No. 2D16-3887

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT, LAKELAND, FL

RONALD P. GILLIS

Appellant,

v.

DEUTSCHE BANK TRUST COMPANY AMERICAS
As Trustee for RESIDENTIAL ACCREDIT LOANS, INC.,
Mortgage Asset-Backed Pass Through Certificates, Series 2006-QS8

Appellee.

On Appeal from the Circuit Court in and for Charlotte, County
Lower Case No. 2008-CA-252

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Rules

STATEMENT OF THE CASE AND FACTS

"Deutsche Bank Trust Company of Americas as Trustee" filed a two-count foreclosure complaint against Appellant Ronald P. Gillis ("Gillis") on January 16, 2008. (R. at 1-23). Gillis answered, raised affirmative defenses, including standing, (R. at 31-34) and litigated vigorously. On September 27, 2010, upon motion, and without making any findings of fact, the trial court struck Gillis's pleadings and entered a judicial default. (R. at 751-52; 779-80). The case was resolved after trial in July 2016, at which the trial court struck the testimony of Plaintiff's sole witness, denied Gillis's motion for involuntary dismissal, and then entered a default final judgment against Gillis. (Tr. at 65-66.) This appeal followed.

The Complaint and Various Plaintiffs

On January 16, 2008, Plaintiff "Deutsche Bank Trust Company Americas as Trustee" ("Plaintiff 1") filed a two-count Complaint ("Complaint"). (R. at 1-23). In Count I-Mortgage Foreclosure, Plaintiff 1 pled, "Plaintiff now *owns and holds* the Mortgage Note and Mortgage (R. at 2, ¶ 3). (emphasis added). In Count II – Re-Establishment of Note, Plaintiff 1 pled:

- "Plaintiff owns the Mortgage Note and is entitled to enforce said Mortgage Note." (R. at 3, ¶ 19).
- "At some time between May 1, 2006 and the present, the Mortgage Note has *either been lost or destroyed* and the Plaintiff is unable to state the manner in which this occurred. … The Mortgage *Note is not now in the custody and control of the Plaintiff*." (R. at 3, ¶ 20) (emphasis added).

- "Plaintiff was in possession of the Mortgage Note and entitled to enforce it when loss of possession occurred or Plaintiff has been assigned the right to enforce the Note." (R. at 3, ¶ 22) (emphasis added).

Because the Note was lost at the inception of the suit, Plaintiff 1 did not attach a copy of the Note to the Complaint. (R. at 1-23). Gillis filed an Answer and Affirmative Defenses on May 30, 2008[1]. (R. at 31-34). Litigation ensued. Seventeen months later, on June 23, 2009, Plaintiff 1 filed a First Interest Note ("Note") and Assignment of Mortgage and Interest First Note. (R. at 128-144; 145-147). The after-filed Note bears two undated special endorsements[2]. (R at 145-147). Plaintiff filed an improper Notice of Voluntary Dismissal as to Count II, Re-Establishment of Lost Note that same day. (R. at 148-149). Plaintiff never sought to amend the Complaint.

On November 13, 2009[3], Plaintiff 1 moved, *ex parte*, to substitute "Deutsche Bank Trust Company of Americas as Trustee for GMAC-RFC Master Servicing"

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[1] Shortly thereafter, Gillis's counsel withdrew and Gillis proceeded pro se until just before trial.

[2] One endorsement is from Wachovia Mortgage Corporation to Residential Funding Corporation and the other is from Residential Funding Corporation to Deutsche Bank Trust Company Americas as Trustee.

[3] The Certificate of Service on the motion (R. at 317) reflects a service date of November 13, 2009 but it was not docketed until December 2. The trial court entered its order (R. at 315) on December 1 and the order was docketed December 2. A letter (R. at 322) from Plaintiff's counsel to the trial judge dated November 9 enclosing a copy of the motion and proposed order was also docketed on December

("Plaintiff 2") as the new plaintiff. (R. at 322; 317-318). The court granted the substitution of Plaintiff 2, *without hearing,* on December 1, 2009. (R. at 315-316). On December 4, 2009, when Gillis found out about the *ex parte* order, he filed his objection. (R. at 333-370). On July 25, 2013, Plaintiff 2 moved to substitute the plaintiff because of a sale of Plaintiff 2 to a new entity that occurred in February 2013. (R. at 2082-2084). The moving papers indicated "Ocwen Master Servicing purchased GMAC-RFC Master Servicing." (Id.). The third Plaintiff is "Deutsche Bank Trust Company of Americas as Trustee for Residential Accredit Loan, Inc., Mortgage Backed Pass-Through Certificates, Series 2006-QS8" ("Plaintiff 3"). The motion languished for two years. The hearing was held on July 30, 2015. (R. at 3268-3269). Over Gillis's objections, the trial court entered an order granting the substitution of Plaintiff 3. (R. at 3268-3269; 3270-3271).

