* RP 00006-000030.][2]

Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Self v. UPS Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396. By supporting its Motion for Summary Judgment with an Affidavit and depositing the original Note with the District Court, PNC Bank made a prima facie showing that it was entitled to summary judgment. *See Roth v. Thompson*, 1992-NMSC-011, ¶ 17, 113 N.M. 331. Appellants failed to rebut PNC Bank's evidence and therefore an entry of Summary Judgment to the Appellee was appropriate and should be upheld by the Court of Appeals.

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[2] To the extent Appellants are arguing that the inclusion in the Ely Affidavit of the language they perceive to be legal opinion is somehow hearsay, Appellants have not made reference to any precedent in support of this proposition and the Court should disregard it. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 24, 767 P.2d 1329 ("Issues raised in appellate briefs which are unsupported by cited authority will not be reviewed by us on appeal.").

IV. Difference in the Indorsements on the Note Attached to the Complaint and that Filed as Part of the Summary Judgment Did Not Defeat Summary Judgment.

It is fundamentally irrelevant that the copy of the Note attached to the 2010 Complaint showed no indorsements, while the Note now does. Unlike the situation in *Romero*, in this case whether the Note was not indorsed at all, was indorsed in blank, or was indorsed only to NCMC, PNC Bank would be entitled to enforce. *See* § I, *supra*. Indeed, even *Romero* does not stand for the proposition that there is anything incorrect about attaching a differing copy of the Note to the Complaint than the one used at summary judgment. Instead, that decision only states that where the copy of the Note attached to the Complaint does not show standing on its face, the movant must establish standing in an alternate way. 2014-NMSC-007, ¶¶ 28-29. Here, PNC Bank has standing to bring suit under either the unindorsed Note or Note indorsed in blank. Appellants' reliance on this distinction is entirely misplaced and does not serve to defeat PNC Bank's entitlement to summary judgment.

Appellants' argument that attaching a copy of the indorsed Note to the Reply in Support of the Motion for Summary Judgment is somehow an unfair ambush is equally unavailing. If Appellants believed they were disadvantaged by the inclusion of these documents in PNC Bank's Reply Brief, it was incumbent upon Appellants to request leave of Court to file a sur-reply or motion to strike to address these issues. Appellants chose not to put the purported "ambush" before the trial court and that issue is not properly raised now. *Deaton v. Gutierrez*, 2004-NMCA-43, ¶ 32, 135 N.M. 423 (citation omitted) ("'To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court.'") (citation omitted). Nor, for that matter, have Appellants yet articulated any point they would have raised, but for the alleged "ambush." Lacking such, the claim of ambush has no merit.

Appellants' argument pertaining to a duelling Note theory is another attempt to inject needless confusion into this matter. Specifically, Appellants make the spurious and unsupported assertion that "[i]t is unlikely in the extreme that both versions of the Note are genuine" and that PNC Bank attempted to "perpetrate a deception upon this Court . . ." [Brief in Chief at 5, 17.] Those statements are unfounded. 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. This is not a case where an earlier copy showed indorsements that a subsequent copy showed were missing, creating "duelling" notes, but rather a case of change over time, which is exactly what would be expected.

Moreover, the merger of NCB into PNC Bank was approved by the Office of the Comptroller of the Currency. [RP00050.] That approval expressly provides that PNC Bank had authority "to operate branches" of the predecessors "as branches of the resulting bank." [*Id.*] The National Bank Act also provides that the "corporate existence of each of the merging banks . . . shall be merged into and continued in the receiving association and such receiving association shall be deemed to be the same corporation as each bank or banking association participating in the merger." 12 U.S.C. § 215a(e). Accordingly, whenever the indorsements were added (even if they were not added until after NCBI's merger into NCB or NCB's into PNC Bank), the resulting bank would have had the right to add those indorsements in the name of its predecessors.

Finally, the fact of different, but consistent, indorsements at different times is irrelevant. In *Licha* this Court noted that the inclusion of a subsequent indorsement in blank on a note that plaintiff had standing to enforce when it filed its complaint, had no significance when determining the foreclosing plaintiff's standing to bring the underlying suit. *Id.* at ¶ 16. That was true because either under the version of the note attached to the complaint or under the copy with the indorsement in blank, the *Licha* plaintiff had standing. *Id.* In the present case, PNC Bank had standing to enforce the unendorsed Note and the indorsed Note at all times since 2009. Accordingly, that the Note had different indorsments at different times has no legal significance.

CONCLUSION

Based upon the foregoing, the Court should affirm the trial's court grant of Summary Judgment.

Respectfully Submitted,

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