IN THE DISTRICT COURT OF THE STATE OF FLORIDA,
FOURTH DISTRICT

142 CWELT-2007 LLC, Appellant, v. US BANK NATIONAL ASSOCIATION, AS LEGAL TITLE TRUSTEE FOR TRUMAN SC6 TITLE TRUST, ET AL., Appellees.	Case No.: 4D23-1688 L.T. Case No.: 2018-CA-007245

On Appeal from a Final Order of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida

APPELLANT'S INITIAL BRIEF

BUSHELL LAW, P.A.[1]
1451 W. Cypress Creek Road
Suite 300
Fort Lauderdale, Florida 33309
Phone: 954-666-0220
dan@bushellappellatelaw.com

Counsel for Appellant

[1] This Initial Brief was primarily drafted by Polaris Legal Group, which previously represented Appellant but has abandoned the representation.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Rules

STATEMENT OF THE CASE

Appellant 142 CWELT-2007 LLC (the Homeowner) appeals a Final Judgment of Foreclosure entered in favor of US Bank National Association, as Legal Title Trustee for Truman SC6 Title Trust, (US Bank). It raises unique issues as to whether certain real property was inadvertently omitted from a mortgage and whether a purchaser in good faith who takes title to the propery prior to a reformation of a mortgage may challenge that reformation to the extent it affects the property it purchased.

In June 2018, US Bank filed a three-count complaint. It asserted purported causes of action for (1) reformation of mortgage (Count I); (2) foreclosure of the reformed and modified mortgage (Count II); and (3) declaratory relief (Count III). R.10. [2] Only Counts I and II are at issue in this appeal.

In its amended complaint, US Bank sought to foreclose the mortgage as modified and reformed and did not assert an alternate claim to foreclose the mortgage absent the modification or reformation. See id. There was no dispute that the mortgage at issue identifies two distinct properties, one identified by a street address

[2] "R.__" refers to the page number in the Record on Appeal prepared and transmitted to this Court by the Clerk of the Circuit Court.

and another identified by a legal description for a property that does not match the property located at the street address, and that reformation was required for foreclosure.

In its answer, the Homeowner contested the reformation of mortgage claim for multiple reasons:

(1) the Homeowner had standing to challenge the validity of the mortgage at issue because it is facially invalid as there is a Defective/Insufficient Property Description in the Mortgage (See the Homeowner's Answer, Tenth Affirmative Defense.)

(2) US Bank's reformation of mortgage claim was barred by the statute of limitations. (Twenty-sixth Affirmative Defense.)

(3) US Bank failed to state a cause of action for mortgage reformation because it had an adequate remedy at law. (Fifth Affirmative Defense.)

(4) A mortgage cannot be reformed where doing so prejudices a person or entity that acquired legal rights before the reformation occurred. (Twelfth Affirmative Defense.)

(5) US Bank's claim to foreclose the reformed and modified mortgage was barred because US Bank's loan modification was an unrecorded interest that was foreclosed by the lis

pendens statute, section 48.23. (Twenty-seventh Affirmative Defense.)

(6) The Mortgage, as Modified by the Loan Modification, was Not Enforceable for Failure to Pay Intangible and Documentary Taxes on the Loan Modification (Thirteenth Affirmative Defense.)

On these bases, the Homeowner prayed that judgment be entered in its favor on as to Counts I and II.

STATEMENT OF THE FACTS

A. *The Mortgage*

Nixon and Kelene Alexis (the "Borrowers") executed the mortgage at issue, which was then recorded on September 7, 2007 in Official Records Book 22091, Page 1175 of the Public Records of Palm Beach County, Florida. (Tr. at .)[3] (Mortgage, Pltf Ex. 5.)[4] The parties intended the mortgage to encumber the property located at 142 Lancaster Road, which had a legal description of "Lot 142 of Carriage Pointe Townhomes." The mortgage identified the encumbered property by the correct street address for that property

[3] "Tr." refers to the transcript of the May 8, 2023 trial.

[4] "Pltf. Ex." refers to US Bank's Exhibit that was entered into evidence at trial.

but the legal description of the encumbered property described a different parcel than the property identified by the street address. Id.

At that time that the Borrowers entered into the promissory note and mortgage, they owned both properties described in the mortgage: the one located at 142 Lancaster Road, Boynton Beach, Florida with a legal description of "Lot 142 of Carriage Pointe Townhomes" and the other located at 6801 Lake Worth Rd, Suite 109, Lake Worth, Florida with a legal description of "Lot 71 of Strawberry Lakes Plat 1." (See, Deeds, Pltf. Ex. 1 and Dft Ex. A)[5]

B. The 2009 Foreclosure Action

In 2009, a prior foreclosure action was filed in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida and assigned Case No. 2009CA033227XXXXMB (the "2009 Action"). (Pltf. Ex. 18 & 22.) On June 22, 2010, the circuit court entered a Final Judgment of Mortgage Foreclosure in the 2009 Action, in which it purported to reform the mortgage:

> 11. The Court finds there was a mistake in the legal Description contained in the MORTGAGE recorded in Official Records Book 22091 at Page 1175 of the Public Records of PALM BEACH County, Florida.

[5] "Pltf. Ex." refers to US Bank's Exhibit that was entered into evidence at trial.

> 12. The court finds it was the intent of the original mortgagee, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INCORPORATED AS NOMINEE FOR HOMEFIELD FINANCIAL, INC. and NIXON ALEXIS AND KELENE ALEXIS to give a mortgage lien on the following described property located in PALM BEACH County:
>
> > LOT 142, CARRIAGE POINTE TOWNHOMES, A P.U.D., ACCORDING TO THE PLAT THEREOF, RECORDED IN PLAT BOOK 102, PAGE 125, OF THE PUBLIC RECORDS OF PALM BEACH COUNTY, FLORIDA.
>
> 13. The court finds the above-described legal description is the correct legal description that should have been used in the MORTGAGE.
>
> 14. The legal description contained in the MORTGAGE recorded in Official Records Book22091 at Page 1175 of the Public Records of PALM BEACH County, Florida is hereby reformed, Nunc Pro Tune to September 7, 2007 to be: LOT 142, CARRIAGE POINTE TOWNHOMES, A P.U.D., ACCORDING TO THE PLAT THEREOF, RECORDED IN PLAT BOOK 102, PAGE 125, OF THE PUBLIC RECORDS OF PALM BEACH COUNTY, FLORIDA.

