DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 3D2024-0203

JESSICA PALTER AND JAKE PALTER, AS CO-TRUSTEES OF THE JP 401K TRUST,

Appellants,

v.

SUNSET PALM VILLAS CONDOMINIUM ASSOCIATION, INC.,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

LOWER TRIBUNAL CASE NO. 2021-010969-CA-01

APPELLEE'S ANSWER BRIEF

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INTRODUCTION

For purposes of this Answer Brief, Appellants, Jessica Palter and Jake Palter, as Co-Trustees of the JP 401K Trust, will be referred to as "Appellants." Appellee, Sunset Palm Villas Condominium Association Inc., will be referred to as "Appellee" or "Association." The Appellants' Initial Brief will be cited to with the following notation: [IB. ___]. The Record on appeal will be cited to with the following notation: [R. ___]. In this Brief, Appellee references two depositions. Because the deposition transcripts are not part of the record on appeal, Appellee has attached the pertinent pages of these depositions as part of its Appendix, which will be cited to with the following notation: [A. ___].

All emphasis is ours unless otherwise indicated.

ANSWER STATEMENT OF THE FACTS AND CASE

The Appellants are the co-trustees of a trust ("Trust") that owns a condominium unit with an address of 434 N.W. 85th Street Road, Miami, Florida 33150 ("Unit") located in the Sunset Palm Villas community. [R. 180-1]. On October 30, 2012, the Association recorded a claim of lien against the Unit in the public records of

Miami-Dade County, Florida. [R. 182, 192]. The claim of lien reflected that assessments were owed going back as far as October 2007 and that the Association was owed $18,925.57 through October 25, 2012. [R. 193, 196].

Wells Fargo Bank, N.A. ("Wells Fargo") filed an action to foreclose its mortgage on the Unit (Miami-Dade County Circuit Court Case No. 2009-029901). On January 5, 2012, a final judgment of foreclosure was entered in favor of Wells Fargo. [R. 282]. On January 13, 2012, Wells Fargo filed an Assignment of Bid in the foreclosure action assigning its bid to Federal National Mortgage Association ("FNMA"). [R. 288]. On February 27, 2012, the clerk of court issued a Certificate of Title in FNMA's name. [R. 290].

The Trust entered into a contract to purchase the Unit from FNMA in December 2012. [R. 181]. The closing occurred on January 7, 2013. [R. 189]. As part of the closing, a title commitment was issued that required the Appellants' closing agent to obtain "proof of payment of any Condominium Association liens and/or assessments." [R. 181, 302] The closing agent did not secure a

release/satisfaction of the Association's claim of lien prior to the closing.

This lawsuit ensued eight years later when the Association sent a demand letter to the Appellants seeking to collect assessments that, in part, were due before they purchased the Unit. The lawsuit, as amended twice, was based entirely on an estoppel letter the Appellants claim was issued by the Association. The Appellants asserted that the estoppel letter reflected that there was a zero balance due, which prohibited the Association from collecting any assessments that were due before they bought the Unit. The Appellants claimed that the Association's efforts to effort to collect these past due assessments violated Florida law (§718.303) and was an effort to collect an illegal debt.

In the original Complaint, Appellants sued the Association for violation of Florida Statute §718.303 (Count I) and to Quiet Title/Remove Cloud (the claim of lien)(Count II). [R. 18-19]. The lower court dismissed Count II via order dated October 12, 2021 with leave to amend. [R. 95].

On November 10, 2021, Appellants filed an Amended Complaint. [R. 101]. Count I was identical. Count II purported to state a cause of action for violation of Florida's Unfair and Deceptive Trade Practices Act ("FUDTPA").

On September 12, 2022, the Appellee filed an Answer to the Amended Complaint asserting ten affirmative defenses. [R. 133]. On February 6, 2023, the Appellee filed a Motion for Partial Summary Judgment as to Count II of the Amended Complaint. [R. 140].