The Sanctions and Default

On November 13, 2009, Plaintiff 1 filed an *ex parte* Motion to Compel Deposition of Ronald P. Gillis and Request for Sanctions. (R. at 319-321; 322). On November 24, 2009, the trial court, *without hearing,* entered an Order Compelling Deposition of Defendant, Ronald P. Gillis and Imposing Sanctions. (R. at 381-382).

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2. Defendant raised several substantial objections to the *ex parte* ruling in his Objection to Alleged Plaintiff's Motion to Correct Name of Plaintiff (R. at 333).

The order compelled Gillis's deposition within sixty days and levied $470.00 in financial sanctions. (Id.). Plaintiff 2 unilaterally re-set the deposition of Gillis for January 22, 2010. (R. at 541-546). Gillis did not attend. Seven months later, on August 2, 2010, Plaintiff 2 filed a Motion to Strike Pleadings, for Default, and for the Entry of Default Judgment because Gillis failed to attend a unilaterally set deposition. (R. at 541-546). Gillis filed an objection on August 9, 2010 (R. at 547-579). A non-evidentiary hearing took place on September 27, 2010. (R. at 767). The trial court did not enter an order to show cause or set an evidentiary hearing, did not obtain any evidence at the hearing (Id.), only allowed Gillis to argue against the sanctions for five minutes (Id.), and then entered an Order Granting Motion for Judicial Default ("Default Order 1") dated September 27, 2010 (docketed October 1, 2010). (R. at 767; 751-752). On October 1, 2016 the trial court entered an Order Granting Motion to Strike Pleadings and for Judicial Default Against Ronald P. Gillis ("Default Order 2")(R. at 779-780). Neither order included findings of fact. On September 29, 2010, Gillis filed an appeal with the Second District Court of Appeal[4]. (R. at 772-774). This Court denied the appeal as interlocutory on February 4, 2011. (R. at 963). Gillis litigated the foreclosure matter for the next several years and sought on numerous occasions to have the default set aside. (Tr. at 4; R. at 1584-

[4] Gillis v. Deutsche Bank Trust Company, Case No. 2D10-4757 (R. at 963).

1615; 2013-2029; 2411-2417; 3183-3190; 3454-3464; 3476-3482). The court denied the requests to set aside the default. (R. at 2406-2408; 2418-2419; 3500).

The Trial

Trial commenced on July 6, 2016. (R. at 3539; Tr. at 1-78.) Gillis was represented by counsel Gregg M. Horowitz. Plaintiff 3 presented one witness, Lucinda Calderon. ("Calderon") (Tr. at 25). Calderon testified she was an employee of Wells Fargo Bank, N.A. ("Wells Fargo") (Tr. at 25) and that Wells Fargo was "the trustee, the servicer, the holder" of the Note. (Tr. at 26). Calderon did not know who held the Note when the action was filed nor did she have any knowledge of when the two special endorsements were placed on the Note. (Tr. at 55). Gillis's counsel objected to the testimony because there was no evidence that Calderon had authority to testify for Plaintiff 3, but the trial court allowed the testimony based on the "defaulted status" of the defendant. (Tr. at 26-27). Calderon testified but did not have a power of attorney to testify on behalf of the Plaintiff 3 trust. (Tr. at 35). Calderon introduced seven exhibits. (Tr. at 3). Exhibit "2" is a copy of the Note. (Tr. at 42-43). Exhibit "3" is a copy of the Mortgage. (Tr. at 44-46).

On cross-examination, Calderon testified that her employer, Wells Fargo, not Plaintiff 3, was the "owner" of the Note. (Tr. at 56). Based, in part, on this startling revelation at the close of Plaintiff 3's case, Gillis moved for involuntary dismissal

and judgment in his favor. (Tr. at 63-64). The trial court denied the involuntary dismissal and ruled:

> "What I'm going to do is give you both something to take to the Appellate Courts. I'm going to strike the witness's testimony, I'm going to strike all of the exhibits except the original note and mortgage, [Exhs. 2 and 3 copies] on the grounds that they failed to establish Wells Fargo authority to act for the plaintiff." (Tr. at 65).

After striking Calderon's testimony, the trial court entered a default final judgment for the amount alleged in paragraph 7 of Count I of the Complaint plus interest. (Tr. at 65-67.) The judge concluded the trial by stating, "I can hardly wait to read the appellate decision." (Tr. at 68).

