

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
CASE NO: 08-28846 CA 10

Wells Fargo Bank, National
Association, as Trustee

Plaintiff(s),

vs.

John Cirigliano

Defendant(s).

ORDER
~~GRANTING/DENYING~~
PLAINTIFF'S/DEFENDANT'S

MOTION FOR Summary
Judgment of Foreclosure

THIS CAUSE having come on to be heard on 03/25/10
on Plaintiff's Defendant's Motion

for summary judgment of foreclosure

and the Court having heard argument of counsel, and being otherwise advised in the premises, it is
hereupon

ORDERED AND ADJUDGED that said Motion be, and the same is hereby

DENIED. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
of foreclosure is DENIED based on issues of material
fact as to standing.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida this 25 day of
March, 2010

STUART M. SIMONS
CIRCUIT COURT JUDGE

Copies furnished to: Counsel of Record

ACTING

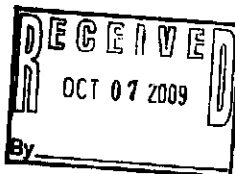
MARGARITA ESQUIROZ
CIRCUIT JUDGE



CFN 2009R0743585
 OR Bk 27047 Pgs 1543 - 1544 (2pgs)
 RECORDED 10/14/2009 13:45:29
 HARVEY RUVIN, CLERK OF COURT
 MIAMI-DADE COUNTY, FLORIDA

Prepared By: Ronnie Sanders
 Chase Home Finance, LLC
 780 Kansas Lane, 2nd Floor
 Monroe, LA 71203

LOAN NAME: Cirigliano
 LOAN NO.: 0014367155



ASSIGNMENT OF MORTGAGE

That, Mortgage Electronic Registration Systems, Inc. (MERS) As Nominee for GreenPoint Mortgage Funding, Inc., 4318 Miller Road, Flint, MI 48507, hereinafter designated as Assignor for valuable consideration in an amount of not less than outstanding principal amount plus accrued and unpaid interest, the receipt whereof is hereby acknowledged, does by the presents hereby grant, bargain, sell, assign, transfer and set over to:

Wells Fargo Bank, NA As Trustee

2780 Lake Vista Drive, Lewisville, TX 75067

hereinafter designated as Assignee, all of it rights, title and interest, as holder thereof, in and to the following described lien in the form of a mortgage or deed of trust, the property therein described and the indebtedness thereby secured:

MORTGAGE:

Executed by: John Cirigliano, a single man
 Payable to: GreenPoint Mortgage Funding, Inc.
 Note dated: 08/12/2005 Original Principal Amt.: \$548,000.00
 Recorded on: 08/19/2005 CFN 2005R0877082 Bk: 23698 Pg: 0496
 County of: Miami-Dade State of: Florida
 Property Address: 6515 Collins Avenue #302, Miami Beach Florida 33141

Legal Description:

Condominium Unit No. 802 of BEL-AIRE ON THE OCEAN, a Condominium, according to the Declaration thereof, recorded in Official Records Book 23003, Page 1410, of the Public Records of Miami-Dade County, Florida.

Together with the note or obligation described in said mortgage, endorsed to the Assignee this date, and all money due to and become due thereon, with interest. The Assignee is not acting as nominee of the mortgagor and that the mortgage continues to secure a bonafide obligation. This Assignment is not subject to the requirements of Section 275 of the Real Property Law because it is an Assignment within the Secondary Mortgage Market

TO HAVE AND TO HOLD the same unto Assignee and to the successors, legal representatives and assigns to the Assignee forever, and Assignor hereby constitute and appoints said Assignee its attorney irrevocable to collect and receive said debt, and to foreclose, enforce, and satisfy said lien the same as it might or could have done were these presents not executed, but at the cost and expense of the Assignee, subject however to the right and equity of redemption, if any there be, of the maker(s) of the mortgage or deed of trust herein above described.

09-155106

PAGE TWO

LOAN NAME: Cirigliano
LOAN NO.: 0014367155

Date: September 18, 2009

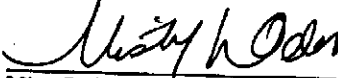
Mortgage Electronic Registration Systems, Inc.
(MERS) As Nominee for GreenPoint Mortgage Funding, Inc.


