

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2005-CA-2570
DIVISION: CV-F

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., as nominee for EMC
MORTGAGE CORPORATION, Plaintiff,
vs.
JANNETTE LEE, et al., Defendants.

ORDER OF DISMISSAL

Now on this 7th day of September, 2005, came on for hearing the separate defendant, Jannette Lee's motion to dismiss the plaintiff's complaint, and the court, upon argument of counsel, review of the record and being sufficiently advised in the premises, finds:

1. In this case, Defendant requests the Court dismiss this action pursuant to Rule 1.210(a) and 1.140(7), because it appears on the face of the Complaint that a person other than the Plaintiff is the true owner of the claim sued upon and that the Plaintiff is not the real party in interest and is not shown to be authorized to bring this action. In Florida, a suit cannot be prosecuted to foreclose a mortgage which secures the payment of a promissory note, unless the Plaintiff actually holds and owns the original note. Your Construction Center, Inc. v. Gross, 316 So. 2d 596 (Fl. 4th DCA 1975), Overseas Development, Inc. v. R.A. Krause, 323 So. 2d 679 (Fla. 3d DCA 1975) Lawyers Title Insurance Company, Inc. v. Novastar Mortgage, Inc., 862 So. 2d 793 (Fla. 4th DCA 2003 and see: Booker v. Sarasota, Inc., 707 So.2d 886 (Fla. 1st DCA 1998)

2. Fla.R.Civ.P. Rule 1.130(a) requires a Plaintiff to attach copies of all bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought to its complaint. The plaintiff failed to attach a copy of the Promissory Note upon which its claim is based to the complaint filed herein.

3. Fla.R.Civ.P. Rule 1.310(b) provides that all exhibits attached to a pleading shall be considered a part of the pleading for all purposes. It appears on the face of the plaintiff's Complaint that the plaintiff is not the proper party to bring this action based

upon the recitation in the mortgage that the lender is not the plaintiff. The mortgage identifies the plaintiff as "nominee" for Fremont Investment & Loan but the complaint identifies the plaintiff as "nominee" for EMC Mortgage Corporation. The mortgage conflicts with the allegation in the plaintiff's complaint as to who the owner of the subject promissory note and mortgage are and as a result the allegations in the complaint are cancelled by the contents of the mortgage. 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)

4. Rule 1.210(a) of the Florida Rules of Civil Procedure 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..."

The court finds that, based on the plaintiff's complaint, the plaintiff in this action meets none of these criteria.


5. The owner of a promissory note is an indispensable party to a residential foreclosure action filed in Florida because the owner of the note has an interest in the subject matter of the controversy. In this case, the owner of the note is absent from the action, therefore, a final decree cannot be rendered without leaving the controversy in a situation where "a complete and efficient determination of the equities, rights and liabilities of the other parties is not possible." 39 Fla. Jur. Indispensable Parties Sec. 9, citing Gonzalez v. MI Temps of Fla. Corp., 664 So. 2d 17 (Fla. 4th DCA1995), Bernstein v. Dwork, 320 So. 2d 472 (Fla. 3d DCA 1975

6. Moreover, in Florida, an agent does not have a cause of action against a party allegedly breaching a contract with its principal. Media Placement v. Combined Broad., Inc., 638 So. 2d 105, 106 (Fla. Dist. Ct. App. 1994).

7. THEREFORE, the separate defendant's motion to dismiss the plaintiff's complaint is granted; the plaintiff's complaint is dismissed without prejudice and the

plaintiff is granted leave to file an amended complaint within 30 days of the date of this order.

IT IS SO ORDERED THIS 1st DAY OF February, 2006


Charles O. Mitchell, Jr., Circuit Judge

Copies provided to:

Matthew Gibbons, attorney for plaintiff

April Carrie Charney, attorney for separate defendant, Jannette Lee