(Pltf. Ex. 21.)

However, that final judgment was vacated by an order entered October 20, 2011. (Pltf. Ex. 24.)

C. <u>The Loan Modification</u>

The mortgage was modified in 2011 by a loan modification agreement. (Pltf. Ex. 6.) The agreement purported to increase the

principal balance and changed the interest rate terms. Id. However, the loan modification is not recorded in Palm Beach County's Official Records. Id.

D. The HOA Action

On or about June 13, 2012, Carriage Pointe Homeowners Association, Inc. (the "HOA"), commenced a lien foreclosure action in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, which was assigned Case Number: 50-2012-CC-008093-XXXXMB (the "HOA Action"). (See, HOA Action Docket in Evidence.) (See also, Dft. Req. for Jud. Ntc., Ex. N.) In connection with the HOA Action, on or about June 27, 2012, the HOA recorded a lis pendens (the "Lis Pendens") against the Carriage Pointe property. (See, HOA Lis Pendens in Evidence.) (See also, Dft. Req. for Jud. Ntc., Ex. O.)

While the HOA Action was pending, the Lis Pendens was never dissolved and did not expire according to Florida Statute § 48.23. (See, HOA Docket.) On or about April 24, 2013, the HOA obtained a Final Judgment of Foreclosure, which was recorded on April 29, 2013. (Pltf. Ex. 25.)

Pursuant to the Final Judgment, the Carriage Pointe property was sold on April 1, 2011, with a Certificate of Sale docketed by the

Clerk of the Circuit Court on April 2, 2011. On October 17, 2013, the Clerk of the Circuit Court recorded a Certificate of Title. (Pltf. Ex. 26.). The Homeowner took title to the Carriage Pointe property pursuant to that Certificate of Title.

SUMMARY OF THE ARGUMENT

The trial court erred in denying the Homeowner's motion for involuntary dismissal and entering judgment in favor of US Bank for multiple reasons.

Initially, the mortgage contains a patent ambiguity in describing two different properties. That patent ambiguity renders the lien void.

At a minimum, reformation was required before foreclosure could occur. But reformation was precluded as a matter of law.

First, Florida law imposes a five-year statute of limitations for reformation causes of action. And US Bank filed this case in 2018, eleven years after the mortgage was executed, well beyond the five-year statute of limitations.

Second, the trial court should have dismissed the reformation claim because reformation is only available when there is no adequate remedy at law. US Bank failed to show it had no adequate

remedy at law and cannot make such a showing because it has adequate remedies at law.

Third, reformation is impermissible where it prejudices a third party that acquired an interest in an affected property before reformation. It also cannot affect the priority of the third party's interest in the property acquired prior to the reformation.

Fourth, US Bank's interest in the property by virtue of the modification agreement was unrecorded at the time of entry of the final judgment in the HOA Action. As a matter of law, the judgment in the HOA Action extinguished all unrecorded interests, including US Bank's interest.

Finally, section 201.08(1)(b), Florida Statutes, makes modifications unenforceable where documentary tax has not been paid. Because documentary tax was not paid on US Bank's modification, the trial court erred in enforcing it.

ARGUMENT

I. Standards of Review

A. The Trial Court's Application of the Hearsay Rule is Reviewed De Novo

Generally, appellate courts review a trial court's ruling on the admissibility of evidence under an abuse of discretion standard. See, e.g., Sas v. Fed. Nat'l Mortg. Ass'n, 112 So. 3d 778, 779 (Fla. 2d DCA 2013). However, a "[trial] court's discretion is limited by the evidence code and applicable case law. A [trial] court's erroneous interpretation of these authorities is subject to *de novo* review." Bank of Am., N.A. v. Delgado, 166 So. 3d 857, 860 (Fla. 3d DCA 2015), (quoting Olesky ex rel. Estate of Olesky v. Stapleton, 123 So. 3d 592, 594 (Fla. 2d DCA 2013)). Where the issue is the correctness of the trial court's interpretation of the law in making an evidentiary ruling, the appellate court's review is *de novo*. Bank of Am., N.A. v. Delgado, 166 So. 3d 857, 860 (Fla. 3d DCA 2015).

B. The Standard of Review of US Bank's Standing is De Novo

The determination of whether a plaintiff has standing is a legal issue subject to *de novo* appellate review. Citibank, N.A. v. Olsak, 208 So.3d 227, 229 (Fla. 3d DCA 2016), citing Reynolds v. Nationstar Loan Servs., LLC, 190 So.3d 219, 221 (Fla. 4th DCA 2016). The trial

court's factual findings are reviewed for competent, substantial evidence. Verneret v. Foreclosure Advisors, LLC, 45 So. 3d 889, 891 (Fla. 3d DCA 2010).

No witness, including a purported expert, are may permissibly testify to a legal conclusion. See Palm Beach Cty. v. Town of Palm Beach, 426 So.2d 1063, 1070 (Fla. 4th DCA 1983) ("Regardless of the expertise of the witness, generally, and his familiarity with legal concepts relating to his specific field of expertise, it is not the function of the expert witness to draw legal conclusions. That determination is reserved to the trial court."). Testimony that amounts to a legal conclusion is inadmissible because the determination of such questions is exclusively within the court's province. Thundereal Corp. v. Sterling, 368 So.2d 923, 928 (Fla. 1st DCA 1979). It is reversible error for a trial judge to rely on expert testimony to determine a question of law. Devin v. City of Hollywood, 351 So.2d 1022, 1026 (Fla. 4th DCA 1976).