Dee Dee M Latham, Authorized Officer

STATE OF LOUISIANA

COUNTY OF OUACHITA

On this day, September 18, 2009, before me, Misty L. Odom, Notary Public, personally came Dee Dee M Latham to me known, who, being duly sworn, did depose and say that he/she resides at 780 Kansas Lane, Monroe, Louisiana 71203, that he/she is the Authorized Officer for Mortgage Electronic Registration Systems, Inc. (MERS) As Nominee for GreenPoint Mortgage Funding, Inc., the corporation described in and which executed this foregoing instrument: and that he/she signed his/her name by authority of the Board of Directors of said corporation.


Misty L. Odom Notary Public
Commission expires: Lifetime



IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI DADE COUNTY, FLORIDA

WELLS FARGO BANK, NATIONAL
ASSOCIATION, AS TRUSTEE FOR BEAR
STERNS ASSET BACKED SECURITIES I
LLC GREENPOINT MORTGAGE FUNDING
TRUST 2006-ARI, MORTGAGE PASS THROUGH
CERTIFICATES, SERIES 2006-ARI,

CASE NO: 08-28846 CA 10

FL BAR NO: 0879071

Plaintiff,

VS.

JOHN CIRIGLIANO, et al,

Defendant(s)

THE ORIGINAL
FILED ON:
MAR 23 2010
IN THE OFFICE OF
CIRCUIT COURT DADE CO., FL

**DEFENDANT'S SUPPLEMENTAL RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

The Defendant, JOHN CIRIGLIANO, by and through his undersigned attorney,
hereby files his Supplemental Response in opposition to Plaintiff's Motion for Summary
Judgment and states as follows:

I. **FURTHER LEGAL ARGUMENT IN FAVOR OF NO STANDING**

**A. NO EVIDENCE OF CHAIN OF ENDORSEMENTS OR CUSTODY OF NOTES
FROM GREENPOINT MORTGAGE FUNDING TO WELLS FARGO IN
ACCORDANCE WITH PRINCIPLES OF POOLING AND SERVICING
AGREEMENT**

Plaintiff fails to attach the Servicing and Pooling Agreement and the
Securitization Agreement to the Complaint. These agreements control and dictate the
rights of the Lender and the servicer agent. MERS is only an agent for the Lender and
their ability to act to enforce the mortgage is strictly limited and their rights are governed
by the Pooling and Servicing Agreement. However, there is no evidence that MERS has
any rights in this case.

Under the securitization process, loans are sold to a Trust and pooled with other loans. The trust in turn sells Certificates to investors who receive interest income payments on each certificate. Securitized loans are typically governed by a Pooling and Servicing Agreement (PSA). This document is one of many that are required to be filed with the Securities and Exchange Commission (SEC). The specific PSA reflects Wells Fargo bank as Trustee in this case. This agreement requires that the original mortgage note (including all riders thereto), or certified copies thereof, bearing all intervening endorsements necessary to show a complete chain of endorsements from the original payee, endorsed in blank, via original signature, and, if previously endorsed, signed in the name of the last endorsee by a duly qualified officer of the last endorsee be in place.

In this case as reflected in the Complaint for foreclosure filed May 22, 2008, the original promissory note was lost or destroyed subsequent to Plaintiff's acquisition thereof. The lack of ability to produce an original note and required endorsements fails to conform to the requirements of the Pooling and Servicing Agreement and Purchase Agreement. Those agreements require that chain of custody must be followed in order to protect the integrity of the original note. Intervening endorsements should show a complete chain of title from the originator, Greenpoint Mortgage Funding. In the Securitization process there is a Sponsor, Seller and Depositor that sells the loan to the Trust. There is no note to evidence valid intervening endorsements of the Note to reflect a valid legal chain of title from the originator, Greenpoint Mortgage Funding to Wells Fargo Bank, National Association, Trustee. Therefore, there is a genuine issue of material fact as to whether there is a valid conveyance of the Note to Wells Fargo Bank under the express transfer requirement terms of its own PSA and Purchase Agreement. Wells Fargo

Bank does not appear to be the bona fide owner or holder of the Note.

