IN THE FOURTH DISTRICT COURT OF APPEAL

IN AND FOR THE STATE OF FLORIDA

CASE NO. 4D15-1087
L.T. Case No. 13-4386

MARLENE RATTIGAN and ERROL RATTIGAN,

Appellants,

v.

CENTRAL MORTGAGE COMPANY

Appellee.

On appeal from the Circuit Court of the Seventeenth Judicial Circuit
in and for Broward County, Florida
The Honorable John J. Murphy

ANSWER BRIEF OF APPELLEE

Respectfully submitted,

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INTRODUCTION

Appellants, Marlene and Errol Rattigan, shall be referred to herein as "the Rattigans" or "Appellants."

Appellee, Central Mortgage Company, shall be referred to herein as "Central" or "Appellee."

References to the Record on Appeal shall be cited as "R __."

References to the Transcript shall be cited as "T __."

References to Appellants' Initial Brief shall be cited as "IB __."

STATEMENT OF THE CASE AND FACTS

The underlying case involved Central's residential mortgage foreclosure lawsuit against the Rattigans. By way of brief background, the Rattigans executed the Note and Mortgage on October 30, 2006 in favor of GL Financial Services, LLC, a Florida LLC. (R. 5-26). On February 19, 2013, Central filed a Verified Complaint for Foreclosure of Mortgage against the Rattigans. (R. 1-30). Paragraph 5 of the Verified Complaint alleged that "[p]laintiff is the holder of the Note." (R. 1). The copy of the Note, attached to the Verified Complaint as Exhibit A, evidenced the following indorsements: 1) GL Financial Services, LLC (the original lender) in favor of Flagstar Bank, FSB; 2) Flagstar Bank, FSB in favor of Flagstar Capital Markets Corporation; 3) Flagstar Capital Markets Corporation in favor of "blank." (R. 8-9).

The Rattigans filed an answer and affirmative defenses, which was later amended twice. (R. 36-38; 68-70). The first through fourth affirmative defenses related to Central's standing. (R. 36-37). The fifth affirmative defense alleged a failure of condition precedent. (R. 38). The final affirmative defense alleged "double recovery." (R. 38).

Following several continuances, which do not form the basis of any issue raised on appeal, the trial was scheduled for and held on January 18, 2015. (T. *in passim*). At trial, Central called Natalie McClendon as its witness. (T. 3). The

Rattigans did not personally appear and no evidence or testimony was presented in their case in chief. (T. *in passim*). Following the conclusion of Central's case, the Rattigans made an oral motion for involuntary dismissal. (T. 67). The trial court took the case under advisement and the Final Judgment of Foreclosure was ultimately rendered on January 9, 2015. (T. 86; R. 292-295). The Rattigans, through counsel, filed a motion for rehearing, which was denied. (R. 402). A timely notice of appeal was filed. (R. 403-408).

SUMMARY OF ARGUMENT

Central met its burden and satisfied the Best Evidence Rule when it surrendered the Original Note to the Court and thus took it out of the stream of commerce. *See* § 90.952, Fla. Stat. (2014); § 90.953(1), Fla. Stat. (2014). Central's cause of action was based upon the Note and Mortgage that was accepted as evidence at trial. The testimony regarding a modification that was elicited by the Rattigans' counsel on cross examination explained the payment history; it explained how payments were posted and how payments were classified. The Rattigans offered no testimony or evidence at trial that supports the assertion that a "Modified Note" or "second note" existed sufficient to find that the Original Note that was accepted into evidence was not *the* negotiable instrument in question. Finally, it is not necessary for this Court to take any logical or equitable leaps of faith, such that the *Huber* Court would have had to do. The Original Note was accepted into evidence. The facts at issue in this case are distinguishable from the facts present in each of the cases relied upon within the Initial Brief. As such, Central respectfully requests this Court affirm the trial court's Final Judgment of Foreclosure.

STANDARD OF REVIEW

The standard of review for a motion for involuntary dismissal is *de novo*. *See Deutsche Bank Nat'l Trust Co. v. Clarke*, 87 So.3d 58, 60 (Fla. 4th DCA 2012); *Deutsche Bank Nat. Trust Co. v. Huber*, 137 So. 3d 562, 563 (Fla. 4th DCA 2014).

ARGUMENT

I. CENTRAL MET ITS BURDEN BY A PREPONDERANCE OF THE EVIDENCE AND SURRENDED THE ORGINAL PROMISSORY NOTE

To establish its entitlement to foreclosure, a mortgagee must introduce the subject note and mortgage, an acceleration letter, and some evidence regarding the mortgagors' outstanding debt on the note. *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825, 826 (Fla. 3d DCA 2014). The measure of persuasion required in civil cases is proof by preponderance of the evidence. *See e.g. Slomowitz v. Walker*, 429 So. 2d 797 (Fla. 4th DCA 1983). Moreover, a mortgagor's defense regarding payment is an affirmative defense that must also be established by a preponderance of the evidence. *Drake Lumber Co. v. Semple*, 130 So. 577 (Fla. 1930).