On March 17, 2023, Appellants filed a Second Amended Complaint. [R. 178]. The causes of action were identical: Count I (violation of Florida Statute §718.303) and Count II (FUDTPA violation). On March 26, 2023, Appellee filed its Answer which asserted the following affirmative defenses: (1) Appellants have not sustained any damages, (2) statute of limitations, (3) no independent cause of action under Florida Statutes §718.303, (4) failure to state a cause of action, (5) Appellee's conduct did not constitute trade or commerce as defined by FDUPTA, (6) the pursuit of legal remedies is not actionable under FDUTPA, (7) debt collection does not constitute trade or commerce under FDUPTA, (8) failure to investigate/waiver,

(9) the subject claim of lien expired long ago and is not a lien, (10) laches, (11) declaratory and injunctive relief are not available under §718.303, (12) Count I fails to state a cause of action for injunctive relief, (13) the document alleged to be an estoppel is not an estoppel, (14) the estoppel was not authorized by the Association, and (15) neither the Appellants nor their predecessor in interest are/were entitled to safe harbor protections under §718.116. [R. 205].

On April 13, 2023, the Appellee filed a Renewed Motion for Partial Summary Judgment as to Count II. [R. 211]. The Appellants did not file a response to the Appellee's Renewed Motion for Partial Summary Judgment. Instead, on June 14, 2023, Appellants filed a Motion for Summary Judgment as to both counts of the Second Amended Complaint. [R. 218]. On July 3, 2023, the Appellee filed its Response to the Appellants' Motion for Summary Judgment and Cross Motion for Summary Judgment as to Count I of the Second Amended Complaint. [R. 270]

On July 24, 2023, the lower court conducted a special set hearing on the competing summary judgment motions. At the hearing, the lower court heard extensive argument from both sides.

On September 1, 2023, the lower court entered an order denying the Appellants' motion for summary judgment and granting the Appellee's motions for summary judgment. [R. 335] The Order included a detailed analysis of the motions and a well-reasoned basis why the Appellants' motion was denied and the Appellee's motions were granted.

The September 1, 2023 Order included the following findings of fact and conclusions of law:

Fla.Stat.§718.116(1)(g) clarifies that the safe harbor protection only applies to a subsequent holder of a first mortgage. [R. 339, ¶22]

FNMA was not a subsequent holder of Wells Fargo's mortgage. Consequently, based on the express provisions of §718.116, neither FNMA, nor its successors in interest (here, the Appellants) had the right to the safe harbor protections found in §718.116. [R. 339, ¶23]

Further, even if the Appellants were entitled to the safe harbor protections afforded in §718.116, there is no record evidence that Wells Fargo's mortgage was a first mortgage. Without such proof, Appellants' motion should be denied. [R. 339-40, ¶24]

The estoppel had not been properly authenticated. The Appellants had the burden of supplying a proper predicate to admit evidence under an exception to the rule against hearsay. *Yisrael v. State,* 993 So. 2d 952, 956 (Fla. 2008). They did not. Consequently, the estoppel was inadmissible hearsay. [R. 340, ¶26]

The Association presented evidence of a ledger for the Unit from the business records of its prior property manager, Association Management Group. This ledger reflected that as of the date the Appellants took title, the Association was owed $19,717.61. [R. 340, ¶27]

The Association had recorded a claim of lien in the public records well before the Appellants closed on their purchase of the Unit. The satisfaction of any Association lien was a requirement in the Appellants' title commitment. Yet, the Appellants never obtained a satisfaction of the previously recorded claim of lien. As the Appellants were on notice of the claim of lien, any reliance on the estoppel was not justifiable. [R. 340-1, ¶28]

The existence of the recorded claim of lien meant that the Appellants' reliance on the estoppel was not made in "good faith" as required by Fla.Stat.§718.116(8)(c). [R. 341, ¶29]

Based on the findings of fact and conclusions of law, the lower court granted the Appellee's motions and denied the Appellants' motion. [R. 341] On September 14, 2023, the lower court entered a final judgment. [R. 446]

On September 29, 2023, Appellants filed a Motion for Rehearing. [R. 343] After extensive briefing, the Motion for Rehearing was denied by the lower court. [R. 448]. This appeal ensued. [R. 436]

Appellee feels compelled to point out several misstatements in Appellants' Statement of the Case and Facts.