C. There is No Presumption that a Trial Court Disregarded Erroneously Admitted Evidence in Reaching Its Decision, but Rather that It Was Considered and Resulted in Harmless Error

While there is an initial presumption that trial judges in non-jury cases base their decisions upon admissible evidence and have

disregarded inadmissible evidence, "[t]he appellate court should **not** presume that the trial court disregarded all improperly admitted evidence where the record reflects that the evidence was admitted over objection." Petion v. State, 48 So. 3d 726, 735 (Fla. 2010) (emphasis in original) (ruling the district court erroneously concluded that the presumption was not overcome where evidence admitted over objection). Instead, where a trial court expressly admits evidence over objection, "the trial court must make an express statement on the record that the erroneously admitted evidence did not contribute to the final determination. Otherwise, the appellate court cannot presume that the trial court disregarded evidence which was specifically admitted as proper." Id.

II. Because the Mortgage Fails to Sufficiently Identify the Property Encumbered, the Trial Court Erred in Holding that the Homeowner Took Title Subject to the Unreformed Mortgage.

The parties do not dispute that the mortgage fails to sufficiently identify the property encumbered and must be reformed in order to be enforced against the property. As the Third District Court of Appeal has explained, "the lien of a mortgage encompasses the property described in the mortgage. Thus, for a mortgage to create a valid lien, the mortgage must contain a sufficient description of the

property to enable the parties to ascertain and locate the property affected by the lien." Heartwood 2, LLC v. Dori, 208 So.3d 817, 821 (Fla. 3d DCA 2017) (citation omitted); see also § 697.02, Fla. Stat. (2014) ("A mortgage shall be held to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession.").

"Florida courts have repeatedly held descriptions of property in mortgages sufficient despite **minor** mistakes and irregularities where the description of the property intended to be encumbered could be determined from a review of the **entire** instrument." Regions Bank v. Deluca, 97 So.3d 879, 884–85 (Fla. 2d DCA 2012). In Deluca, the court noted that the mortgage at issue had a blank space where the legal description was to be written but included an Exhibit A, that *had the correct legal description* and an indication that 2 parcels were encumbered by the mortgage. Therefore, reformation was not even at issue in Deluca. The Deluca court found that when read in its entirety, Exhibit A made it clear that the mortgage encumbered two properties. Id. At 884.

In Deluca, the mortgage referenced two separate parcels but when read in its entirety, the mortgage made it clear that it was the intent to mortgage two separate parcels. While the mortgage here

also references two separate parcels, nothing in the mortgage suggests that both properties were encumbered by the mortgage and, therefore, the mortgage is facially invalid and has a patent ambiguity

This Court has offered guidance in determining the sufficiency of property descriptions:

> [T]he rule is that a description is sufficient if, by relying on the description read in light of all facts and circumstances referred to in the instrument, a surveyor could locate the land. Following this rule, Florida courts have upheld conveyances that identified the subject properties by their street addresses, or by designations commonly understood in the communities in which the properties were located, and by such seemingly imprecise language as "my forty near the Garrison lands, in Hernando County."

Salam v. U.S. Bank National Association, 233 So.3d 473, 475-476 (Fla. 4th DCA 2017) (internal citations omitted). But the Salam court made clear that where the mortgage is ambiguous as to the property it encumbers, it is void: "On the other hand, if the instrument's description of the property is patently ambiguous, and the instrument furnishes no other information from which the parties' intention can be gleaned, the attempted conveyance is void, and parole evidence may not be employed to cure the deficiency." Id.

The Salam court held that where--as here--the instrument at

issue gave two inconsistent legal descriptions describing two separate parcels, in the absence of other language **in the instrument showing the grantor's intent** as to which parcel was to be conveyed, the deed was void. Id. at 476 (citing Carson v. Palmer, 139 Fla. 570, 190 So. 720 (Fla. 1939)).

To be sufficient, the deed or other instrument must describe the property such that it is evident that a particular parcel, and not a different or unspecified one. Mendelson v. Great Western Bank, F.S.B., 712 So.2d 1194 (Fla. 2d DCA 1998). Where, as here, the street address points to one property and the legal description identifies a different one, there is a patent ambiguity. And as this Court has held, a patent ambiguity renders the instrument void.

Here, there is nothing in the mortgage that allows one to determine which parcel was the intended parcel. It merely describes the mortgaged property by one reference to a street address and a second reference to a legal description, but both are separate parcels. The evidence further shows that the borrowers owned both properties described.

Where, as here, the mortgage describes two separate and distinct properties, it contains a patent ambiguity. The patent ambiguity rendered the lien void. And at a minimum, reformation

was necessary before foreclosure could occur. But reformation was impermissible under the circumstances.

A. The Homeowner has standing to challenge the validity of the mortgage because it is facially invalid

Where, as here, the Homeowner acquired title of the property **before** the filing of a foreclosure complaint and notice of lis pendens, the title holder is an indispensable party to the foreclosure and that status confers on the title holder the standing to contest the foreclosure proceeding. See, 3709 N. Flagler Drive Prodigy Land Trust v. Bank of America, N.A., 226 So.3d 1040 (Fla. 4th DCA 2017) (reversing and remanding where party who acquired title before foreclosure action filed was not permitted to contest foreclosure). After discovering that a trust obtained title to property **before** the filing of a foreclosure complaint and lis pendens, and thus was an indispensable party to the foreclosure action, the Fourth District framed the issue as follows:

> The question, then, is whether appellant Trust can assert the affirmative defense of lack of standing to bring the foreclosure proceeding. The Trust obtained title to the property subject to the mortgage, no doubt. Such a purchaser is estopped from contesting a mortgage which is valid on its face. See Eurovest, Ltd. v. Segall, 528 So.2d 482, 483 (Fla. 3d DCA 1988). but contesting standing of a plaintiff to bring a

> foreclosure action is ***not*** contesting the validity of the mortgage itself. Further, if the plaintiff does not have standing, it is not entitled to enforce the note and foreclose on the property. Standing in a foreclosure proceeding requires the plaintiff to show that it is the holder or is in possession of the note at the time of filing suit. See Caraccia v. U.S. Bank, Nat'l Ass'n, 185 So.3d 1277, 1279 (Fla. 4th DCA 2016). **A subsequent Titleholder may contest the plaintiff's standing to foreclose on the mortgage to the extent that there is no prejudicial delay to the proceedings occasioned by any transfer of ownership during the pending process. A subsequent purchaser has an interest in assuring that the foreclosing plaintiff actually has the authority to bring the suit and is entitled to raise such a defense so long as they do not cause unreasonable delay to any ongoing proceedings. To hold otherwise would allow a stranger to the note and mortgage to foreclose on the property, and a subsequent purchaser would never have the ability to defend against the taking of a bona fide interest in the property through a foreclosure sale.**