The Default Final Judgment of Foreclosure, dated July 19, 2016 (R. at 3671-3674), was issued in favor of Plaintiff 3 even though: (1) there was no evidence presented as to how, when, or why Plaintiff 3 had standing at the time of trial to foreclose, (2) the Note was improperly allowed to remain in evidence, (3) neither of the special endorsements on the Note was in favor of Plaintiff 3, and (4) Calderon testified the Note was owned and held by Wells Fargo at the time of trial. The Judgment was silent as to Count II, the re-establishment of the Note. (Tr. at 63-64). Gillis moved for rehearing on July 29, 2016. (R. at 3690-3697). The rehearing was denied. (R. at 3699). This appeal followed.

STANDARD OF REVIEW

The denial of the motion for involuntary dismissal and the default final judgment are subject to *de novo* review. Deutsche Bank Nat. Trust Co. v. Kummer, 195 So. 3d 1173, 1175 (Fla. 2d DCA 2016) and Pichowski v. Florida Gas. Transmission Co., 857 So. 2d 219, 220 (Fla. 2d DCA 2003) respectively. The orders imposing sanctions, including entry of judicial default, are reviewed for abuse of discretion. Ham v. Dunmire, 891 So. 2d 492, 495 (Fla. 2004).

SUMMARY OF THE ARGUMENT

At trial, the judge struck the testimony of Plaintiff 3's sole witness because the witness did not have authority as servicer to testify on behalf of Plaintiff 3. The trial court failed to grant Gillis's Motion for Involuntary Dismissal. A motion for involuntary dismissal can only be denied when a court finds the plaintiff presented competent substantial evidence to establish a *prima facie* case. This is true even when a defendant is in default. Plaintiff, whose identity changed two times during the pendency of the lawsuit, failed to prove its *prima facie* case by failing to adduce evidence that it had standing at the time of trial to enforce the note. Plaintiff 1 filed the Note seventeen months after the lawsuit commenced. The Note included two undated special indorsements. Neither indorsement was in favor of the Plaintiff that appeared at trial. In addition, Plaintiff 3's witness testified Wells Fargo Bank, N.A., not the Plaintiff, was the owner, holder, servicer, and trustee of the Note. Upon *de*

novo review, Gillis seeks reversal of the Default Final Judgment with instructions to enter judgment in favor of Gillis.

Instead of dismissing the action, the trial court erroneously relied on two "cherry-picked" exhibits, the Note and Mortgage, admitted, but only through the testimony of the witness whose testimony was struck, and entered final default judgment. The rules of evidence prohibited the trial court from relying on evidence that did not have a foundational basis. At the close of Plaintiff 3's case, and after striking the testimony of the sole witness, the trial court was constrained to enter dismissal.

Even assuming *arguendo* the trial court had properly denied the dismissal, the allegations in the poorly pled complaint and the exhibits attached thereto did not establish entitlement to relief against the defaulted Gillis. A "defendant's default does not in itself warrant the court in entering a default final judgment—a court must still determine whether the factual allegations of the complaint provide a sufficient basis for the judgment entered." Nishimatsu Constr. Co., Ltd. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975). The Complaint was irreconcilable on its face because Plaintiff 1 alleged in Count I it "held", and in Count II it had "lost" the Note. That is a physical impossibility. The after-filed Note was not attached to the Complaint so its contents or existence could not be considered by the trial court when determining sufficiency of the allegations or fashioning relief. The Mortgage

attached to the Complaint identified Gillis as being indebted to Wachovia Mortgage Corporation. Upon *de novo* review, Gillis seeks reversal of the Default Final Judgment with instructions to enter judgment in favor of Gillis.

With respect to the default, thirty-three months into the foreclosure litigation, the trial court committed a *per se* abuse of discretion by failing to receive evidence or make findings of fact to support its orders striking Gillis's pleadings and granting judicial default. Gillis had timely filed his answer and affirmative defenses to the Complaint. The judicial default was entered as a sanction. Florida law mandates that a trial court must make express findings of fact to support a conclusion that a party willfully or deliberately disregarded a court order before the court can enter the harsh sanctions of default and strike the pleadings. The trial court's orders were devoid of any such findings.

If this Court does not mandate reversal pursuant to the abuses that took place at trial as described above, then upon an abuse of discretion review, this Court should, at the very least, remand with instructions that the orders granting default and striking the pleadings be set aside. However, due to the trial admissions and sworn testimony that Wells Fargo Bank, N.A., is the owner and holder of the Note, continuing this litigation would be futile. Such a remand would result in Gillis's ability to move for successful dismissal though summary judgment. The time for dismissal is now; the lower court has been burdened long enough with this faulty

foreclosure. Gillis seeks, as ultimate relief, reversal of the Default Final Judgment with instructions to enter judgment in his favor.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR INVOLUNTARY DISMISSAL AFTER THE TRIAL COURT STRUCK THE TESTIMONY OF PLAINTIFF'S WITNESS BECAUSE THE WITNESS DID NOT HAVE AUTHORITY TO TESTIFY ON BEHALF OF PLAINTIFF.