1. Appellants state that the Association "unlawfully" recorded a claim of lien. [IB. 2] This is a legal conclusion. There was no finding in the lower court, or anywhere else for that matter, that the Association's claim of lien was "unlawfully" recorded.

2. Appellants state that the Appellee attached an estoppel letter to its pleadings showing an amount owed as past due assessments of zero. [IB. 2, citing to R. at 155-175] The document at

155-175 of the record is the Appellants' Corrective Motion to File Second Amended Complaint. The estoppel letter referenced in the Initial Brief was attached as exhibit "A" to the Appellants' proposed Second Amended Complaint. The estoppel letter was NOT part of a pleading filed by the Appellee.

3. Appellants state that the Appellee produced an estoppel letter showing no money was owed for past due assessments. [IB. 3, again citing to R. at 155-175]. This is another patently false fact. The Appellee never produced an estoppel letter showing no money was owed for past due assessments.

SUMMARY OF ARGUMENT

The Appellants' case rests entirely on the estoppel letter. The estoppel letter was hearsay. The Appellants did not properly authenticate the estoppel letter or establish any exception to hearsay in the lower court.

The lower court properly determined that the estoppel letter was not admissible. The lower court also properly determined that even if the estoppel letter was admissible, the Appellants could not rely on it in good faith due to numerous red flags.

Without the estoppel letter, the Appellants claims that the Association's debt was illegal and violated Florida law had no evidentiary support. Accordingly, the lower court was correct when it entered summary judgment in the Appellee's favor.

STANDARD OF REVIEW

The standard of review of an order granting final summary judgment is de novo. *Ibarra v. Ross Dress for Less, Inc.*, 350 So. 3d 465, 467 (Fla. 3d DCA 2022). However, the standard of review of a trial court's decision to admit evidence is abuse of discretion. *Jackson v. Household Fin. Corp. III*, 298 So. 3d 531, 535 (Fla. 2020).

As this appeal involves a judgment on competing motions for summary judgment, Appellee feels compelled to point out the burden of proof applicable to summary judgment motions.

Effective May 1, 2021, Florida adopted the federal summary judgment standard. *In Re Amendments to Florida Rule of Civil Procedure 1.510*, 309 So. 3d 192 (Fla. 2020). Pursuant to the new Rule 1.510, a judgment sought must be rendered immediately if the pleadings and summary judgment evidence on file show that there is no genuine issue or dispute as to any material fact and that the

moving party is entitled to a judgment as a matter of law. Fla.R.Civ.P. 1.510(c).

Under the federal standard, a moving party is not required to support its motion with affidavits or other materials negating the opponent's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Instead, the burden on the moving party may be discharged by showing that there was an absence of evidence to support the non-moving party's case. *Id.* at 325. The moving party may support its motion by citing to affidavits or other summary judgment evidence or by showing that (a) the materials cited to do not establish the presence of a genuine dispute or (b) *the adverse party cannot produce admissible evidence to support a fact*. Fed.R.Civ.P. 56. Under the federal standard the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-8 (1986).

If the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then

there is no genuine dispute as to any material fact because "a *complete failure of proof* concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

ARGUMENT

I. THE LOWER COURT PROPERLY DETERMINED THAT THE ESTOPPEL WAS UNAUTHENTICATED HEARSAY

"[A]uthentication or identification of evidence is required as a condition precedent to its admissibility." §90.901, Fla.Stat. Authentication is necessary to establish that matter in question is what its proponent claims. *Daniels v. State*, 634 So. 2d 187, 192 (Fla. 3d DCA 1994).

