

IN THE CIRCUIT COURT OF THE OF THE 15th JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CHASE HOME FINANCE, LLC,

CASE NO.: 09-3747 AW

Plaintiff,

vs.

JOHN WALK, etc., et. ux., et al,

Defendants.

JOHN WALK'S MOTION TO DISMISS COMPLAINT

NOW INTO COURT, through undersigned counsel, comes **JOHN WALK**, the Defendant, herein (Hereinafter "Mr. Walk"), and moves that this Honorable Court Dismiss the Complaint filed by Plaintiff **CHASE HOME FINANCE, LLC** (Hereinafter "Chase"), alleging as grounds there as follows; to wit,

**THE COMPLAINT ALLEGATIONS CONTRADICT THEMSELVES
AND THE ATTACHED MORTGAGE**

1. Chase filed a 2 count complaint, purportedly as the "holder of the mortgage note and mortgage and/or entitled to enforce the mortgage note and mortgage." See: Complaint Para. 4.
2. Chase has sued inter alia, **JOHN WALK**, who is the title owner of the property. The complaint named several "Unknown Parties" i.e. spouses, heirs, and tenants 1-4, who Chase alleged may have an interest in the property subject to this foreclosure. See: Complaint Para. 12 & 13.
3. The first count of the Complaint seeks to foreclose the mortgage and enforce a lost note that is purportedly secured by the mortgage. The second count seeks to reestablish the lost instrument that the first count seeks to foreclose.
4. The Complaint Count I ¶3 (foreclosure count) alleges that Mr. Walk executed and delivered the attached mortgage. The Complaint alleges that this is an in rem proceeding but, and

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there is no count to sue on the note, but the prayer for relief seeks a deficiency judgment.

5. The attached mortgage shows that someone modified the mortgage after Mr. Walk signed to “add the lender’s name and address”.

6. The attached mortgage then shows that someone handwrote “Blue Chip Mortgage LLC” in the space for the mortgagee on the first page, placed the initials “SS” next to the handwritten name, not “JW” for the mortgagor John Walk.

7. The attached mortgage also shows that someone handwrote “116 E. Ocean Ave. Lantana FL 33462” on the 2nd page in the space for the mortgagee’s address, again placed the same initials “SS” next to the handwritten address, not “JW” for the mortgagor John Walk, then re-recorded the instrument.

8. The second count of the Complaint Para. 17 alleges Plaintiff, meaning Chase was in possession of the instrument and entitled to enforce the instrument when the loss occurred, and further concedes this Plaintiff, Chase does not have a copy of the lost note so a copy is not attached.

9. In addition to the fact that Chase did not attach a copy of the lost promissory note, Chase also failed to attach a copy of any assignment.

10. Presumably the lost note would also show that the payee is “Blue Chip Mortgage LLC” which, while matching the name of the “Lender” in the mortgage it is decidedly not the Plaintiff, “**CHASE HOME FINANCE, LLC**”, as named in the complaint.

11. Since there is no exhibit which purports to be a copy of the lost promissory note, there are no endorsements from “Blue Chip Mortgage ” to the Plaintiff, “Chase ” nor is there any allonge attached.

12. The absence of a copy of the assignment shows that nothing confers on Chase the

right to bring this action as the assignee of Blue Chip Mortgage.

13. Moreover, the complaint does not allege who assigned to Plaintiff, i.e. did Blue Chip Mortgage assign to Chase, or is there one or more intermediary assignees, such that Chase is the proper assignee with the right to reestablish and enforce the mortgage and lost note.

14. These pleading deficiencies combined with the attached documents, and the “unattached documents” establish a discrepancy between the Plaintiff “Chase”, Blue Chip Mortgage, the mortgagee in the attached mortgage, and the payee of the “unattached” note that “Chase” seeks to reestablish, as the party authorized to enforce the reestablished lost note.

15. Chase’s Complaint does not allege any facts that would reconcile these obvious and patent pleading discrepancy. Nor does the complaint attach a copy of an assignment of the right to reestablish or enforce the note and mortgage from Blue Chip Mortgage to Chase.

16. Moreover, the attached mortgage ¶22 requires that the mortgagee provide written notice of acceleration with a 30 day cure provision and other required information. However, Chase has failed to attach a copy of the required notice to its complaint.