An order denying a motion for involuntary dismissal is subject to *de novo* review. Deutsche Bank Nat. Trust Co. v. Kummer, 195 So. 3d 1173, 1175 (Fla. 2d DCA 2016).

Florida Rule of Civil Procedure 1.420(b) provides that "[a]fter a party seeking affirmative relief in an action tried by the court without a jury has completed the presentation of evidence, any other party may move for a dismissal on the ground that on the facts and the law the party seeking affirmative relief has shown no right to relief."

"When confronted with a motion for involuntary dismissal, the trial court must determine whether or not the plaintiff has made a prima facie case." May v. PHH Mortg. Corp., 150 So. 3d 247 (Fla. 2d DCA 2014) citing Capital Media, Inc. v. Haase, 639 So.2d 632, 633 (Fla. 2d DCA 1994). A motion for involuntary dismissal can only be denied when a court finds that a plaintiff presented competent substantial

evidence to establish a prima facie case. State Dep't of Health & Rehabilitative Servs. ex rel. Williams v. Thibodeaux, 547 So. 2d 1243, 1244 (Fla. 2d DCA 1989).

This is true even when the defendant is in default. See Kelsey v. SunTrust Mortg., Inc., 131 So. 3d 825, 826 (Fla. 3d DCA 2014) (plaintiff must establish its entitlement to foreclosure before the court can enter a default final judgment ordering foreclosure); see also Pastore-Borroto Dev., Inc. v. Marevista Apartments, M.B., Inc., 596 So. 2d 526 (Fla. 3d DCA 1992) (listing cases); accord Venture Holdings & Acquisitions Group, LLC v. A.I.M. Funding Group, LLC, 75 So. 3d 773 (Fla. 4th DCA 2011) (even where a defendant is in default, the foreclosing plaintiff is still obligated to prove standing to foreclose).

In this case, the trial court struck the testimony of Plaintiff 3's witness, Calderon, because she testified she was an employee of Wells Fargo Bank, N.A., and she did not present any evidence to show she was authorized to testify on behalf of the plaintiff. (Tr. at 65). Once the court struck the testimony, the record was devoid of the evidence necessary to sustain a final judgment. The defaulted status of Gillis does not change this equation. Even if this Court finds the poorly pled allegations in the Complaint to be deemed admitted, Plaintiff 3 would still have to: (1) prove standing at the time of trial, (2) introduce the Note, and (3) present evidence proving the undated special indorsements were present on the Note at the commencement of the action.

There was no proof of standing at the time of trial. When a named plaintiff changes its identity during the course of litigation, the substituted plaintiff must present evidence that it has standing to foreclose at the time of trial. Houk v. Pennymac Corporation, 2017 WL 535437 (Fla. 2d DCA Feb. 10, 2017). In Houk, the substituted plaintiff Pennymac could not prove its standing to enforce a note specially endorsed to Citibank based solely on a previously entered order of substitution. The identity of the Plaintiff changed two times during the pendency of the instant action. Because of these changes, it was necessary for Plaintiff 3 to put forth evidence that would support the entry of affirmative relief on its behalf, e.g., some reason why the court should enter judgment in the name of Plaintiff 3 rather than Plaintiff 1. Plaintiff 3 did not introduce such evidence. Though the trial court struck all of her testimony, Calderon did not even attempt to offer any testimony on this topic.

There was no proof regarding the Note or the undated special indorsements. Plaintiff 1 filed the Note seventeen months after the inception of the lawsuit (R. at 145-147). The Note contained two undated special indorsements, neither of which identified Plaintiff 3 as the special indorsee. (Id.). It was incumbent on Plaintiff 3 to introduce evidence of and authenticate the Note at trial. Plaintiff 3 was also required to introduce evidence that the special indorsements were affixed to the Note before Plaintiff 1 filed the complaint, and that Plaintiff 3 was authorized to foreclose even