Id. at 1042. (Emphasis added.) Following this case, the Third District addressed the ability of a titleholder to raise a statute of limitations defense in Wilmington Trust, N.A. v. Alvarez, 239 So.3d 1265 (Fla. 3d DCA Mar. 14 2018). In Wilmington, the court expressly rejected a bank's assertion that a titleholder lacked standing to raise the affirmative defense that the instant claim is barred by the statute of limitations. 239 So.3d at 1266, citing 3709 N. Flagler Drive, 226

So.3d 1040 (Fla. 4th DCA 2017).

Any reliance on Pealer is misplaced. As the Third District pointed out,

> Pealer was a *per curiam* affirmance with a special concurring opinion that was not joined by the other panel members. Concurring opinions, of course, have no precedential value. See Miller v. State, 980 So.2d 1092, 1094 (Fla. 2d DCA 2008). Absent a conflict, and because this Court had no binding precedent on this issue, the predecessor judge was duty bound to follow the Fourth District's decision in 3709 N. Flagler. See Pardo v. State, 596 So.2d 665, 666 (Fla. 1992) ("[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts."); Miller, 980 So.2d at 1094. The trial court's failure to follow 3709 N. Flagler resulted in the erroneous striking of Benzrent's responsive pleading.

Benzrent 1, LLC v. Wilmington Savings Fund Society, FSB, 273 So.3d 107, 110 (Fla. 3d DCA 2019)

Thus, while the Pealer Court may have a conflicting or more limited view, the 3709 N. Flagler is a Fourth District Court decision and is dated August 30, 2017, over five months after the Second District's March 17, 2017 opinion in Pealer and, therefore, it is controlling.

Even so, the Pealer decision is inapplicable to the facts *sub judice* because unlike here, Pealer's interest was subordinate to the

bank's interest as the Pealer court pointed out, "[I]f a recorded mortgage is valid on its face, a subsequent purchaser 'is assumed to have recognized it as a valid lien against the property which he is buying.'" Pealer, 212 So.3d at 1138, citing CCM Pathfinder Palm Harbor Mgmt., LLC v. Unknown Heirs of Gendron, 198 So.3d 3, 7 (Fla. 2d DCA), quoting Spinney v. Winter Park Bldg. & Loan Ass'n, 120 Fla. 453, 162 So. 899, 904 (Fla. 1935), review denied sub nom. Thebeau v. CCM Pathfinder Palm Harbor Mgmt., LLC, 192 So.3d 45 (Fla. 2015).

Unlike Pealer, the mortgage at issue here is facially defective because, by Wells Fargo's own assertion, it fails to sufficiently describe the property being encumbered. See, e.g., Salam v. U.S. Bank National Association, 233 So.3d 473 (Fla. 4th DCA 2017). In Salam, the Fourth District examined the sufficiency of the description of property:

> "[T]he lien of a mortgage encompasses the property described in the mortgage. Thus, **for a mortgage to create a valid lien, the mortgage must contain a sufficient description of the property to enable the parties to ascertain and locate the property affected by the lien**." Heartwood 2, LLC v. Dori, 208 So.3d 817, 821 (Fla. 3d DCA 2017) (citation omitted); see also § 697.02, Fla. Stat. (2014) evidence was admissible to identify the property. Id.

* * *

We can also find guidance in cases involving the sufficiency of property descriptions in deeds. In Mendelson v. Great Western Bank, F.S.B., 712 So.2d 1194 (Fla. 2d DCA 1998), the court summarized our courts' holdings:

To affect a valid conveyance of real property, a deed or other instrument must describe the property such that it is evident that a particular parcel, and not a different or unspecified one, is to be conveyed. See Simons v. Tobin, 89 Fla. 321, 104 So. 583 (1925); Lente v. Clarke, 22 Fla. 515, 1 So. 149 (1886). Florida follows a liberal policy in this regard. See Mitchell v. Moore, 152 Fla. 843, 13 So.2d 314 (1943). The rule is that a description is sufficient if, by relying on the description read in light of all facts and circumstances referred to in the instrument, a surveyor could locate the land. See Burns v. Campbell, 131 Fla. 630, 180 So. 46 (1938); Bajrangi v. Magnethel Enterprises, Inc., 589 So.2d 416 (Fla. 5th DCA 1991).

* * *

On the other hand, if the instrument's description of the property is patently ambiguous, and the instrument furnishes no other information from which the parties' intention can be gleaned, the attempted conveyance is void, and parol evidence may not be employed to cure the deficiency. **For example, in Carson v. Palmer, 139 Fla. 570, 190 So. 720 (1939), the deed at issue gave two inconsistent legal descriptions, describing two separate parcels. Our supreme court held that, in the absence of other language in the instrument showing the grantor's intent as to which parcel was to be conveyed, the deed was void.**

233 So.3d at 475-476.

Following Carson v. Palmer, 190 So. 720 (Fla. 1939), and since the mortgage lien recorded in public records gave two a description for two inconsistent properties, one by the legal description and one by the address, in the absence of other language in the mortgage showing the intent of which parcel was to be encumbered, the mortgage is facially defective and void. Id.

Here, like the description in Carson v. Palmer, points to two separate parcels. Absent other language in the mortgage showing the grantor intent as to which parcel it was, the mortgage is void and does not constitute valid lien against either property.

Since the mortgage at issue does not constitute a valid lien against the property, when the Homeowner purchased the property in 2013, it did not take title subject to the mortgage.