17. The second count (reestablishment) Para. 15 reincorporates all of the allegations of the 1st count.

18. Plaintiff Para. 12 and 13 sued several “unknown” parties.

19. These pleading deficiencies create several bases to dismiss the Chase complaint and require Chase to re-pled in an Amended Complaint:

a. Chase must add a count to reform the mortgage because Mr. Walk did not agree to add the name of the mortgagee after signing the mortgage, assuming Blue Chip Mortgage was the actual mortgagee and payee of the as yet unfound note.

b. Chase's failure to attach a copy of the promissory note compels Chase to attach a copy of whatever assignments exist to show that Chase is the correct Plaintiff, as assignee of "Blue Chip Mortgage" assuming Blue Chip Mortgage was in fact the payee of the lost note.

c. Chase must re-plead and allege and or explain with ultimate facts how it is that "Chase" can reestablish a lost promissory note, when the mortgagee identified in the mortgage, and presumably the lost note, is payable to "Blue Chip Mortgage".

d. Chase must re-plead and allege and or explain with ultimate facts how the note and mortgage and the right to reestablish and enforce them went from "Blue Chip Mortgage" to Chase and attach the assignments, the lost note and the successor documents.

e. Chase must re-plead and either attach a copy of the mortgage Para. 22-required written acceleration notice or provide the reason that it cannot attach said notice.

f. Chase must re-plead and allege and or explain how Chase is simultaneously a "holder" of a negotiable instrument entitled to enforce it and a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Fla. Stat. §673.3091 under the Harry Pepper, Hillcrest, and Ginsberg, cases because of this obvious and apparent inconsistency in the complaint allegations as to whether Chase is a holder entitled to enforce or a person not in possession of the instrument who is entitled to enforce.

g. The second count (reestablishment) Para. 15 reincorporates all of the allegations of the 1st count.

h. Plaintiff sued several "unknown" parties, which does not institute an action against a cognizable party.

- i. The Complaint alleges that this is an in rem proceeding but prayer for relief seeks a deficiency judgment. Chase must sue on the note to get a deficiency, or drop the prayer for a deficiency if it seeks only an in rem foreclosure.

DISMISSAL BASED ON AN ALTERED MORTGAGE

20. The Court must dismiss and require Chase to add a count to reform the mortgage because Mr. Walk did not agree to add the name of the mortgagee after signing the mortgage.

21. The original mortgagee could not correct this deficiency by having someone other than the mortgagor acknowledge that he signed and or agreed to modify the already signed mortgage by adding the mortgagee.

22. If Blue Chip Mortgage was the actual mortgagee and payee of the as yet unfound note, Chase must allege these facts in a count to reform the mortgage.

FAILURE TO ATTACH OPERATIVE DOCUMENTS

23. Chase's failure to attach a copy of the promissory note compels Chase to attach a copy of whatever assignments exist to show that Chase is the correct Plaintiff, as assignee of "Blue Chip Mortgage" assuming Blue Chip Mortgage was in fact the payee of the lost note.

24. The Court must dismiss for failure to attach assignment, especially in light of the failure to attach a copy of the promissory note, and the written notice of acceleration as required by the mortgage Para. 22. See: Fla. R. Civ. Pro. 1.130(a) ("All . . . contracts . . . upon which an 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.").

25. While the Complaint Para. 9 alleges all conditions precedent have occurred, the contractual condition precedent requires a written document establishing the condition precedent.

The Complaint fails to allege the reason for the failure to attach a copy of this written contractual requirement.

26. Contractors v. Nortrax Equip., 833 So.2d 286 (Fla. 5th DCA 2002) informs the Court

that it must dismiss for these pleading deficiencies:

“A complaint based on a written instrument does not state a cause of action until the instrument or an adequate portion thereof, is attached to or incorporated in the complaint. Samuels v. King Motor Co. of Fort Lauderdale, 782 So.2d 489 (Fla. 4th DCA 2001). See Fla. R.Civ.P. 1.130(a)”.

DISMISSAL BASED ON FAILURE TO PLEAD STANDING

27. There are no assignments nor endorsements attached to the complaint and Plaintiff has failed to attach any document under which it has the right to reestablish and enforce the mortgage and note as the assignee of the mortgagee Blue Chip Mortgage.

28. Assuming the Court allows Chase to proceed with its suit, there is no copy of the lost note and Exhibit “A” is the mortgage showing the mortgagee is Blue Chip mortgage.

29. There is nothing to show the payee of the original note, nor the payor, only the “mortgagor” Nor does any exhibit reflect that there are any endorsements to the lost note.

30. Accordingly, if the Court re-establishes the “lost note” according to the terms of the mortgage, the court would re-establish a purported negotiable instrument with no identifiable maker, only a mortgagor, with no identifiable payee, and no endorsements. The court would not establish a negotiable instrument under the under Florida’s Uniform Commercial Code (Hereafter “UCC”), nor would this Plaintiff be entitled to enforce that which is reestablished.

