

IN THE CIRCUIT COURT OF THE 9TH JUDICIAL CIRCUIT, IN AND FOR ORANGE
COUNTY, FLORIDA

CASE NO. XXXXX

XXXXXX

Plaintiff,

v.

XXXXXXXXXX

Defendant.

**DEFENDANT'S MOTION TO DISMISS FOR LACK
OF SUBJECT MATTER JURISDICTION**

Defendant, XXXX X XXX, moves the Court to dismiss for lack of subject matter jurisdiction under authority of Florida Rules of Civil Procedure, rule 1.140(b)(1) and shows:

1. This Court lacks subject matter jurisdiction to proceed. Subject matter jurisdiction has never been established on the record. The jurisdictional question can be raised at any time and can never be time-barred. *DeClaire v. Yohanan*, 453 So. 2d 375 (Fla. 1984).
2. The Court should dismiss this action pursuant to Rules 1.210(a) and 1.140(7) of the Florida Rules of Civil Procedure because the record is clear from the promissory note submitted as evidence that a person other than Plaintiff is the true owner of the claim sued upon and that Plaintiff is not the real party in interest and is not shown to be authorized to maintain this foreclosure action.
3. In Florida, the prosecution of a foreclosure action is by the owner and holder of the mortgage and the note. Plaintiff is not entitled to maintain this action in which it seeks to foreclose on a note which Plaintiff does not own. *Your Construction Center, Inc. v. Gross*, 316

So. 2d 596 (Fla. 4th DCA 1975)

4. Plaintiff, Midland Mortgage Co., alleges that it owns and holds the subject note and mortgage pursuant to an assignment. There is no evidence or testimony supporting this. In fact, all evidence and testimony specifically and conclusively demonstrates the opposite.

5. Rule 1.210(a) of the Florida Rules of Civil Procedure provides, in pertinent part:

Every action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought...

Plaintiff in this action meets none of these criteria.

6. Standing requires that the party prosecuting the action have a sufficient stake in the outcome and that the party bringing the claim be recognized in the law as being a real party in interest entitled to bring the claim. This entitlement to prosecute a claim in Florida courts rests exclusively in those persons granted by substantive law, the power to enforce the claim. *Kumar Corp. v Nopal Lines, Ltd, et al*, 462 So. 2d 1178, (Fla. 3d DCA 1985)

7. No Florida case holds that a separate entity can maintain suit on a note payable to another entity unless the requirements of Rule 1.210(a) of the Florida Rules of Civil Procedure and applicable Florida law are met. *Corcoran v. Brody*, 347 So. 2d 689 (Fla. 4th DCA 1977)

8. Fla.R.Civ.P. Rule 1.130(a) requires a Plaintiff to attach copies of all bonds, notes, bills of

exchange, contracts, accounts, or documents upon which action may be brought to its complaint. Plaintiff has failed to attach any document that supports its pleadings.

9. As a result, although Plaintiff names Midland Mortgage Co. as the owner of the promissory note, the promissory note submitted as evidence conflicts with this allegation, making no mention of Midland. Plaintiff's own witness, Jason Lane, has testified at his deposition and in a hearing that Midland merely services the mortgage for an unknown entity.

10. When exhibits are inconsistent with Plaintiff's allegations of material fact as to who the real party in interest is, such allegations cancel each other out. *Fladell v. Palm Beach County Canvassing Board*, 772 So.2d 1240 (Fla. 2000); *Greenwald v. Triple D Properties, Inc.*, 424 So. 2d 185, 187 (Fla. 4th DCA 1983); *Costa Bella Development Corp. v. Costa Development Corp.*, 441 So. 2d 1114 (Fla. 3rd DCA 1983).