Even so, the Pealer decision is inapplicable to the facts *sub judice* because unlike here, Pealer's interest was subordinate to the bank's interest as the Pealer court pointed out, "[I]f a **recorded mortgage is valid on its face**, a subsequent purchaser 'is assumed to have recognized it as a valid lien against the property which he is buying.'" Pealer, 212 So.3d at 1138, citing CCM Pathfinder Palm Harbor Mgmt., LLC v. Unknown Heirs of Gendron, 198 So.3d 3, 7 (Fla. 2d DCA), quoting Spinney v. Winter Park Bldg. & Loan Ass'n,

120 Fla. 453, 162 So. 899, 904 (Fla. 1935), review denied sub nom. Thebeau v. CCM Pathfinder Palm Harbor Mgmt., LLC, 192 So.3d 45 (Fla. 2015). Furthermore, Pealer did not involve a defense of statute of limitations raised against a reformation count.

B. US Bank's Reformation of Mortgage Claim is Barred by the Applicable Statute of Limitations.

Count I is an equitable action seeking reformation of the mortgage, a written contract and, therefore, is subject to a five-year limitations period." Fla. Stat. § 95.11(2). A reformation action is a claim that sounds in equity. See, e.g., Providence Square Ass'n v. Biancardi, 507 So. 2d 1366, 1369 (Fla. 1987) ("A court of equity has the power to reform a written instrument where, due to a mutual mistake, the instrument as drawn does not accurately express the true intention or agreement of the parties to the instrument."); Resort of Indian Spring, Inc. v. Indian Spring Country Club, Inc., 747 So. 2d 974, 976-77 (Fla. 4th DCA 1999) ("In an equitable action for reformation of a contract, the plaintiff must prove by clear and convincing evidence that a mutual mistake occurred to overcome the strong presumption that a contract expresses the intent of the parties." (citing Canal Ins. Co. v. Hartford Ins. Co., 415 So. 2d 1295, 1297 (Fla. 1st DCA 1982))). but section 95.11(2)(b) covers both legal

and equitable actions, so that poses no impediment. No case cited by US Bank supplants the plain meaning and application of section 95.11(2)(b) to the reformation claim.

Section 95.11(2)(b), Florida Statutes, provides a five-year statute of limitations for reformation actions:

> 95.11 Limitations other than for the recovery of real property.—Actions other than for recovery of real property shall be commenced as follows:
>
> * * *
>
> (2) WITHIN FIVE YEARS.—
>
> * * *
>
> (b) A legal or equitable action on a contract, obligation, or liability founded on a written instrument, except for an action to enforce a claim against a payment bond, which shall be governed by the applicable provisions of paragraph (5)(e), s. 255.05(10), s. 337.18(1), or s. 713.23(1)(e), and except for an action for a deficiency judgment governed by paragraph (5)(h).

As such, the applicable limitations period for a reformation of mortgage claim is five years. Indeed, this Court has expressly recognized that the five-year statute of limitations applies to reformation claims. See Ryan v. Lobo De Gonzalez, 841 So.2d 510 (Fla. 4th DCA 2003), citing § 95.11(2)(b), Fla. Stat. See, also, Hogg v. Villages of Bloomingdale I Homeowners Association, Inc., 357 So.3d 1271 (Fla. 2d DCA 2023) (finding homeowner's Association's action

seeking to reform declarations so as to include subsequent phases of community was an action founded on a written instrument and thus was subject to five-year statute of limitations governing legal or equitable actions on a contract, obligation, or liability founded on a written instrument.) See, also, Simony v. Fifth Third Mortg. Co., 2014 WL 5420796 (M.D. Fla. 2014) ("Count I is an equitable action seeking reformation of a written contract and, therefore, is subject to a five-year limitations period. Fla. Stat. § 95.11(2).")

A statute of limitations defense to a reformation of mortgage claim is not a challenge to the validity of the underlying mortgage but, rather, merely a recognition that the time period within which a claim may be brought to reform a mortgage has expired. As the evidence demonstrates, the mortgage was recorded in 2007. As shown by the 2009 Action, the bank knew of the alleged mistake and its need to reform the mortgage. Despite this, the final judgment that granted reformation was vacated in its entirety. the Homeowner did not take title to the property until 2013-more than six years after the mortgage was recorded, and at a time when a reformation claim was barred by the applicable statute of limitations.

Where, as here, a party purchases a property after the expiration of the limitations period, that party does not take title

subject to the mortgage and has standing to raise the limitations defense. Zlinkoff v. Von Aldenbruck, 765 So.2d 840 (4th DCA 2000) In Zlinkoff, the court allowed a subsequent purchaser to raise a statute of limitations defense even where the borrower had executed an agreement extending the maturity date of the mortgage.

Here, like in Zlinkoff, the Homeowner did not take the property subject to the mortgage between Von Aldenbruck and the DeSantises. At no time did the Homeowner recognize the validity or existence of the mortgage. The certificate of title fails to mention the mortgage at all. In fact, the Homeowner raised issued of statute of limitations in its very first answer and has always maintained that the time for reforming the mortgage had expired under section 95.11(2)(b). In contrast, without any explanation, the bank could have easily chosen to vacate **only** the portion of the final judgment that granted foreclosure and leave intact the final judgment as to the reformation claim, but it **chose** not to do so. Section 95.11(2)(b) does not prevent an action to reform a mortgage, it merely dictates the time within which it must be brought. US Bank failed to comply with this statutory requirement, and thus, by waiting until 2018 to commence this action to reform a mortgage recorded in 2007, the reformation claim is now time barred.

Further, a "delayed discovery doctrine" is inapplicable to claims for reformation for mutual mistake. Ryan v. Lobo De Gonzalez, 841 So.2d 510, 517-518 (Fla. 4th DCA 2003). "The 'delayed discovery' doctrine generally provides that a cause of action does not accrue until the plaintiff either knows or reasonably should know of the tortious act giving rise to the cause of action." Hearndon v. Graham, 767 So.2d 1179, 1184 (Fla. 2000). The doctrine applies only in cases of fraud, products liability, professional and medical malpractice, and intentional torts based on abuse. Ryan v. Lobo De Gonzalez at 517-518.