31. Assuming the Court allows Chase to proceed, the only potential “payee” of the lost note would be Blue Chip Mortgage, not Chase.

32. Chase must re-plead and allege and or explain with ultimate facts how it is that

“Chase” can reestablish a lost promissory note, when the mortgagee identified in the mortgage, and presumably the lost note, is payable to “Blue Chip Mortgage”.

33. Chase must re-plead and allege and or explain with ultimate facts how the note and mortgage and the right to reestablish and enforce them went from “Blue Chip Mortgage Mortgage” to Chase and attach the assignments, the lost note and the successor documents.

34. Accordingly, the Court should dismiss on this basis.

DISMISSAL BASED ON INCONSISTENT HOLDER ALLEGATIONS

35. Another problem with Chase’s complaint, Count II Para. 8 alleges that Chase is the present owner and holder of the note and mortgage, or the person entitled to enforce the lost note. The issue arises because Chase cannot be the “holder” of a lost instrument under Florida’s Uniform Commercial Code (Hereafter “UCC”).

36. “Holder” is a term defined by the UCC. The holder is a required party who receives issuance of an instrument, or a subsequent delivery of an instrument as part of the “negotiation” process of a “note”, which makes the note a negotiable instrument under Fla. Stat. §673.1041.

37. Fla. Stat. §671.201(21) defines a “Holder” as follows: “with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession...”.

38. Fla. Stat. §673.2011 defines “negotiation” and Fla. Stat. §673.3021 describes the manner the holder of a negotiable instrument conveys the negotiable instrument to a new holder by endorsing the instrument to the new holder so the new holder can enforce the instrument.

39. Fla. Stat. §673.3011 entitled “Person entitled to enforce instrument.” defines the term “person entitled to enforce” an instrument as either:

“(1) The holder of the instrument;” which is defined by Fla. Stat. §671.201(21) as a person with physical possession of the original note;

“(2) A nonholder in possession of the instrument who has the rights of a holder;” which again is a person with physical possession of the original note;

“(3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to s. 673.3091 or s. 673.4181(4).”

“A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.”

40. In other words, Chase’s foreclosure complaint Count I alleges that Chase is person entitled to enforce the note as a “holder” i.e. a person with possession of the original negotiable instrument, but Chase’s Count II alleges that the note is lost, which makes Chase a person who does not have physical possession of the original negotiable instrument. Chase cannot at the same time be a “holder” and a party entitled to enforce under Fla. Stat. §673.3091.

41. Fla. Stat. §673.3011 makes it impossible for Chase to be entitled to enforce the note as a “holder” under Fla. Stat. §673.3011(a) as alleged in Para. 8, and at the same time be a person entitled to enforce the note under Fla. Stat. §673.3011(c) through the Complaint’s Count II to Reestablish because Chase does not have physical possession of the lost note.

42. Chase is either a holder i.e. Chase has physical possession of the original note, or Chase is “(3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to s. 673.3091 or s. 673.4181(4).” which means even though Chase does not have physical possession of the original note because it is lost, Chase is entitled to enforce the lost note.

43. Under Hillcrest Pacific Corp. v. Yamamura, 727 So.2d 1053 (Fla. 4th DCA 1999) exhibits attached to a pleading shall be considered a part thereof for all purposes. Therefore, the Court must consider and examine the Complaint Count I ¶¶ 3 that Chase is the holder along with the

mortgage and note attachments to determine the bona fides of Chase's allegation that it is the holder of the mortgage and note, and has the right to enforce the note.

44. Harry Pepper & Assocs., Inc. v. Lasseter, 247 So.2d 736, 736-37 (Fla. 3d DCA 1971),

instructs the Court: [if there] is an inconsistency between the general allegations of material facts in the . . . complaint and the specific facts revealed by the exhibit [attached or referred to in the complaint] . . . they have the effect of neutralizing each allegation as against the other, thus rendering the pleading objectionable. See also Hillcrest, p. 1056; Buck v. Kent Sec. of Broward, 638 So.2d 1004 (Fla. 4th DCA 1994); Ginsberg v. Lennar Florida Holdings, Inc., 645 So.2d 490, 494 (Fla. 3d DCA 1994), review denied, 659 So.2d 272 (Fla. 1995); Franz Tractor Co. v. J.I. Case Co., 566 So.2d 524, 526 (Fla. 2d DCA 1990).