The fact that Plaintiff has failed to follow the general principles and procedures regarding a Pooling and Servicing Agreement and the fact that MERS may not even have any rights to enforce the mortgage and Note create genuine issues of material facts as to whether Plaintiff has any standing and Plaintiff's Motion for Summary Judgment should be denied.

ARTURO R. ALFONSO, P.A.

7821 Coral Way

Suite #125

Miami, Florida 33155

Tel: (305) 266-9584

Fax : (305) 573-6385

BY: 

Arturo R. Alfonso, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was fax/mailed to: Marshall C. Watson, P.A., Tara Castillo, Esq., 1800 NW 49th Street, Suite 120, Fort Lauderdale, FL 33309 and Ellen Patterson, Esq, Rothman & Tobin, PA, 12514 W. Atlantic Blvd, Coral Springs, FL 33017 and Carol Ann Strauss, Esq, Bakalar & Eichner, PA, 150 S. Pine Island Road, Suite 540, Plantation, FL 33324-2667; Elliot D. Goldberg, Esq, One E. Broward Blvd, Suite 700, Ft Lauderdale, FL 33301 and Mortgage Electronic Registration Systems, Inc, as nominee for Greenpoint Mortgage Funding, Inc, 3300 SW 34th Avenue, Suite 101, Ocala, FL 34472 on this 19 day of March 2010.

ARTURO R. ALFONSO, P.A.

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Miami, Florida 33155

Tel: (305) 266-9584

Fax : (305) 573-6385

BY: 

Arturo R. Alfonso, Esq.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI DADE COUNTY, FLORIDA

WELLS FARGO BANK, NATIONAL
ASSOCIATION, AS TRUSTEE FOR BEAR
STERNS ASSET BACKED SECURITIES I
LLC GREENPOINT MORTGAGE FUNDING
TRUST 2006-ARI, MORTGAGE PASS THROUGH
CERTIFICATES, SERIES 2006-ARI,

CASE NO: 08-28846 CA 10

FL BAR NO: 0879071

Plaintiff,
VS.

JOHN CIRIGLIANO, et al,

Defendant(s)

THE ORIGINAL
FILED ON:
MAR 11 2010
IN THE OFFICE OF
CIRCUIT COURT DADE CO., FL

**DEFENDANT, JOHN CIRIGLIANO'S RESPONSE TO PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT OF FORECLOSURE**

COMES NOW, the Defendant, JOHN CIRIGLIANO, by and through his undersigned attorney, and files his Response to Plaintiff's Motion for Summary Judgment of Foreclosure and states as follows:

I. STANDARDS FOR GRANTING SUMMARY JUDGMENT

Courts sparingly grant summary judgment to avoid infringing on the constitutional right to trial. If fact issues exist and the slightest doubt remains, the Court must resolve the doubt in favor of the non-movant and deny summary judgment. Williams v. City of Lake City, 62 So.2d 732 (Fla. 1953).

Courts hold the movant to a strict standard and must resolve all facts in evidence and reasonable inferences against the movant. Majeske v. Palm Beach Kennel Club, '77 So.2d 531 (Fla 4th DCA 1965). If facts are undisputed but conflicting issues arise over the inferences, a Court must deny summary judgment. Distribution Company v. Sav-A-Stop, Inc., 124 So.2d 753 (Fla. 1st DCA1960). As a result, all doubts and inferences must be

resolved against the moving party, and if there is the slightest doubt or conflict in the evidence, then summary judgment is not available. C & J Publishing Company v. Tandy Corporation, 585 So.2d 290 (Fla. 2d DCA 1991), citing Young v. Johnson, 538 So.2d 1387 (Fla. 2d DCA 1989).

Where existence of material fact appears in record, case must be referred for proper determination of issues of fact and credibility and summary judgment may not be granted. Ritchey v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 361 So.2d 438 (Fla. 2d DCA 1978).