Even if it were applicable, it is completely disingenuous for US Bank to claim that it "did not discover or become aware of the error regarding the legal description on the Mortgage until the initiation of this foreclosure action." (Amended Complaint, ¶13.) Indeed, if US Bank's argument of notice based on a 2009 lis pendens is to apply to the Homeowner, it too applies to US Bank, who should have been aware that of the prior action to reform the mortgage to correct the perceived error. Moreover, a party cannot re-start an expired statute of limitations, claiming delayed discovery, simply by assigning its interest to a new party.

When applicable, the delayed-discovery doctrine generally

provides that a cause of action does not accrue until the plaintiff either "knows or reasonably should know" of the matter giving rise to the cause of action. Carter v. Lowe's Home Centers, Inc., 954 So. 2d 734, 735 (Fla. 1st DCA 2007). The delayed discovery doctrine is reserved to those cases where the plaintiff cannot readily discover the matter giving rise to the claim. Id. Here, there is nothing to prevent US Bank from discovering the error in the legal description.

Any reliance on Irwin v. Grogan-Cole, 590 So. 2d 1102, 1104 (Fla. 5th DCA 1991), is misplaced. In Irwin, the mortgagor's successor-in-interest specifically took title subject to an "existing, valid mortgage". The Fifth District held that because the mortgagor's successor-in-interest took title to the property subject to the mortgage, thus recognizing the mortgage as valid and existing after the time for enforcing the mortgage had already expired under section 95.281(1), the mortgagor's successor-in-interest could not later claim that the mortgage was invalid and unenforceable under section 95.281. Id. at 1104. By accepting the deed subject to the mortgage more than five years after its original due date, the third party purchaser acknowledged that the mortgage still existed even after the statute of limitations had facially run.

Here, the Homeowner took title to the property after the statute

of limitations had run on a reformation claim and, therefore, did not acknowledge even the possibility of a reformation.

C. US Bank Failed to State a Cause of Action for Mortgage Reformation Because it had an Adequate Remedy at Law.

To establish entitlement to reformation, the plaintiff, by clear and convincing evidence,[6] must show:

(1) a written agreement;[7]

(2) a mistake:
- a. a mutual mistake [8] or
- b. a unilateral mistake coupled WITH
  - i. fraud, or
  - ii. misrepresentation or
  - iii. inequitable conduct by the defendant;[9] [10] and

---

[6] Canal Insurance Co. v. Hartford Ins. Co., 415 So.2d 1295 (Fla. 1st DCA 1982); Fidelity Ins Co. v. Hilliard, 62 So. 585 (Fla. 1913); Samet v Prudential Ins Co., 294 So.2d 35 (Fla. 3d DCA 1974); Sobel v. Lobel, 168 So.2d 195 (Fla. 3d DCA 1964); see Kelly v. Threlkeld, 193 So.2d 7 (Fla. 4th DCA 1966).

[7] 6 Pomeroy's Equity Jurisprudence, Chapter 32 (1905); Kooman, Fla. Chancery Pleading and Practice, §§371-373(1939); Baynes, Florida Mortgages, §8-3 (1999); Restatement of Contracts (Second) §155.

[8] Circle Mort Corp. v. Kline, 645 So.2d 75 (Fla. 4th DCA 1994); Old Colony Ins. Co. v. Traponi, 118 So.2d 850 (Fla. 2d DCA 1960).

[9] Hopkins v. Mills, 156 So. 532 (Fla. 1934).

[10] Ayers v. Thompson, 536 So.2d 1151 (Fla. 1st DCA 1988); Pitofsky v. Liberty Mutual Ins Co., 386 So.2d 1235 (Fla. 3d DCA 1980); Robinson v. Wright, 425 So.2d 586 (Fla. 3d DCA 1982); Hopkins v. Mills, 156 So. 532 (Fla. 1934).

(3)**that it has no adequate remedy at law**.[11]

Reformation is an equitable remedy and Florida courts have long recognized that "[e]quity will never take jurisdiction where the parties have a plain, adequate and complete remedy at law." Degge v. First State Bank of Eustis, 199 So. 564, 565 (Fla. 1941); see also Schroeder v. Gebhart, 825 So. 2d 442 (Fla. 5th DCA 2002). Here, there was no showing, and no finding, that US Bank did not have an adequate remedy at law absent the reformation. Indeed, Florida courts recognize an action at law directly against the Borrowers without the need for any foreclosure. Because US Bank had an adequate remedy at law, the trial court erred in judgment granting reformation.

D. A Mortgage Cannot Be Reformed Where it Prejudices a Person or Entity that Acquired Legal Rights Before the Reformation Occurs Reformation Limited by Prejudice

The Homeowner took title to the property having an address of 142 Lancaster Road, having recorded title to that property in 2013, prior to the institution of this action. While a mortgage may

[11] Palmer v. R.S. Evans, Jax Inc., 69 So.2d 342 (Fla. 1954); Florida Ins. Co. v. Bozeman, 50 So. 513 (Fla. 1909); Taylor v. Glen Falls Ins. Co., 32 So. 882 (Fla. 1902).

sometimes be reformed to conform to the original parties' original intent, and that reformation generally may relate back with respect to the interests of the original parties, such is not the case where a third party has acquired rights to an affected property before the reformation occurs. Atkins North America, Inc. v. Tallahassee MH Parks, LLC, 277 So.3d 1156 (Fla. 2d DCA 2019), citing Straight's Tr. v. Comm'r of Internal Revenue, 245 F.2d 327, 329 (8th Cir. 1957) ("The broad rule as to the effect of a reformation decree is that it relates back to the date of the instrument reformed and is binding upon all except bona fide purchasers without notice 'and those standing in similar relations'[ ] – in short, covering those who have acquired some legal rights which would be destroyed or injured by subsequent reformation nunc pro tunc.") (citation omitted).