DISMISSAL BASED ON UNKNOWN PARTIES

45. Moreover, Chase identified an "Unknown Person In Possession of the Subject Property" and "Unknown Spouse of Janet L. Vorinas." These are not the formal name of any person, and is in the nature of a "John Doe" summons. See, for example, Grantham v. Blount, Inc., 683 So.2d 538 (Fla. 2nd DCA 1996) rev. den., 690 So.2d 1299 (Fla. 1997) (table citation):

"'John Doe' is not a misnomer. A plaintiff uses this term intentionally to identify the fact that the defendant's real identity is unknown." Grantham, p. 541

46. Therefor, when Plaintiff named "Unknown Person In Possession of the Subject Property" and the "Unknown Spouse of Janet L. Vorinas." as defendants in this case, procedurally service of the summons on these unknown and unidentified persons cannot as a matter of law commence an action against anyone, including Mr. Vorinas:

"Accordingly, we choose to treat a John Doe complaint in the same manner we treat a complaint that contains a substantially incorrect identification of the defendant and hold that it does not commence an action against the real party and it does not toll the statute of

limitations against that party.” Grantham, p. 542.

47. Gilliam v. Smart, 809 So.2d 905 (Fla. 1st DCA 2002), affirmed Grantham, in a similar context as here. Gilliam, involved an action against the Town of Havana and an unidentified “John Doe” police officer. Once the Town identified the police officer by answering interrogatories, the Plaintiff simply filed an amended complaint with the same “John Doe” police officer, Mr. Gilliam, and served Mr. Gilliam with the amended complaint.

48. The Gilliam, panel held that filing the “John Doe” summons and complaint did not institute an action against Mr. Gilliam. The Court further held that the amended complaint served without adding Mr. Gilliam as a party, and then serving the summons issued to Mr. Gilliam as opposed to the John Doe officer did not commence an action against Mr. Gilliam.

49. Accordingly, The Plaintiff here must amend his complaint to add the now known Peter Vorinas as a party, and serve him with a summons directed to Mr. Vorinas in order to institute an action against Mr. Vorinas. See: Gilliam, Grantham.

DISMISSAL BASED ON AN IN REM PROCEEDING

50. the foreclosure complaint alleges that the action is “in rem” but the prayer for relief seeks a deficiency judgment against the makers of the note. This is another inconsistent and contradictory allegation which requires dismissal because an “in rem” foreclosure, by definition seeks to establish and foreclosure a lien against property without personal liability by the maker of the note. See: Carter v. Kingsley Bank, 587 So.2d 567, p. 569 (Fla. 1st DCA 1991), citing to Pennoyer v. Neff, 95 U.S. 714 (1878) and holding that “[Pennoyer] established that a judgment entered in an in rem proceeding can have no effect beyond the property that is the subject of the suit, and this principle remains intact today.”

51. Therefor an in rem proceeding is an action that seeks to foreclose the mortgage against the property and does not seek a deficiency against the note's maker.

52. If Plaintiff seeks a deficiency he must drop the "in rem" allegation and add a count to sue on the note.

DISMISASL BASED ON INCORPORATING PRIOR COUNTS

53. The second count (reestablishment) Para. 15 reincorporates all of the allegations of the 1st count.

54. Gerentine v. Coastal Sec. Systems, 529 So.2d 1191, p. 1194 (Fla. 5th DCA 1988), relying on Chaires v. North Florida National Bank, 432 So.2d 183 (Fla. 1st DCA 1983) and Frugoli v. Winn Dixie Stores, Inc., 464 So.2d 1292 condemn Chase's method of pleading and requires the Court to dismiss the Complaint: "By the time the beleaguered reader gets to the fifth count, he is having to cope with presumably five causes of action asserted in one count. This practice is an unnecessary hindrance to trial courts' efforts to determine the facial validity of the various causes being asserted and serves only to confuse and delay."

55. The Court must dismiss Chase's Complaint under Gerentine, Chaires, and Frugoli because the 2nd count incorporates the prior count.

WHEREFOR, Mr. Vorinas prays that this Honorable Court dismiss Plaintiff's Complaint with prejudice, taxing costs fees and reasonable attorney fees as provided by 15 U.S.C.1640(a)(3), the reciprocity of Fla. Stat. §57.105, the mortgage and note, and such other relief as this Court deems just and proper.

I HEREBY CERTIFY that a true and accurate copy of the above has been furnished by facsimile and/or U.S. mail this 27th day of February, 2009, to: Samantha A. Satish, Esq., Florida