For the Plaintiff to prevail on its summary judgment motion it must first conclusively establish each allegation of the Complaint against ~~the Talaveras~~ ^{Cirigliano}. Plaintiff must then submit sufficient facts to show it is entitled to summary judgment and conclusively show the non-existence of any countervailing facts or inferences from those facts. Moreover where a defendant pleads an affirmative defense, the Plaintiff must by affidavit or other sworn evidence, negate or deny that defense. Johnson & Kirby, Inc v. Citizens Nat'l Bank of Fort Lauderdale, 338 So.2d 905, 906 (Fla. 3rd DCA 1976); see also Fasano v. Hicks, 667 So.2d 1033, 1034 (Fla. 2d DCA 1996) (finding that in absence of some proof contradicting or opposing affirmative defense, entry of summary judgment is improper). Only then does the burden shift to ~~the Talaveras~~ ^{Cirigliano} as the non-movants to disprove ~~Tiffany Lakes'~~ ^{Wells Fargo's} entitlement to summary judgment. Step v. State Farm Fire & Cas. Co., 656 So.2d 494,496 (Fla. 1 DCA 1995).

The Court must examine the facts in a light most favorable to the non-movant, the ~~Talaveras~~ ^{Cirigliano}. Gast v. Mak Enter of Gainesville, 944 So.2d 1119 (Fla. 5th DCA 2006).

ARGUMENT

Wells Fargo Bank, as the summary judgment movant, must conclusively establish that it owned and held the mortgage and note at the time it filed suit. If not, a new lawsuit must be filed. See Jeff-Ray Corp. v. Jacobson, 566 So.2d 885, 886 (Fla. 4th DCA 1990) (holding that the assignee of a mortgage could not maintain the mortgage foreclosure action because the assignment was dated four months after the action was filed; if the plaintiff wished to proceed in the assignment, it must file a new complaint). This is because Florida does not permit a party to establish the right to maintain an action retroactively by acquiring standing to file a lawsuit after the fact. See: Progressive Exp. v. McGrath Chiro., 913 So.2d 1281 (Fla. 2nd DCA 2005).

Wells Fargo Bank must also conclusively establish that the amount of the debt is due to him and not another person or party. See: F.E Booker v. Sarasota, Inc., 707 So. 2d 886 (Fla. 1st DCA 1998), Troupe v. Redner, 652 So.2d 394,395-396 (Fla. 2nd DCA 1995), Laing v. Gainey Builder's Inc., 184 So.2d. 897,900 (Fla. 1st DCA 1966), Hughes v. Home Savings of America, 675 So.2d 649 (Fla. 2nd DCA 1996). The reasons are simple. A mortgage secures repayment of a debt evidenced by a negotiable instrument. Therefore, it is imperative for res judicata purposes and to prevent another suit by an alleged holder that the Plaintiff establish that he owns and holds the mortgage and note. Dollar Systems v. Delta, 688 So.2d 470 (Fla. 3 DCA 1997), F.E. Booker.

Wells Fargo Bank must also conclusively establish the debt due. Mr. Cirigliano owns title to his home and gave a mortgage to secure repayment of the alleged debt. If Cirigliano does not repay the debt, the holder can force a sale of Cirigliano's home to collect the debt. Mr. Cirigliano had the right to redeem the home for the debt due, which inures to all mortgagors. The court cannot extinguish the right to redeem the property except by due of process law. Sundie v. Harden 253 So.2d 857 (Fla. 1971), American Banker Life Assure. Co. v. Williams Saloman Kanner & Damian, 399 So.2d 365, 367 (Fla. 3 DCA 1981), Cain & Bultman Inc. v. Miss Sam Inc., 409 So.2d 114, 118 (Fla. 5 DCA 1982). The amount of the debt due as found in the final judgment establishes the amount needed for Cirigliano to exercise the right of redemption and his home from a sale. A judgment establishes the amount needed for a clerk to publish the sale, prompting

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buyers to attend in order to bid on the property, and establishes the debt for potential deficiency. John Stepp Inc. v. First Federal Sav. And Loan Assoc., 379 So.2d 384 (Fla. 3 DCA 1980). Therefore, Wells Fargo bank must conclusively establish the amount of the debt due in order to extinguish Cirigliano's right to redeem the property by a foreclosure sale.