The party seeking to admit a document in evidence has the burden of supplying a proper predicate to admit the document under an exception to the rule against hearsay. *Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008). If evidence is to be admitted under one of the exceptions to the hearsay rule, it must be offered in *strict compliance* with the requirements of the particular exception. *Yisrael v. State*,

993 So. 2d 952, 957 (Fla. 2008)(document inadmissible where a records custodian did not appear as a witness, the parties did not stipulate to admissibility, and the proponent did not provide a certification under section 90.902(11)).

A trial court has *great latitude* in determining whether the proponent of evidence has met the burden of establishing a prima facie case of authenticity. *Casamassina v. U.S. Life Ins. Co. in City of New York*, 958 So. 2d 1093, 1099 (Fla. 4th DCA 2007); *Jackson v. State,* 979 So. 2d 1153, 1154 (Fla. 5th DCA 2008). The admissibility of evidence is within the sound discretion of the trial court and the trial court's determination will not be disturbed on review absent a clear abuse of that discretion; discretion is abused when the judicial action is arbitrary, fanciful, unreasonable, or when no reasonable person would take the view adopted by the trial court. *Jackson v. State*, 979 So. 2d 1153, 1154 (Fla. 5th DCA 2008). As stated by the Appellants in their Initial Brief, unless *clearly erroneous*, the trial court's determination of admissibility will be sustained. [IB. 7, citing to *Daniels v. State*, 634 So. 2d 187, 192 (Fla. 3d DCA 1994)].

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." §90.801(1)(b), Fla.Stat. Florida's Evidence Code sets forth the general rule that "hearsay" is not admissible except as provided by statute. §90.802, Fla.Stat.

The lower court correctly found that the estoppel letter was hearsay. It was an unsigned letter being used by the Appellants to prove that the Association was not owed any past due assessments at the time the Appellants purchased the Unit. In fact, Appellants do not even try to argue that the estoppel letter is not hearsay. That is because it cannot be disputed that the estoppel letter is hearsay. *See, e.g., 5 Star Builders, Inc., of W.P.B. v. Leone,* 916 So. 2d 1010, 1012 (Fla. 4th DCA 2006)(letters written by attorney to other party regarding harassment of witness were hearsay and not admissible).

So, to be admissible, the estoppel letter must meet a hearsay exception. The Appellants do not express which exception they believe applies. Presumably, the only exception that could apply is the "business records" exception. §90.803(6), Fla.Stat. To be admissible under the business records exception, a proponent must

show that the document was made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such a document, all as shown by the testimony of the custodian or other qualified witness. §90.803(6)(a), Fla.Stat.

Simply stated, the Appellants did not meet their burden of authenticating the estoppel letter. Despite having the opportunity to try to do so, the estoppel letter was not authenticated by any witness. The Appellants deposed the Association's corporate representative, Juan Martinez. Mr. Martinez could not identify the estoppel letter. [A. 2-3]

The Appellants also deposed the corporate representative of the company that managed the Association back in 2012 (AMG), Caridad Kremens. The Appellants *did not show* Ms. Kremens the estoppel letter or ask her *any* questions about it. Ms. Kremens did testify that they would not have issued an estoppel if there was a pending claim of lien against a unit. [A. 5]

Despite having the opportunity to try to authenticate the estoppel letter through these witnesses, the Appellants failed to do so[1]. This is undisputed. Accordingly, the estoppel letter was inadmissible. *See, e.g., 5 Star Builders, Inc., of W.P.B. v. Leone*, 916 So. 2d 1010 (Fla. 4th DCA 2006)(Letters were inadmissible hearsay; neither the sender nor the recipient of the letters testified at trial, and the witness had no direct interest in the outcome of the case); *Tomlinson v. GMAC Mortg.*, 173 So. 3d 1121, 1123 (Fla. 2d DCA 2015)(letter informing property owners that a mortgage account had been transferred from the original lender was hearsay and was not admitted as a business record with a proper foundation).