11. Plaintiff is not the real party in interest and is not shown to be authorized to bring this action. *In re: Shelter Development Group, Inc.*, 50 B.R. 588 (Bankr.S.D.Fla. 1985) [It is axiomatic that a suit cannot be prosecuted to foreclose a mortgage which secures the payment of a promissory note, unless the Plaintiff actually holds the original note, citing *Downing v. First National Bank of Lake City*, 81 So.2d 486 (Fla. 1955)]; *Your Construction Center, Inc. v. Gross*, 316 So. 2d 596 (Fla. 4th DCA 1975), See also 37 Fla. Jur. Mortgages and Deeds of Trust '240 (One who does not have the ownership, possession, or the right to possession of the mortgage and the obligation secured by it, may not foreclose the mortgage)

12. Plaintiff's pleadings fail to contain sufficient facts to establish who the actual Plaintiff is and its relationship to Defendant and to the claim for foreclosure of the subject promissory note. The record also fails to sufficiently identify who Plaintiff is and fails to allege facts sufficient to determine the standing of Plaintiff.

13. The record does not show that Midland Mortgage Co. has standing to maintain an action in the State of Florida. It is not registered to do business in the state. In order for a Court to have in personam jurisdiction over the parties, the record, if challenged, must show that the challenged party has sufficient minimum contacts with the forum state to bestow in personam jurisdiction on the Court. Florida Rules of Civil Procedure, rule 1.120(A).

14. The record does not show that Midland Mortgage Co. is authorized as an entity to own a promissory note. It claims to be a mortgage servicer not a lender. Plaintiff appears to be operating ultra vires in this action.

15. Neither Midland Mortgage Co. nor its attorneys, Richard McIver and Kass, Shuler, Solomon, Spector, Foyle & Singer, P.A., have validated the alleged debt as required by the Fair Debt Collection Practices Act. They refuse to identify the owner of the alleged debt and refuse to provide an accurate accounting of the alleged debt. Such lack of validation prohibits these debt collectors from taking any action to collect on the alleged debt.

16. Plaintiff has refused to apply many thousands of dollars in timely mortgage payments from Defendant. Plaintiff has accepted other amounts, particularly those paid through Defendant's bankruptcy and insurance proceeds, yet has continued its attempts to foreclose without proper consideration for those payments. There is no evidence that Plaintiff has forwarded any payments to the actual owner of the note, who the evidence suggests may have been defrauded by Plaintiff.

17. Plaintiff has added sums to the amount allegedly owed that are not authorized by any agreement or court order. Furthermore its attorney has written to Defendant saying that he will seek additional attorney's fees even after the foreclosure is concluded.

18. Plaintiff has repeatedly filed ex parte motions to reschedule foreclosure sale depriving

Defendant of an opportunity for hearing. Several times, these motions were not even served on Defendant and Defendant learned of their existence only upon receiving a Court order for an imminent foreclosure sale. These affronts to due process impose jurisdictional failings on the Court requiring the action's dismissal with prejudice.

19. The record does not verify that Plaintiff has suffered any damages other than those directly attributable to their own deliberate and ongoing frauds. Claim of damages, to be admissible as evidence, must incorporate records such as a general ledger and accounting of an alleged unpaid promissory note and the person responsible for preparing and maintaining the account general ledger must provide a complete accounting which must be sworn to and dated by the person who maintained the ledger. Plaintiff has adamantly refused to provide any accounting to Defendant.

20. This action has been used as a vehicle for the so-called Plaintiff and its attorneys to attack and harass Defendant unmercifully for almost six years in an attempt to silence his substantiated claims of their crimes and misdeeds. The Plaintiff's action in refusing to allow insurance proceeds to be used for repairs and twice breaking into the property have prevented Defendant from being able to use the property in any way for more than four years.

21. The record is replete with Plaintiff and its attorneys committing numerous frauds upon the Court. The evidence and the testimony of Defendant and his witness specifying these frauds remain entirely unrefuted. Based on the record, the Court should conclude that this action amounts to nothing less than criminal extortion and attempted grand theft by Plaintiff against Defendant. The Court cannot be in a position of enabling Plaintiff and its attorneys to commit felony crimes.

WHEREFORE, Defendant requests that this action be dismissed for lack of subject matter jurisdiction.

Respectfully submitted this 19th day of May, 2008.

/s/ Richard M. Nazareth II
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