Cirigliano raises among other things in his Amended Answer and Affirmative Defenses that Wells Fargo Bank lacks standing to bring this foreclosure suit. In State Street Bank and Trust Company vs. Lord, 851 So.2d 790 (Fla. 4th DCA 2003), the issue on appeal was whether a mortgagee by assignment may pursue a mortgage foreclosure in the absence of proof that whether the mortgagee or its assignor ever had possession of the missing promissory note. In the State Street case, the lender sought to establish the promissory note and mortgage under section 71.011, Florida Statutes. The appellate court affirmed the trial court's decision that the lender never had actual or constructive possession of the promissory note and therefore, the lender as a matter of law could not maintain a cause of action to enforce the note or foreclose the mortgage. The right to enforce the lost instrument was not properly assigned where neither the lender nor its predecessor in interest possessed the note and did not otherwise satisfy the requirements of section 673.3091, Florida Statutes, at the time of the assignment. It was unrefuted that Street Bank in that case was unable to meet the requirement of section 673.3091. The Court found that the note was lost before the assignment to State Street was made. Id at 792.

Florida Statute, section 90.953, Florida Code of Evidence, requires that the original document, in this case the promissory note, must be presented as the best evidence. A duplicate copy is not admissible unless the Plaintiff meets the requirements of section 673.3091 to pursue enforcement. See WH Dwoning v. First National Bank of Lake City, 81 So.2d 486 (Fla. 1955); Nat'l Loan Investors, LP v. Joymar Assocs, 767 So.2d 549, 551 (Fla. 3rd DCA 2000). In Dasma Investments, LLC v. Realty Associates Fund III, LP, 459 F.Supp.2d 1294 (S.D.Fla.2006), the Court held that if a party is not in possession of the original note and cannot reestablish it, the party cannot prevail in an action on the note.

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In Jeff-Ray Corp vs. Jacobson, 566 So.2d 885 (Fla. 4th DCA 1990), the trial court dismissed a foreclosure lawsuit because the lender alleged an assignment of mortgage which was recorded after the foreclosure case was filed. The court in Jeff-Ray held that the trial court erred in not dismissing the Complaint for failure to state a cause of action because it relied upon an assignment which was not in existence at the time the Complaint was filed.

Furthermore, in order to have an effective assignment of a note to prevent others to sue upon the note in the future, the original holder must endorse an allonge to the new lender. An allonge is defined as a piece of paper annexed to a negotiable instrument or promissory note, on which to write endorsements for which there is no room on the instrument itself.

NO ORIGINAL NOTE

Wells Fargo Bank does not possess the original note. Wells Fargo admits to this in their Complaint where they state the original note is lost and in their response to Discovery and in their Complaint. Therefore, without the original note under Florida Statute 90.953, a duplicate copy is not admissible unless they can reestablish the note pursuant to Fla. Stat. 673.3091.

**WELLS FARGO CANNOT REESTABLISH PROMISSORY NOTE UNDER
FLORIDA STATUTE 673.3091**

Florida Statute 673.3091 states:

- (1) A person not in possession of an instrument is entitled to enforce the instrument if:
 - (a) The person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;
 - (b) The loss of possession was not the result of a transfer by the person or

- (c) a lawful seizure; and
- (d) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person
- (e) or a person that cannot be found or is not amenable to service of process.

(2) A person seeking enforcement of an instrument under subsection (1) must prove the terms of the instrument and person's right to enforce the instrument. If that proof is made, s. 673.3081 applies to the case as if the person seeking enforcement had produced the instrument. The Court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument.

Adequate protection may be provided by any reasonable means.

In this case, Wells Fargo cannot prove that it is the holder in due course of the original promissory note. The original lender that held the note was Green Point Mortgage and they closed their doors in ~~1997~~²⁰⁰⁷. Wells Fargo has failed to prove in this case how the note got from GreenPoint Mortgage to Wells Fargo. Wells Fargo fails to show by way of any properly recorded assignments how the Note got from Green Point Mortgage to Wells Fargo Bank. There is only an assignment of mortgage which was produced midway through this litigation an assignment of mortgage from Green Point to Wells Fargo recorded October 14, 2009, one year after the foreclosure complaint was filed. Under Jeff-Ray Corp vs. Jacobson, 566 So.2d 885 (Fla. 4th DCA 1990), the trial court dismissed a foreclosure lawsuit because the lender alleged an assignment of mortgage which was recorded after the foreclosure case was filed. The court in Jeff-Ray held that the trial court erred in not dismissing the Complaint for failure to state a cause of action because it relied upon an assignment which was not in existence at the time the Complaint was filed. See also, Progressive Exp. v. McGrath Chiro., 913 So.2d 1281 (Fla. 2nd DCA 2005). The assignment in this case which is attached to the Plaintiff's Motion for Summary Judgment is improper because it was not signed by Green point Mortgage prior