Instead, Appellants rely on two affidavits that were filed *twenty-eight days after* the lower court order granting summary judgment in the Association's favor and *fifteen days after* the judgment on appeal was entered to support their position that they met their burden of authentication. [IB. 8 citing to R. 343-364] Neither affidavit authenticates the estoppel letter.

[1] Tellingly, the estoppel letter was ***not*** contained in the records produced by Kremens/AMG.

The first affidavit was of Appellant Jake Palter. In his affidavit, Mr. Palter simply states that the estoppel letter was reviewed by him at the closing of the purchase of the Unit and that he relied on it. [R. 359] Mr. Palter did not, and cannot, state who issued the estoppel letter or any other foundational testimony necessary to authenticate the document and lay a foundation for its admission as an exception to the hearsay rule.

The second affidavit was from a lawyer named Neil Milestone. Mr. Milestone averred that the estoppel letter was reviewed prior to the closing on the purchase of the Unit. [R. 361] As with Mr. Palter, Mr. Milestone did not, and cannot, state who issued the estoppel letter or any other foundational testimony necessary to authenticate the document and lay a foundation for its admission as an exception to the hearsay rule.

According to the Appellants, these affidavits authenticated the estoppel letter. They did not. Of course, the Appellants fail to cite to any authority to support their argument that the affidavits authenticated the estoppel letter and laid a foundation for its

admission. Why? Because there is no authority to support that argument. Quite the contrary.

The Appellants were required to both authenticate the estoppel letter and lay a foundation for its admission. *See,* Charles W. Ehrhardt, Florida Evidence, §901.1, at 1288-89 (2019 ed.) (explaining that authentication of an item of evidence does not make it "automatically admissible" and that "after a document has been authenticated," a witness must then "lay the foundation for the admission of a document under a hearsay exception"). The affidavits did not: (1) authenticate the estoppel letter, or (2) lay a foundation for its admission.

Further, as these affidavits were filed post judgment, the lower court (and this Court) should not even consider them. A party should not be allowed to surprise or ambush the other by using previously unidentified evidence to support or defeat a summary judgment motion. *See, Coastal Caribbean Corp. v. Rawlings*, 361 So. 2d 719, 721 (Fla. 4th DCA 1978); *State Farm Mutual Auto. Ins. Co. v. Figler Family Chiropractic, P.A.*, 189 So. 2d 970, 974 (Fla. 4th DCA 2016).

As the estoppel letter was unauthenticated hearsay it could not be considered by the lower court. The lower court's decision was not arbitrary, fanciful, unreasonable, or that no reasonable person would take the view adopted by the trial court. Accordingly, the lower court did not abuse its discretion when it properly ruled that the estoppel letter was not admissible.

Second, the Association had recorded a claim of lien in the public records well before the Appellants closed on their purchase of the Unit. Paragraph 5 of the closing requirements on Appellants' Title Commitment states: "Proof of payment of any Condominium Association liens and/or assessments." [R. 181, 302] Yet, the Appellants never obtained a satisfaction of the previously recorded claim of lien. As the Appellants were on notice of the claim of lien, any reliance on the "estoppel" was not justifiable.

Third, there is unrefuted competent record evidence to support the Association's claim that it was owed a significant amount of money at the time the Appellants purchased the Unit. The Association's property manager at that time was Association Management Group, Inc. ("AMG"). AMG was responsible for collection

of assessments. As part of its responsibilities, AMG maintained ledgers for all unit owner accounts.

The Appellants took the deposition of the owner of AMG, Caridad Kremens. Ms. Kremens produced a multitude of business records at her deposition, one of which was the ledger for the subject Unit. The ledger for the Unit reflects that at the time the Appellants purchased the Unit, the Association was owed $19,717.61. [R. 306]

Assuming the estoppel letter was properly authenticated and could be considered by the lower court, the Appellants could not rely on the estoppel letter for the reasons set forth in Argument III below.

