

Filing # 182474123 E-Filed 09/22/2023 07:15:17 PM

**IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT  
IN AND FOR BROWARD COUNTY, FLORIDA**

CASE NO. CACE22000905 DIVISION: 11 JUDGE: Garcia-Wood, Marina (11)

**Bank of New York Mellon Trust Company, N.A**

Plaintiff(s) / Petitioner(s)

v.

**United States of America , et al**

Defendant(s) / Respondent(s)

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**ORDER (DISPOSITION)**

THIS CAUSE, having come before this Court on August 24, 2023, upon Defendant, TIMOTHY M. RYAN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KURT ELY A/K/A KURT D. ELYA/K/A KURT DAVID ELY, DECEASED (*hereinafter* Defendant), Motion for Final Summary Judgment, the Court having heard argument from counsel, having reviewed the pleadings, and the written argument with exhibits attached to Defendant's written Motion for Final Summary Judgment, the Court find that:

- A. Plaintiff, BANK OF NEW YORK MELLON TRUST COMPANY, N.A. AS TRUSTEE FOR MORTGAGE ASSETS MANAGEMENT SERIES I TRUST, filed its Complaint for Foreclosure of Mortgage on January 20, 2022.
- B. Defendant, TIMOTHY M. RYAN, filed his Answer and Affirmative Defenses on February 2, 2023, including the affirmative defense that Plaintiff failed to establish standing to bring this mortgage foreclosure at the time Plaintiff filed the action.
- C. Defendant filed his Motion for Final Summary Judgment on June 8, 2023, and specifically alleged Plaintiff failed to establish standing for two separate assignments of
- D. the Promissory Note that is the subject of this mortgage foreclosure action.
- E. Plaintiff filed a Request for Judicial Notice on July 17, 2023 requesting the Court take judicial notice of selected Court filings in a previous mortgage foreclosure case filed by

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Cit Bank N.A. as Plaintiff against Defendant, Kurt Ely, Broward Circuit Court Case No. CACE15018097.

F. This is a residential foreclosure action commenced by Plaintiff seeking to enforce a Home Equity Loan Conversion Loan Agreement (hereinafter maybe referred to as the "Note") and Mortgage against Defendants.

G. Plaintiff claims entitlement to enforce the note under Florida's lost note statute § 673.3091 and §§ 71.011.

H. The lost note affidavit attached to Plaintiff's operative complaint sets forth a deraignment of title of the mortgage and note through a series of assignments attached to the complaint.

I. The assignments are set forth in the complaint as follows:

	By/ From:	To:
Assignment 1: Funding	ARK-LA-TEX Financial Services, LLC  dba Benchmark Mortgage Corporation	Financial Freedom Senior  Corporation, a Delaware
Assignment 2: Registration	Financial Freedom Senior Funding Corporation, a Delaware Corporation for Financial Freedom Acquisition LLC	Mortgage Electronic  Systems, Inc., as nominee for
Assignment 3:	Mortgage Electronic Registration Systems Inc., as nominee for for Financial Freedom Acquisition LLC	Onewest Bank, N.A.
Assignment 4:	Cit Bank, N.A. f/k/a Onewest Company, Trust Bank, N.A. by Compu-Link Corporation, Mortgage Assets Db a Celink as Attorney in Fact	Bank of New York Mellon N.A. as Trustee for  Management Series I Trust

I. The Assignment of Mortgage by Mortgage Electronic Registration Systems Inc., as nominee for Financial Freedom Acquisition LLC to Onewest Bank, N.A. recorded on May 20, 2015 as Instrument No. 112998411 of the public records of Broward County, FL, fails to assign the note.

J. The Assignment of Mortgage by Cit Bank, N.A. f/k/a Onewest Bank, N.A. by Compu-Link Corporation DBA Celink as Attorney in Fact to Bank of New York Mellon Trust Company, N.A. as Trustee for Mortgage Assets Management Series I Trust recorded on October 03, 2019 as Instrument No. 116091996 of the public records of Broward County, FL, fails to assign the note.

K. There are endorsements which appear on the note however, they are undated.

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L. Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law”.

M. The Note at issue does not state an unconditional promise or order to pay a fixed amount of money and therefore is not a negotiable instrument. Fla. Stat. § 673.1041.

N. As such, Plaintiff’s Home Equity Loan Conversion Loan Agreement (note) is a *non*-negotiable instrument and cannot be transferred by an endorsement. See, *Demakis v. SunTrust Bank*, (Fla. 2d DCA 2021), *Third Federal Savings & Loan Association of Cleveland v. Koulouvaris*, 247 So.3d 652, 654–55 (Fla. 2d DCA 2018), and *Lewis v. US Bank Nat’l Ass’n*, 298 So. 3d 72, 76 (Fla. 4th DCA 2020).

O. Since the Plaintiff is relying on the assignments of mortgage to prove standing, all of the assignments when linked or chained together must properly transfer the note. As discussed above the third and fourth assignments do not transfer the note. *Jelic v. BAC Home Loans Servicing, LP*, 178 So. 3d 523, 525 (Fla. 4th DCA 2015), *Supria v. Goshen Mortgage, LLC*, 232 So. 3d 422, 424 (Fla. 4th DCA 2017), *Morrone v. Wilmington Sav. Fund Soc’y FSB*, 292 So. 3d 514, 519 (Fla. 2d DCA 2020).

P. Since the Plaintiff has pled a lost note count and filed its pleading(s) and affidavit(s) pursuant to Rule 1.115 of the Florida Rules of Civil Procedure and Florida Statute § 702.015 it has framed the pleadings as to its theory of standing. The Plaintiff has relied solely on the assignment(s) of mortgage. This pleading of the assignments and the Plaintiff’s allegations as to how it has standing has been framed by the pleadings before this Court, *State Farm Mut. Auto. Ins. Co. v. Davis*, 336 So. 3d 392, 398 (Fla. 5th DCA 2022).

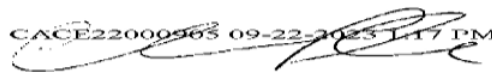
Q. At the Defendant’s Motion for Summary Judgment hearing the Plaintiff requested that the Court hear its Request for Judicial Notice filed on July 17, 2023. This motion is **Denied**. Pursuant to the Plaintiff’s argument before this Court, standing was not litigated in the prior foreclosure action because it ended with a “consent judgment.” Any issue under the theory of collateral estoppel is waived if the parties did not actually litigate the issue, *Marquardt v. State*, 156 So. 3d 464, 481 (Fla. 2015). The only document that the Plaintiff filed in opposition to Defendant’s Motion for Summary Judgment was the same affidavit relied upon by the Defendant and therefore the Plaintiff failed to file any material in opposition to Defendant’s Motion for Summary Judgment.

NOW THEREFORE it is hereby Ordered and Adjudged:

1. Defendant's Motion for Final Summary Judgment be and the same is hereby GRANTED.
2. Plaintiff shall take nothing by this suit and go hence without day.
3. This Court retains jurisdiction to determine entitlement to fees on behalf of the prevailing party and other orders which are just and proper.

**DONE AND ORDERED** in Chambers at Broward County, Florida on 22nd day of September, 2023.

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Christopher William Pole

**SENIOR JUDGE**

Electronically Signed by Christopher William Pole

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