to it going out of business, it was signed by an agent of Chase Bank which is not affiliated or connected to Greenpoint in any way and was recorded after the lawsuit was instituted. Therefore, there is not title trail to show how the note got from Greenpoint Mortgage to Wells Fargo. Wells Fargo cannot reestablish the note pursuant to Fla. Stat. 673.3091.

WELLS FARGO'S ASSIGNMENT OF MORTGAGE ATTACHED TO MOTION FOR SUMMARY JUDGMENT FAILS AS A MATTER OF LAW

There is an issue of material fact as to the Assignment which was recorded by Wells Fargo a year after the foreclosure case was filed and which is attached to Plaintiff's Motion for Summary Judgment. Since the assignment is not valid, Wells Fargo cannot prove that it is the holder in due course of the Note and Mortgage and cannot foreclose.

Jeff-Ray Corp v. Jacobson, 566 So.2d 885, 886 (Fla. 4th DCA 1990) informs the Court that Wells Fargo cannot create a mortgage foreclosure cause of action in itself after it files suit. The trial court must dismiss a foreclosure suit when the Plaintiff who files the suit does not own and hold the mortgage note at the time he files the suit. Jeff Ray holds: "Given the scenario before us, appellees' complaint could not have stated a cause of action at the time it was filed, based on a document that did not exist until some four months later. Marianna & B.R. Co. v. Maund, 62 Fla. 538, 56 So.670 (Fla. 1911).

The reasonable inference from the assignment attached to Plaintiff's Motion for Summary Judgment dated September 17, 2009 and recorded October 14, 2009, in light of its timing, is that Wells Fargo Bank did not have the right to enforce the note and mortgage when it filed this suit. This mortgage foreclosure lawsuit was filed May 20, 2008 and the assignment was signed September 17, 2009 and recorded October 14, 2009. The assignment was not in existence at the time the lawsuit was filed. Secondly, the assignment was not executed by an agent of Green Point Mortgage was closed their doors in 2007. The assignment seems to be a fraud on the Court because it was signed by an agent of Chase Bank not Greenpoint. Also, the title history of this property fails to show how the note and mortgage got into the hands of Wells Fargo. There is no paper trail

showing how the loan went from Greet Point to Wells Fargo. Also, the Plaintiff's Complaint fails to attach the Trustee agreement for Bear Sterns Asset backed Securities.

**AFFIDAVIT OF PLAINTIFF ATTACHED TO MOTION FOR SUMMARY
JUDGMENT IS INSUFFICIENT TO PROVE STANDING**

The Affidavit signed by Vicki Novotny-Landis as Assistant Vice president of EMC Mortgage Corporation is insufficient to refute Defendant's Affirmative Defense of Lack of Standing.

The Affidavit mentions the Assignment which was dated 1 year and 5 months after the foreclosure was filed. However, the Affidavit is silent as to how the loan got from Green Point Mortgage to Wells Fargo Bank nor does the affidavit explain why the Plaintiff got an Assignment signed during the course of this litigation. The answer is simple being that there was no intent on the part of Greenpoint Mortgage to assign this loan. The Complaint fails to attach any assignments nor explain how the loan got from Greenpoint Mortgage to Wells Fargo nor does it attach the Trust Agreement for Bear Sterns. Secondly, it is impossible for the affiant to testify as to anything that Greenpoint Mortgage did as it would constitute hearsay.

Furthermore, there is no Affidavit that meets the statutory burden under Fla. Stat 673.3091 to reestablish the lost promissory note. Since Wells Fargo lost the original promissory note, the Affidavit is insufficient to prove that Wells Fargo is the holder in due course of the promissory note. That is a heavy burden for Wells Fargo bank to show as they cannot prove they are legally entitled to enforce the lost note without any assignments showing the chain of title from Green Point Mortgage to Wells Fargo Bank. Also, the copy of the promissory note attached to the Complaint contains no allonge endorsed to Wells Fargo Bank.