Where a mortgage lien fails to sufficiently describe the encumbered property, it is facially defective. And where, as here, it describes two separate properties, the mortgage lien is either wholly void or at least must be reformed before it may be enforced. But the reformation of a mortgage lien does not relate back for purposes of determining priorities, such that a non-party to the mortgage who takes title to property prior to recording of a reformed mortgage, maintains his or her priority over the reformed mortgage. See Roberts

v. Hart, 573 So.2d 12 (Fla. 4th DCA 1990) (holding that the reformation of a mortgage lien to correct an earlier mortgage could not affect priority of mortgage that was executed by wife before reformation occurred). The Homeowner, having taken title to the property prior to the claim for reformation being filed, cannot lose its priority over any mortgage reformed after it took title. Id. For this additional reason, the trial court erred in entering judgment for US Bank.

E. US Bank's Claim to Foreclose the Reformed and Modified Mortgage is Barred Because US Bank's Loan Modification was an Unrecorded Interest that was Foreclosed by the Lis Pendens Statute, Section 48.23.

All or part of US Bank's claim is barred because its interest was foreclosed in accordance with the lis pendens statute set forth in section 48.23(1)(d) to the extent that the note and mortgage was been amended or modified and such amendment or modification was not recorded in the Public Records of Palm Beach County, Florida.

On or about April 27, 2011, Carriage Pointe Homeowners Association, Inc. (the "HOA"), recorded a claim of lien against the real property having an address of 142 Lancaster Road, Boynton Beach, Florida. This claim of lien was recorded in Official Records Book 24490, Page 1300 of the Public Records of Palm Beach County,

Florida. (See Claim of Lien.)

On or about June 13, 2012, Carriage Pointe Homeowners Association, Inc. (the "HOA"), commenced a lien foreclosure action in the Circuit Court of the Seventeenth Judicial Circuit, in and for Palm Beach County, Florida, which was assigned Case Number: 50-2012-CC-008093 XXXXMB (the "HOA Action"). In connection with the HOA Action, on or about June 27, 2012, the HOA recorded a lis pendens (the "Lis Pendens") against the Subject Property in the Official Records Book 25292, Page 575 of the Public Records of Palm Beach County, Florida. At no point in time during the course of the HOA Action was the lis pendens dissolved nor did it expire according to the statutory language of Florida Statute § 48.23.

On or about April 24, 2013, the HOA obtained a Final Judgment of Foreclosure, which was recorded in Official Records Book 25982, Page 1814 of the Public Records of Palm Beach County, Florida. (See HOA Final Judgment.) Pursuant to the Final Judgment, the real property having an address of 142 Lancaster Road, Boynton Beach, Florida was sold at public auction and a certificate of sale docketed by the clerk in HOA case on or about September 27, 2013. (See Ex HOA Docket.) On October 17, 2013, the clerk recorded a Certificate of Title in Official Records Book 26391, Page 1012 of the Public

Records of Palm Beach County, Florida. (See, Certificate of Title.)

Section 48.23(1)(d) provides:

> Except for the interest of persons in possession or easements of use, the recording of such notice of lis pendens, provided that during the pendency of the proceeding it has not expired pursuant to subsection (2) or been withdrawn or discharged, constitutes a bar to the enforcement against the property described in the notice of all interests and liens, including, but not limited to, federal tax liens and levies, unrecorded at the time of recording the notice unless the holder of any such unrecorded interest or lien intervenes in such proceedings within 30 days after the recording of the notice. **If the holder of any such unrecorded interest or lien does not intervene in the proceedings and if such proceedings are prosecuted to a judicial sale of the property described in the notice, the property shall be forever discharged from all such unrecorded interests and liens.** If the notice of lis pendens expires or is withdrawn or discharged, the expiration, withdrawal, or discharge of the notice does not affect the validity of any unrecorded interest or lien.

(Emphasis added.) As such, and because the HOA Action was prosecuted to a judicial sale, the subject property is "forever discharged from all such unrecorded interests and liens" and as such, all interests or liens that may be created by the note and mortgage, but which are unrecorded against the property were forever discharged and US Bank's attempts now to reform the

mortgage to reflect an unrecorded interest against the subject property are barred.

F. The Mortgage, as Modified by the Loan Modification, is Not Enforceable for Failure to Pay Intangible and Documentary Taxes on the Loan Modification.

Section 201.08(1)(b), Florida Statutes imposes a documentary tax on mortgages, trust deeds, security agreements, or other evidences of indebtedness filed or recorded in this state. The statute mandates that "[a] notation shall be made on the note, certificate of indebtedness, or obligation that the tax has been paid on the mortgage, trust deed, or security agreement." Id. See, also, § 201.01, Fla. Stat. Section 201.08(1)(b), Florida Statutes, also imposes a documentary tax on each "renewal" of mortgages, trust deeds, security agreements, or other evidences of indebtedness filed or recorded in this state. Section 201.08(5) defines such "renewal" to include "a modification of an original document which change the terms of the indebtedness evidenced by the original document by adding one or more obligors, **increasing the principal balance, or changing the interest rate**, maturity date, or payment terms." Section 201.08(1)(b) expressly states that "[t]he mortgage, trust deed, or other instrument **shall not be enforceable in any court**

of this state as to any such advance unless and until the tax due thereon upon each advance that may have been made thereunder has been paid." (Emphasis added.)

The mortgage at issue secured indebtedness in the amount of $279,750.00 and was recorded on September 7, 2007, in the Official Records Book 22091, Page 1175 of the Public Records of Palm Beach County. The note details the applicable adjustable interest rate, with an initial interest rate monthly adjustment interval and limits the additions to unpaid principal, providing that the unpaid principal can never exceed the maximum limit equal to 115% of the original principal balance, i.e., $321,712.50. The unrecorded loan modification increased the unpaid principal balance to $353,105.59, which exceeds the 115% maximum set forth in the note and changes the interest rate to a step rate as set forth in the addendum. Thus, there is no question that the loan modification increased the principal balance due and, also, changed the interest rate. Accordingly, the loan modification is a "renewal" as defined by section 201.08(5), with respect to which documentary stamps are due and as such, the mortgage as modified cannot be enforced in any court until the applicable stamps are paid.