though Plaintiff 3 was not the named indorsee. See Calvo v. U.S. Bank Nat. Ass'n, 181 So. 3d 562, 564 (Fla. 4th DCA 2015) ("if an indorsement is undated and appears for the first time *after* the complaint is filed, some evidence must be introduced that will support a finding that the indorsement was made prior to the complaint's filing.") (citation omitted); see also Sosa v. Bank of New York Mellon, 187 So. 3d 943, 944–45 (Fla. 4th DCA 2016) (explaining the evidentiary burden of a party attempting to enforce a note that is specially indorsed to another). The defendant's defaulted status did not relieve the plaintiff of this burden. See Kelsey v. SunTrust, 131 So. 3d at 826; accord Pastore-Borroto Dev., Inc., 596 So. 2d 526. Since the Note was not attached to the Complaint, the defendant did not admit (via his default) any fact relating to the actual Note. Big Bang Miami Entm't, LLC. v. Moumina, 137 So. 3d 1117, 1120–21 (Fla. 3d DCA 2014) (stating a default admits only the truth of well-pled allegations of the pleading, fair inferences may be made from the pleadings); see also Bank of New York Mellon v. Reyes, 126 So. 3d 304, 307 (Fla. 3d DCA 2013) (stating that the validity of a default judgment can find no support in facts not properly pleaded or not pleaded at all). A defaulted defendant only admits the well-pled allegations and exhibits that are included in the four-corners of the Complaint. Morales v. All Right Miami, Inc., 755 So. 2d 198, (Mem)–199 (Fla. 3d DCA 2000) (finding final default judgment cannot stand where it was entered on matters outside complaint). By failing to introduce evidence explaining the undated

special indorsements, Plaintiff 3 failed to prove it was entitled to enforce the Note and foreclose at the time of trial. A plaintiff's standing at the time of trial is not admitted by virtue of the default. See Venture Holdings & Acquisitions Group, LLC v. A.I.M. Funding Group, LLC, 75 So. at 773 (even where a defendant is in default, the foreclosing plaintiff is still obligated to prove standing to foreclose) (citation omitted).

The trial court also erred in allowing Exhibit 2 (the Note) and Exhibit 3 (the Mortgage) to remain in evidence. After the trial court struck Calderon's testimony, there was no record foundation that would permit the introduction of the exhibits or the trial court's reliance on the exhibits for entry of the final default judgment. The trial court may not strike the foundational testimony yet still rely on the documents entered through that testimony. "Authentication or identification of evidence is required as a condition precedent to its admissibility." § 90.901, Fla. Stat. (2016) Here, even though the original Note was filed in the lower court file, a witness was required to authenticate the document. In a Second District foreclosure action, the original promissory note must be introduced into evidence at trial or a "satisfactory reason must be given for failure to do so". Heller v. Bank of Am., NA, 209 So. 3d 641, 644 (Fla. 2d DCA 2017) quoting Fair v. Kaufman, 647 So. 2d 167, 168 (Fla. 2d DCA 1994); see also Mazine v. M & I Bank, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011) (determining that because no foundation was laid for the admission of an

affidavit as to amounts due and owing, admission was erroneous and reversal of final judgment was required where the affidavit was the only evidence as to indebtedness). The trial court must obey the rules of evidence.

The trial court was required to grant defendant's involuntary dismissal because Plaintiff 3 failed to present competent substantial evidence to establish a *prima facie* case. The improperly "cherry-picked" trial exhibits are not competent evidence because there was no evidentiary foundation for their admission to the record.

II. THE TRIAL COURT ERRED IN ENTERING THE DEFAULT FINAL JUDGMENT WHERE THE FACTS OF THE COMPLAINT DO NOT PROVIDE A SUFFICIENT BASIS FOR THE JUDGMENT ENTERED.

In reviewing a default final judgment, this Court reviews whether the trial court properly applied the law to the well-pled allegations; thus, the standard of review is *de novo*. Pichowski v. Florida Gas. Transmission Co., 857 So. 2d 219, 220 (Fla. 2d DCA 2003) (citation omitted); see also Aillis v. Boemi, 29 So. 3d 1105, 1108 (Fla. 2010) (the standard of review for questions of law is *de novo*).

Complaint allegations which are too general, vague, and conclusory are insufficient. Beckler v. Hoffman, 550 So. 2d 68, 70 (Fla. 5th DCA 1989). A pleader must allege "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief". Fla. R. Civ. P. 1.110(b)(2). "Allegations can be made on three levels: (1) a description of the evidence itself, (2) a statement of ultimate facts, or

(3) a conclusion of fact or law. Under the above rule, ultimate facts should be alleged." Beckler v. Hoffman, 550 So. 2d at 70. Florida Rules of Civil Procedure, Form 1.944(a) also indicates the type of allegations which will be held to be sufficient and well-pled.

"The entry of a default does not automatically entitle the plaintiff to the entry of a default judgment." Days Inns Acquisition Corp. v. Hutchinson, 707 So. 2d 747, 749 (Fla. 4th DCA 1997). The court must review the allegations and satisfy itself the allegations support the relief sought. "This is so, because where a default is involved, no proof is required; thus, the allegations of the complaint must establish an entitlement to relief against the defaulting defendant." Big Bang Miami Entm't, LLC. v. Moumina, 137 So. 3d at 1120–21.