EQUITABLE LIEN IS NOT APPLICABLE IN THIS CASE

Plaintiff pleads in the alternative that if Defendant prevails on its Counterclaim to

invalidate the mortgage and note, then it would be entitled to an equitable lien. Since the issue of whether there is a valid mortgage and note or whether Plaintiff has any standing are issues for trial, there are obvious issues of material facts present to deny Plaintiff's Motion for Summary Judgment.

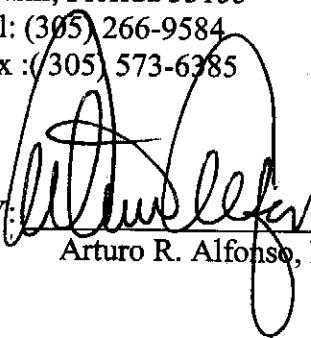
Notwithstanding that argument, Plaintiff does not have a valid legal claim for an equitable lien. An equitable lien is a lien imposed by the Court when there is no formal mortgage and note in place but merely an agreement in writing which shows an intention to charge or mortgage some particular property with a debt or obligation. Blumin v. Ellis, 186 So.2d 286 (Fla. 2nd DCA 1966). Here, there is a formal mortgage and note in place. There are issues as to whether Plaintiff has standing to bring this lawsuit. If Plaintiff has no standing because it cannot show that it is the holder in due course the mortgage and note, Plaintiff's foreclosure action will have to be dismissed. Therefore, there will be no argument for any equitable lien as Plaintiff's foreclosure case is seriously flawed.

CONCLUSION

There are obvious issues of material fact which prevents the Plaintiff from obtaining a summary judgment and this case must proceed to trial on all the issues. The record, Plaintiff's responses to discovery and Plaintiff's Motion and Affidavits are insufficient to refute Defendant's Affirmative Defense of lack of Standing and to prove Plaintiff is the holder and due course as to reestablish a lost note. The record also lacks admissible evidence to conclusively establish a valid legal assignment of the mortgage and note, there is no evidence to show a chain of title of how the note got transferred from Greenpoint Mortgage to Wells Fargo Bank. The Complaint when filed did not attach any assignments showing legal ownership of the note and mortgage by Wells Fargo Bank. The Assignment attached to Plaintiff's Motion for Summary Judgment is a fraud on the Court as it was signed by a person who works for Chase and not by Greenpoint Mortgage and was presented to the undersigned only after the lack of standing defense was raised.

Therefore, Defendant, JOHN CIRIGLIANO, requests that this Court deny Plaintiff's Motion for Summary Judgment.

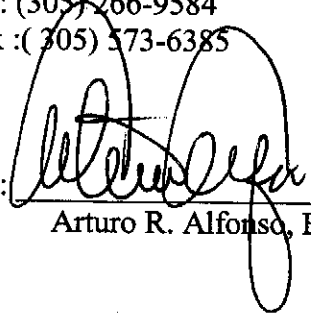
ARTURO R. ALFONSO, P.A.
7821 Coral Way
Suite #125
Miami, Florida 33155
Tel: (305) 266-9584
Fax : (305) 573-6385

BY: 
Arturo R. Alfonso, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was fax/mailed to: Marshall C. Watson, P.A., Tara Castillo, Esq., 1800 NW 49th Street, Suite 120, Fort Lauderdale, FL 33309 and Ellen Patterson, Esq, Rothman & Tobin, PA, 12514 W. Atlantic Blvd, Coral Springs, FL 33017 and Carol Ann Strauss, Esq, Bakalar & Eichner, PA, 150 S. Pine Island Road, Suite 540, Plantation, FL 33324-2667; Elliot D. Goldberg, Esq, One E. Broward Blvd, Suite 700, Ft Lauderdale, FL 33301 and Mortgage Electronic Registration Systems, Inc, as nominee for Greenpoint Mortgage Funding, Inc, 3300 SW 34th Avenue, Suite 101, Ocala, FL 34472 on this 10 day of March 2010.

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BY: 
Arturo R. Alfonso, Esq.