II. THE LOWER COURT WAS EMINENTLY CORRECT WHEN IT RULED THAT THE APPELLANTS DID NOT PROVE THAT THE SAFE HARBOR PROVISIONS OF FLORIDA STATUTES SECTION 718.116 APPLIED TO THEM

Appellants completely and entirely rely on the correctness of their argument that the safe harbor protections found in Florida Statutes §718.116 apply to their predecessor in interest, FNMA. If it doesn't, this Court must affirm.

Here, the Appellants assert that a *first* mortgage was foreclosed by Wells Fargo as servicer for FNMA. [IB. 10] Appellants cite to their

June 14, 2023 Motion for Summary Judgment (R. 218-269) as record evidence of these facts. No more specific record cite is given so it is difficult to determine exactly what part of the Motion for Summary Judgment presumably supports these facts. A review of the Motion for Summary Judgment shows that Appellants statements that a *first* mortgage was being foreclosed by Wells Fargo as servicer for FNMA is pure speculation and without any record support.

The Motion for Summary Judgment attaches a Certificate of Title from the mortgage foreclosure case as Exhibit A. [R. 232] There is nothing in the Certificate of Title that proves the foreclosure was brought by Wells Fargo as servicer of FNMA or that a first mortgage was being foreclosed. The Certificate of Title was issued in the name of FNMA, but that was because Wells Fargo assigned its bid to FNMA as reflected in Exhibit B to the Motion for Summary Judgment. [R. 240]

Exhibit B to the Motion for Summary Judgment included a copy of the final judgment of foreclosure entered in the mortgage foreclosure case. [R. 234] Again, there is nothing in the final

judgment that supports the Appellants' claim that a first mortgage was being foreclosed by Wells Fargo, as servicer for FNMA.

So, the Appellants assertion that the record supports their claim that a first mortgage was being foreclosed by Wells Fargo as servicer for FNMA is false. These "facts" actually have no record support and are speculation, pure and simple.

The subject foreclosure was completed in early 2012. So, the version of Florida Statutes §718.116 that was in effect at that time (2011 version) would apply to the safe harbor analysis. This section clearly provides that the liability of a first mortgagee or its successor or assignees who acquire title to a unit by foreclosure or by deed in lieu of foreclosure for the unpaid assessments that became due before the mortgagee's acquisition of title is limited to the lesser of a (i) twelve months of assessments; or (ii) one percent of the original mortgage debt. Fla.Stat.§718.116(1)(b). Section 718.116 clarifies that the safe harbor protection *only applies to a subsequent holder of the first mortgage*. *See*, Fla.Stat.§718.116(1)(g) ("For purposes of this subsection, the term "successor or assignee" as used with respect to

a first mortgagee includes only a subsequent holder of the first mortgage.").

Wells Fargo assigned its bid to FNMA. Wells Fargo did not assign its note or mortgage to FNMA. FNMA was not a subsequent holder of Wells Fargo's mortgage[2]. Consequently, based on the express provisions of §718.116, neither FNMA, nor its successors in interest (here, the Appellants) had the right to the safe harbor protections found in §718.116.

The case of *Bay Holdings, Inc. v. 2000 Island Boulevard Condo. Ass'n,* 895 So. 2d 1197 (Fla. 3d DCA 2005) is instructive on this issue. In *Bay Holdings*, a bank obtained a final judgment of foreclosure of a first mortgage on a condominium located in Miami-Dade County, Florida. *Id.* at 1197. The bank assigned the judgment to its wholly owned subsidiary. *Id.* The lower court ruled that the wholly owned subsidiary was not entitled to the safe harbor protections because "the statute clearly and unambiguously affords

[2] Further, any attempt to assign the note and mortgage after the final judgment of foreclosure was entered would be futile because the note and mortgage merge into the foreclosure judgment. *See, Aluia v. Dyck-O'Neal, Inc.*, 205 So. 3d 768, 774 (Fla. 2d DCA 2016).

this safe harbor only to first mortgagees or a subsequent holder of the first mortgage." *Id.* (emphasis supplied). The appellate court refused to add words to the statute that were not placed there by the Legislature. *Id.*

Here, there is not even an assignment of the final judgment of foreclosure, only the bid. The *Bay Holdings* ruling clearly supports the Association's position that FNMA was not entitled to safe harbor protections. Neither are the Appellants.