A default:

> [o]perates as an admission of the truth of the ***well pleaded allegations of the pleading .... It does not admit facts not pleaded, not properly pleaded or conclusions of law.*** Fair inferences will be made from the pleadings, but forced inference will not be made. ***The party seeking affirmative relief may not be granted relief that is not supported*** **by the pleadings or** ***by substantive law applicable to the pleadings.*** A party in default may rely on these limitations.

Id. (citations omitted) (emphasis in original). A "defendant's default does not in itself warrant the court in entering a default judgment—a court must still determine whether the factual allegations of the complaint provide a sufficient basis for the

judgment entered." Nishimatsu Constr. Co., Ltd. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975).

The Complaint does not provide a sufficient basis for entry of a final default judgment. Because the trial court struck the testimony of the Plaintiff's only witness, the court was required to determine whether the allegations were sufficient, as a matter of law, for entry of final default judgment for Plaintiff 3. The Complaint is not sufficient to support the Default Final Judgment because the allegations are poorly pled, the allegations are internally irreconcilable, and the exhibits attached to the Complaint conflict with the allegations, to wit:

First, the Complaint is irreconcilable on its face. Count I-Mortgage Foreclosure alleges, "Plaintiff [1] now owns and holds the Mortgage Note and Mortgage" (R. at 2, ¶ 3) and Count II alleges that Note has been "lost or destroyed" and is not now in the custody of the Plaintiff (R. at 3, ¶ 20). It is impossible for a plaintiff to hold something that is lost. Houk v. PennyMac Corp., 2017 WL 535437, FN2 (Fla. 2d DCA Feb. 10, 2017) (addressing the "physical impossibility" for a plaintiff to be the holder of a lost note). The trial court could not make anything but a forced and impossible inference in order to reconcile these two diametrically opposed allegations.

Second, the Note was not attached to the Complaint because Plaintiff 1 alleged it was lost. (R. at 3, ¶ 20). Because the Note was not attached, the trial court

could not consider the Note as support for a default judgment. Morales v. All Right Miami, Inc., 755 So. 2d 198, (Mem)–199 (Fla. 3d DCA 2000) (holding that a document not attached to the pleadings cannot support a final default judgment).

Third, Plaintiff 1 attached a document it identified as "substantial terms of the note" as an exhibit to the Complaint. (R. at 23). The document (like the allegations in Count II) does not include any reference to a loan or loan number, the name of the owner or holder of the note, the identity of Gillis by name or by an account number. (R. at 3, ¶ 17, 23). There is nothing on the "term" sheet, which the court can infer relates to Gillis. (R. at 23).

Fourth, Plaintiff 1 alleges, "Plaintiff was in possession of the Mortgage Note and entitled to enforce it when loss of possession occurred or Plaintiff has been assigned the right to enforce the Note." (R. at 3)(emphasis added). There is no assignment of the Note attached to the Complaint to support this conclusion. Additionally, an "or" statement is not sufficiently pled. The "or" statement requires the trial court decide which part of the allegation is true. Both statements cannot be true because "or" means one or the other.

Fifth, there is a copy of the Mortgage attached to the Complaint. (R. at 5-22). The mortgagee is Mortgage Electronic Registration Systems, Inc. ("MERS") with the Lender identified as Wachovia Mortgage Corporation. Both of these entities are strangers to the litigation. No assignment of the mortgage is attached

to the Complaint. (R. at 1-23). The Mortgage identifies Ronald P. Gillis as the "Borrower". The Mortgage identifies the Note signed by the Borrower dated May 1, 2006 (R. at 6) and includes this language: "The Note states the Borrower owes Lender [Wachovia Mortgage Corporation] One Hundred Forty Six Thousand One Hundred Fifty and no/100 Dollars." (R. at 6). "Where complaint allegations are contradicted by exhibits attached to the complaint, the plain meaning of the exhibits control[s] . . . ." BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques, 28 So. 3d 936, 938 (Fla. 2d DCA 2010) (citation omitted). The Mortgage exhibit states Gillis as Borrower owes Wachovia and, thus by extension, only Wachovia has a right, as a matter of law, to enforce the Note and foreclose. The trial court would have to ignore the attached Mortgage in order to determine the allegations were sufficient to support a judgment in favor of Plaintiff 3. This, the trial court cannot do. "Any exhibit attached to a pleading must be considered a part thereof for all purposes." Fla. R. Civ. P. 1.130(b).