In this case, the Rattigans' appeal is premised, in large part, on the assertion that there exists a "Modified Note" and that Central's failure to admit the "Modified Note" required the trial court to involuntarily dismiss the lawsuit. Specifically, the Rattigans assert that failure to introduce the "Modified Note" is contrary to the Best Evidence Rule and contrary to the requirement that a plaintiff surrender the original note before a final judgment of foreclosure may be entered in its favor.

The Record is clear that the Original Promissory Note dated October 30, 2006 was surrendered to the trial court and admitted into evidence without objection. (R. Exhibit 1 Note 2-8; T. 14, lines 23-25). The Rattigans rely upon testimony elicited

on cross examination from Central's witness, Ms. McClendon. Counsel for the Rattigans questioned Ms. McClendon with respect to the payments evidenced within the payment history, which was introduced as Plaintiff's Exhibit 4 at trial. (T. 47 – 51). Ms. McClendon explained that some of the payments made by the Rattigans were posted to "unapplied" due to a possible trial modification. (T. 48, lines 3-13). Ms. McClendon then testified that there was a modification, which explained the payments and how each was classified within the payment history. (T. 48, lines 17-18; p. 63, lines 9-15). But, the Record is void of any testimony whatsoever that there existed a "Modified Note" or second note. Ms. McClendon was able to describe each payment that she was asked about within Central's payment history and explain the reason each payment posted in a particular way. For the reasons discussed more fully below, the Rattigans' arguments are insufficient to support reversal of the trial court's final judgment and Central respectfully requests this Court affirm the Final Judgment of Foreclosure.

a. <u>The Best Evidence Rule was Satisfied because the Original Promissory Note was Surrendered to the Court at Trial.</u>

The Rattigans assert that the Best Evidence Rule (Fla. Stat. 90.952) required that the "Modification" be admitted into evidence. *See* § 90.952, Fla. Stat. (2014). In support thereof, they cite to *J.H. v. State*, 480 So. 2d 680 (Fla. 1st DCA 1985). But, *J.H. v. State* is distinguishable. In *J.H. v. State*, the Health and Rehabilitative Services (HRS) filed separate petitions for dependency, and alleged that the mother

had neglected her three children and was in violation of a voluntary agreement that she entered into with HRS. *Id.* at 681-682. The agreement, upon which HRS's petitions were based, was never introduced into evidence. *Id*. at 682. Further, there was no testimony presented that reflected the terms of the agreement (or whether the agreement even contained specific terms). *Id*.

Thus, the First District held that the trial court erred when it determined that the agreement was violated. *Id*. The First District went on to state that a lack of the agreement made appellate review difficult and constituted a violation of the best evidence rule. *Id*. But, the distinguishing factor was that HRS's petitions plead the existence of an agreement and the mother's breach of the agreement.

Here, Central filed a mortgage foreclosure complaint and introduced the Note and Mortgage upon which its cause of action was premised. The testimony about a modification that was elicited from Central's witness on cross examination explained how payments were posted and classified; it was not the basis of Central's cause of action. The Rattigans argue that testimony regarding the contents of the "modified agreement" is inadmissible pursuant to § 90.952, Fla. Stat. (IB pp. 9-10). Said testimony, however, was elicited by the Rattigans' counsel on cross examination and was specific to the payment history. To the extent that the Rattigans argue that Central was not entitled to the amounts it claimed as due and owing, the Rattigans neither met the burden of their defense, nor was such a defense plead.

b. *Huber* is Inapplicable because the Original Promissory Note was Surrendered to the Court at Trial.

The Rattigans argue that their motion for involuntary dismissal should have been granted due to Central's failure to surrender the "Original Modified Note" at trial. (IB, p.11). In support of this argument, the Rattigans rely primarily on *Deutsche Bank Nat. Trust Co. v. Huber*, 137 so. 3d 562 (Fla. 4th DCA 2014). *Huber* is distinguishable from the facts present at trial because the Original Note was surrendered to the trial court. In contrast, the plaintiff in *Huber* did not offer any record evidence that the original note was surrendered at trial and only moved a copy of the note into evidence. *Id*. at 564.

The explanation offered on appeal in *Huber* was that the original note was submitted within a "package" submitted to the clerk following trial and that it was logical and equitable to presume the original note had in fact been surrendered. *Id*. This Court went on to explain, however, that "logical and equitable" leaps of faith could not be made where such leaps were unsupported by the record before it. *Id*.

In this case, there is no question that the Original Note, which formed the basis of Central's cause of action, was surrendered to the trial court. As such, Central met its burden, satisfied the Best Evidence Rule, and proved its case by a preponderance of the evidence admitted at trial.

CONCLUSION

For the foregoing reasons, Central respectfully requests that this Honorable Court affirm the trial court's Final Judgment of Foreclosure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via [ ] U.S. Mail, [ ] Facsimile or [**X**] E-mail this 22nd day of October 2015, to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210. This brief contains Times New Roman, size 14 font.

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