With regard to intangible taxes, section 199.133, Florida Statutes, provides:

> (1) **A one-time nonrecurring tax of 2 mills is hereby imposed on each dollar of the just valuation of all notes, bonds, and other obligations for payment of money which are secured by mortgage**, deed of trust, or other lien upon real property situated in this state. This tax shall be assessed and collected as provided by this chapter.
>
> (2) The nonrecurring tax shall apply to a note, bond, or other obligation for payment of money only to the extent it is secured by mortgage, deed of trust, or other lien upon real property situated in this state…

(Emphasis added.)

Section 199.143, Florida Statutes states:

> (1) Except as provided in subsection (3), if the mortgage, deed of trust, or other lien is recorded or executed after December 31, 1985, and secures future advances, as provided in s. 697.04, the nonrecurring tax shall initially be paid on the initial obligation secured, excluding future advances. Each time a future advance is made, additional nonrecurring tax shall be paid on the amount of the advance. However, any increase in the amount of original indebtedness caused by interest accruing under an adjustable interest rate obligation having an **initial interest rate adjustment interval of not less than 6 months** shall be taxable as a future advance only to the extent such increase is a computable sum certain when the original indebtedness is incurred.
>
> * * *

> (3) If the mortgage, deed of trust, or other lien secures a line of credit, the nonrecurring tax shall be paid as provided in s. 199.135 on the maximum amount of the line of credit, except as limited by s. 199.133, and no further nonrecurring tax shall be due on any borrowing under the line of credit.

Pursuant to section 199.135, this intangible tax on mortgages is "due and payable when the instrument is presented for recordation." When the intangible taxes are not fully paid, the mortgage is unenforceable pursuant to section 199.282(4):

> No mortgage, deed of trust, or other lien upon real property situated in this state shall be enforceable in any Florida court, nor shall any written evidence of such mortgage, deed of trust, or other lien be recorded in any public record of the state, until the nonrecurring tax imposed by this chapter, including any taxes due on future advances, has been paid and the clerk of circuit court collecting the tax has noted its payment on the instrument or given other receipt for it. However, failure to pay the correct amount of tax or failure of the clerk to note payment of the tax on the instrument shall not affect the constructive notice given by recording of the instrument.

According to the allegations of the Amended Complaint and an examination of the mortgage and loan modification at issue in this matter, it is apparent that future advances have been made under the mortgage such that the indebtedness secured exceeds the initial debt or obligation secured by the mortgage and upon which the

documentary taxes were paid. The exemption for future advances is inapplicable because the initial interest rate adjustment interval was less than 6 months. The additional documentary taxes have not been paid in connection with the loan modification and, therefore, the mortgage as amended is currently unenforceable in any court of this state in accordance with Section 199.282(4). See, also, Somma v. Metra Electronics Corp., 727 So.2d 302 (Fla. 5th DCA 1999)(holding that a trial court is required to dismiss a foreclosure lawsuit where there is no evidence submitted at trial to prove that the documentary taxes due had been paid).

In reaching this decision, the Appellate Court determined payment of the documentary taxes was a condition precedent to pursuing the action, stating:

> The prohibition against actions to enforce promissory notes until the required documentary taxes have been paid applies to "any court" including ours. The obvious purpose of this statute is to ensure payment of statutorily mandated taxes. "This statutory provision is concerned primarily with enforcement of the taxing statutes and collecting monies due the state for documentary stamps on designated instruments." Silber [v. Cn'R Industries of Jacksonville, Inc.], 526 So.2d [974,] at 977 [(Fla. 1st DCA 1988)]. To this end, section 201.08(1) constitutes an injunction prohibiting courts from enforcing rights created by instruments upon which required taxes have

> not been paid. **Accordingly, since no evidence was submitted at trial to prove that Mr. Somma had paid the taxes due on the note, this lawsuit should have been dismissed**.

Somma, 727 So.2d at 304. (Emphasis added).

The Somma Court rejected the argument that failure to meet this condition precedent to suit was waived by failure to raise the issue until trial:

> Unlike an affirmative defense, section 201.08 was not enacted for the protection of any particular class of defendants, nor was it enacted to preserve the integrity of the judicial proceedings. Therefore, a defendant's failure to plead a plaintiff's noncompliance with section 201.08 does not waive the state's right to receive payment of the requisite taxes nor does such noncompliance excuse the court from complying with the prohibition contained in the statute. … In any event, since the failure to pay taxes due on a note does not constitute an affirmative defense, defendants are not required to undertake pre-trial discovery in order to determine whether the plaintiff has complied with the terms of the statute.

Id.

Promissory notes for which documentary taxes have not been paid are, as a matter of law, unenforceable by any Florida court. In an action to enforce such a note, once the court discovers that the documentary taxes have not been paid, the court must dismiss the action without prejudice. See Id.; Kotzen v. Levine, 678 F.2d

140 (11th Cir.1982).

Hearsay is inadmissible unless it falls within a recognized exception. See § 90.802, Fla. Stat. 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)(c), Fla. Stat. (2012).

CONCLUSION

For the foregoing reasons, the Final Judgment should be reversed and this matter remanded for entry of judgment in favor of the Homeowner.

Respectfully submitted,

142 CWELT-2007 LLC

By its counsel:
BUSHELL LAW, P.A.[12]
1451 W. Cypress Creek Road, Suite 300
Fort Lauderdale, Florida 33309
Phone: 954-666-0220

By: s/ Daniel A. Bushell
Daniel A. Bushell
Florida Bar No. 0043442
dan@bushellappellatelaw.com

[12] This Initial Brief was primarily drafted by Appellant's prior counsel, Polaris Legal Group.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 17, 2024, the foregoing is being filed through the Florida Courts E-Filing Portal, which will serve a true and correct copy by e-mail to:

Kathleen Achille, Esq.
Adam A. Diaz, Esq.
Diaz Anselmo Lindberg PA
answers@dallegal.com
Kachille@dallegal.com

Larry E. Schner, Esq.
Sachs Sax Caplan
foreclosures@ssclawfirm.com

s/ Daniel A. Bushell
Daniel A. Bushell

CERTIFICATE OF COMPLIANCE

In accordance with Florida Rule of Appellate Procedure 9.045, I hereby certify that this document complies with the applicable font and word count limit requirements.

s/ Daniel A. Bushell
Daniel A. Bushell