Sixth, the Complaint does not allege Gillis executed the Note and Mortgage. The Complaint only alleges "[o]n May 1, 2006, **there was executed** a Promissory Note ("Mortgage Note") and Mortgage ("Mortgage") securing the payment of the Mortgage Note." (R. at 2-3, ¶¶ 2, 17) (emphasis added). Even if the court could infer that the phrase "there was executed a . . . Mortgage" related to Gillis, the controlling Mortgage attached is clear, if Gillis owes anything to anyone, it is to

Wachovia not Plaintiff 1, 2 or 3. See Fla. R. Civ. P., Form 1.944(a) outlining very basic mortgage foreclosure allegations that are considered well-pled. At a minimum, the allegation should be "On [date] defendant executed and delivered a promissory note and mortgage securing the payment of the note." Id. Plaintiff 1 has not pled the "ultimate facts" required in a pleading. Beckler v. Hoffman, 550 So. 2d at 70.

Seventh, the Complaint does not allege Gillis owes anything to Plaintiff 1. Count I only alleges "Plaintiff **must be paid** $143,497.94 in principal on the Mortgage Note and Mortgage…" (R. at 2, ¶ 7) (emphasis added). Plaintiff failed to allege the ultimate facts required by Beckler. Alleging Plaintiff 1 "must be paid" is completely different from an allegation Gillis owes this amount to Plaintiff 1. The trial court cannot make the forced inference Gillis owes anything to Plaintiff 1 because the attached Mortgage indicates, "[t]he Note states the Borrower owes Lender [Wachovia] One Hundred Forty Six Thousand One Hundred Fifty and no/100 Dollars." (R. at 6). Confining itself to the four corners of the Complaint, the trial court can only conclude Gillis owes Wachovia but Wachovia did not bring the action.

Eighth, the trial court must reconcile the allegations in Count II-Re-Establishment of Note with the final default judgment because the Plaintiff did not amend the Complaint. The trial court cannot ignore Count II. Under Florida law, Plaintiff's purported "Notice of Voluntary Dismissal as to Count II" (R. at 148-49)

was a nullity. Deseret Ranches of Florida, Inc. v. Bowman, 340 So. 2d 1232, 1233 (Fla. 4th DCA 1976). In 2009, "[t]he proper method of deleting less than all counts from a pleading is amendment of the pleading pursuant ot [sic] Fla. R. Civ. P. 1.190." Id.

> Appellees attempted to do the impossible when they filed a Notice of Dismissal as to one count of a two count complaint. They should have limited themselves to filing their second amended complaint according to Fla. R. Civ. P. 1.190, omitting the undesired count. Because appellees' Notice of Dismissal was a nullity, the action was not terminated by it, and the trial court was not divested of jurisdiction.

Id. Plaintiff's attempt to drop Count II was a nullity. Faced with this dilemma, the trial court had to make determinations regarding the re-establishment of the lost note, which it could not do without some evidence outside of the pleading, which it did not have.

Ninth, the trial court entered the final default judgment in the name of Plaintiff 3. Because there was no evidence before it regarding the substitutions of Plaintiff 2 or Plaintiff 3, at most the trial court could enter judgment in the name of of Plaintiff 1. However, the Mortgage attached to the Complaint controls, so the trial court cannot even make the leap that Plaintiff 1 is entitled to judgment. (See argument in the "**Fifth**" paragraph above).

Tenth, even if the trial court was authorized to comb the record and rely on documents outside the four-corners of the Complaint, e.g., the Note filed seventeen months after the Complaint (R. at 145-147), the trial court could not enter judgment in favor of Plaintiff 3. The Note bears two undated special indorsements. (R. at 147). Neither indorsement is in favor of Plaintiff 3. Id. The law is settled when a Note appears for the first time after the complaint is filed, the Plaintiff must present competent, substantial evidence the indorsements were placed on the note before the case was filed. Calvo v. U.S. Bank Nat. Ass'n, 181 So. 3d 562, 564 (Fla. 4th DCA 2015). The trial court cannot make a forced inference to determine the date the indorsements were placed on the Note, and thus it cannot rely on the after-filed Note to support the entry of the final default judgment.

Because of the default, Gillis only admitted well-pled allegations. As indicated above, many of the allegations are not well-pled. The requirement was for the trial court to make fair and just inferences to determine whether the Complaint allegations were sufficient to enter a final default judgment.

Based on the foregoing, the trial court made many critical inferences which were forced and not supported by well-pled allegations. As a matter of law, the Complaint is insufficient to support the relief granted.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY STRIKING DEFENDANT'S PLEADINGS AND ENTERING JUDICIAL DEFAULT AS A DISCOVERY SANCTION WITHOUT MAKING EXPRESS FINDINGS OF FACT.

An order imposing sanctions is reviewed for abuse of discretion. Ham v. Dunmire, 891 So. 2d 492, 495 (Fla. 2004). It is an abuse of discretion for a trial court to strike a party's pleadings and enter default as a discovery sanction without making "express written findings of fact to support a conclusion that a party's failure to obey court orders demonstrates willful or deliberate disregard". Toll v. Korge, 127 So. 3d 883, 887 (Fla. 3d DCA 2013) (citing Ham v. Dunmire, 891 So. 2d at 492); see also Stabak v. Tropical Breeze Estates, Inc., 925 So. 2d 1104 (Fla. 4th DCA 2006) (describing the court's failure to make express written findings as "an abuse of discretion *per se*").