The case of *Bermuda Dunes Private Residences v. Bank of America*, 133 So. 3d 609 (Fla. 5th DCA 2014) is instructive on this point. Therein, the appellate court reversed summary judgment in favor of a bank because it failed to carry its burden of establishing no genuine issue of material fact existed:

> [A]lthough Bank of America argued below that it took title to the condominium unit through foreclosure as the first mortgagee based upon its assertion that it merely assigned to Federal Home Mortgage Corporation the right to service the mortgage, it did not carry its burden of presenting evidence of such. The assignment of mortgage simply reveals that Bank of America assigned the mortgage and note to Federal Home Mortgage Corporation, including all of the attendant rights and obligations. The key is who had rights and obligations under the mortgage at the time of foreclosure, whether as a first mortgagee or as a successor

> or assignee. If that entity takes title to the condominium unit by foreclosure, its liability for unpaid, past-due assessments is limited pursuant to section 718.116(1)(b) 1. Here, based upon the record evidence, the entity having rights and obligations under the mortgage at the time of foreclosure was Federal Home Loan Mortgage Corporation as assignee of the mortgage, not Bank of America. **Although Bank of America took title to the condominium unit by foreclosure, the record does not show that it did so as first mortgagee**.
> *Id.* at 615 (emphasis added).

The appellate court went on to say: "To say that Bank of America had not "dotted their i's and crossed their t's" in making a record to support judgment in their favor is an understatement. It was error to enter summary final judgment in favor of Bank of America." *Id.* at 616. To put it mildly, the same can be said here.

Lastly, even if the Wells Fargo mortgage was a first mortgage, FNMA was not, by definition, a subsequent holder of the first mortgage. *See, Bay Holdings*. They were the assignee of Wells Fargo's bid rights, post judgment.

For these reasons, the lower court correctly ruled that the Appellants were not entitled to the safe harbor protections.

III. THE LOWER COURT WAS EMINENTLY CORRECT WHEN IT RULED THAT THE APPELLEE DID NOT WAIVE THE RIGHT TO COLLECT PAST DUE AMOUNTS

Appellants argue that the Appellee waived its right to collect the past due assessments because it issued an estoppel certificate that did not reflect the past due amounts. [IB. 10] Appellants rely on Florida Statute §718.116(8)(c) to support this argument.

Florida law requires that a party relying on an estoppel must do so in "good faith." More specifically, Florida Statute §718.116(8)(c) states:

> An association waives the right to collect any moneys owed in excess of the amounts specified in the estoppel certificate from any person who *in good faith* relies upon the estoppel certificate and from the person's successors and assigns.(emphasis added)

Here, Appellants argue that they relied on the estoppel letter in good faith. [IB. 11] The only record evidence the Appellants cite to in support of this statement are the self-serving post judgment affidavits of Palter and Milestone. [IB. 11, R. 343-364] The Appellants do not cite to a single case to support their argument.

There are a multitude of problems with this argument. The threshold problem is the fact that there is *no record evidence* that the Association issued an estoppel certificate. The estoppel letter the Appellants repeatedly refer to and rely on was unauthenticated inadmissible hearsay. See Argument I above.

Assuming, arguendo, that the estoppel letter was somehow properly authenticated and the proper foundation for its admission was laid (of which neither occurred), the record evidence showed that the Appellants, as a matter of law, did not rely on the estoppel letter in good faith, despite their self-serving statements to the contrary.