Under Florida law,

> "the striking of pleadings or entering a default for noncompliance with an order compelling discovery is the most severe of all sanctions which should be employed only in extreme circumstances." Mercer v. Raine, 443 So. 2d 944, 946 (Fla. 1983). Before striking a party's pleadings and entering a default, the trial court must make a finding that the party's nonappearance was willful or done in bad faith. In re Forfeiture of Twenty Thousand Nine Hundred Dollars ($20,900) U.S. Currency, 539 So. 2d 14 (Fla. 4th DCA 1989) (holding that the trial court was required to make a finding or recital that defendant's failure to appear for deposition was willful or contumacious prior to striking the defendant's pleadings) . . . .

Flagg v. Judd, 198 So. 3d 665, 667 (Fla. 2d DCA 2015).

> Express findings are required to ensure that the trial judge has consciously determined that the failure was more than a mistake, neglect, or inadvertence, and to assist the reviewing court to the extent the record is susceptible to more than one interpretation.

Ham v. Dunmire, 891 So. 2d at 496 (citation omitted); see also K&K World Enter., Inc. v. Union SPOL, S.R.O., 692 So. 2d 1000, 1002 (Fla. 3d DCA 1997) ("when the court struck the appellants' pleadings and entered the defaults it had no evidence as to the reasons for their non-compliance with its orders").

The trial court abused its discretion, *per se*, by entering a judicial default and striking Gillis's pleadings. First, Default Orders 1 and 2 (R. at 751-52; 779-80) do not include any findings that Gillis disobeyed a discovery order. Second, Default Orders 1 and 2 are facially defective because they are not based on evidence. Third, Default Orders 1 and 2 are facially defective because they fail to include express findings of willfulness or bad faith on the part of Gillis, to justify imposing the harshest of sanctions. Default Order 1 states that it is based on "arguments of Counsel and Defendant," not evidence. (R. at 779). See Celebrity Cruises, Inc. v. Fernandes, 149 So. 3d 744, 753 (Fla. 3d DCA 2014) ("This opportunity to be heard must include the opportunity to present evidence of extenuating and/or mitigating circumstances, which might explain the failure to comply with the court's discovery order or the opposing party's discovery request.").

The September 27, 2010 hearing on Plaintiff 2's Motion to Strike Pleadings, for Default, and for the Entry of Default Final Judgment, was not an evidentiary hearing. The hearing lasted ten (10) minutes, and consisted only of unsworn argument of counsel and Gillis. (R. at 767). See Beck's Transfer, Inc. v. Peairs, 532 So. 2d 1136, 1137 (Fla. 4th DCA 1988) ("Appellee's pleadings and argument did not constitute evidence [before the trial court.]"). The trial court did not make a single factual determination as to whether Gillis failed to obey a court order. (R. at 767).

The lack of findings is a *per se* abuse of the trial court's discretion. If this Court does not mandate reversal pursuant to the abuses that took place at trial as described above, this Court should, at the very least, remand with instructions that the orders granting default and striking of the pleadings be set aside. However, such a remand is futile since the sworn testimony of Lucinda Calderon reveals that Wells Fargo Bank, N.A., is the owner and holder of the Note. Plaintiff 3 cannot "un-ring the bell." The time for dismissal is now; the lower court has been burdened long enough with this faulty foreclosure. The ultimate relief sought by Gillis is reversal of the Default Final Judgment with instructions to enter judgment in his favor.

CONCLUSION

For all the foregoing reasons, this Court should reverse the Default Final Judgment and remand with instructions for entry of judgment in favor of the Defendant Ronald P. Gillis. At a minimum, this Court should reverse and remand with instructions to set aside the default orders to allow Gillis to litigate his defenses in this case. The undersigned will file a request for oral argument under separate filing.

Respectfully submitted,

/s/ Mark A. Cullen

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy foregoing has been furnished electronically pursuant to Fla. R. Jud. Admin. 2.516 to Kimberly Mello, Esq., Robert Schneider, Esq., Greenberg Traurig, P.A., Bank of Americas Plaza, 101 E. Kennedy Boulevard, Suite 1900, Tampa, FL 33602; E-mail mellok@gtlaw.com; schneiderr@gtlaw.com and Albertelli Law, P.O. 23028, Tampa, FL 33623; E-mail servealaw@albertellilaw.com this 2nd day of April, 2017.

/s/ Mark A. Cullen
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant Initial Brief complies with the font requirements of Fla. R. App. P. 9.210(a).

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