As previously stated, the lower court could not consider affidavits filed after the final judgment was entered. Further, a close examination of these affidavits shows that neither Palter nor Milestone knew where the estoppel letter came from or who issued it. They simply say:

Palter: "At the time of the closing, the estoppel letter, HUD and other closing documents were reviewed were relied [sic] on by me in the purchase of the condominium unit…" [R. 359]

Milestone: "I have reviewed this file and can attest that the Estoppel Letter, HUD and other closing documents were reviewed prior to closing and were relied on by Plaintiff in the purchase of the condominium…" [R. 361]

Moreover, Milestone's statement that Palter relied on the estoppel letter is rank hearsay and speculation.

As the lower court correctly determined, the Appellants could not blindly rely on the estoppel letter. The Association's property manager at that time the Appellants purchased the Unit was Association Management Group, Inc. ("AMG"). [A. 6] AMG was responsible for collection of assessments. As part of its responsibilities, AMG maintained ledgers for all unit owner accounts. [A. 7-8]

The Appellants took the deposition of the owner of AMG, Caridad Kremens. Ms. Kremens produced a multitude of business records at her deposition, one of which was the ledger for the subject Unit. [R. 306] The ledger for the Unit reflects that at the time the Appellants purchased the Unit, the Association was owed $19,717.61. [R. 306] Tellingly, the estoppel letter referenced by the

Appellants was not contained in the records produced by Kremens/AMG.

Further, the Association had recorded a claim of lien in the public records well before the Appellants closed on their purchase of the Unit. [R. 192] So, the Appellants were on constructive notice of the Association's claim of past due assessments. *See*, Fla.Stat.§695.11.

Besides constructive notice, the Appellants were on notice to look for and satisfy any claim of lien recorded by the Association. Paragraph 5 of the closing requirements on Appellants' Title Commitment stated: "Proof of payment of any Condominium Association liens and/or assessments." [R. 302] Yet, the Appellants never obtained a satisfaction of the previously recorded claim of lien.

As the Appellants were on notice of the claim of lien, any reliance on the estoppel letter was not justified or in "good faith." *See, e.g., Metro. Dade Cnty. v. Fontainebleau Gas & Wash, Inc.*, 570 So. 2d 1006, 1008 (Fla. 3d DCA 1990); *See, also, Kester v. Bostwick*, 153 Fla. 437, 15 So. 2d 201 (1943)(Where landowner put purchaser of tax deed on notice of owner's claim before purchaser took possession and

repeatedly warned purchaser that tax deed was void, purchaser could not rely on good faith as a defense to owner's claim to mesne profits in subsequent ejectment action).

Lastly, even if the lower court considered the estoppel letter, it does not state that "zero" is owed. Instead, the lines for past due amounts are blank. This, along with the recorded claim of lien and title commitment requirement, should have put the Appellants on notice to inquire further. They didn't.

For these reasons, the lower court was correct when it found that the Appellants were not entitled to the benefit of the §718.116(8)(c) waiver.

CONCLUSION

The lower court was eminently correct when it entered the judgment on appeal. The Appellants' entire case rested on the estoppel letter, which was inadmissible hearsay. Despite having ample opportunity to try to authenticate the estoppel letter and lay the foundation for its admission, the Appellants could not, and did not, do so. Without the estoppel letter, the Appellants case falls like a house of cards.

Even if the estoppel letter was admissible, the Appellants did not have the right to blindly rely on it and ignore numerous red flags casting doubt as to its accuracy. They should have, but did not, inquire further. Had they done so, we would not be here.

Accordingly, Appellee respectfully requests that this Honorable Court affirm the judgment below and award it attorneys' fees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of the Third District Court of Appeal by using the Florida Courts e-Filing Portal and served by using the Florida Courts e-Filing Portal to Arianna M. Mendez, Esq. [amendez@amendezlaw.com, litigation@amendezlaw.com] on June 26, 2024.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the above-styled Brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a), in that it contains Bookman Old Style 14 point font and does not exceed 13,000 words or 50 pages.

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