

WELLS FARGO BANK, N.A., ET AL

NO. 22-CA-31

VERSUS

FIFTH CIRCUIT

MARC GERARD BARBE, ET AL

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 780-038, DIVISION "C"
HONORABLE JUNE B. DARENSBURG, JUDGE PRESIDING

September 13, 2022

HANS J. LILJEBERG
JUDGE

Panel composed of Judges Stephen J. Windhorst,
Hans J. Liljeberg, and John J. Molaison, Jr.

REVERSED AND REMANDED

HJL

SJW

JJM

FIFTH CIRCUIT COURT OF APPEAL
A TRUE COPY OF DOCUMENTS AS
SAME APPEARS IN OUR RECORDS



Alexis Barteet
Deputy, Clerk of Court

COUNSEL FOR PLAINTIFF/APPELLEE,
WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE POOLING AND
SERVICING AGREEMENT DATED AS OF MARCH 1, 2004 MERRILL
LYNCH MORTGAGE INVESTORS TRUST MORTGAGE LOAN
ASSET-BACKED CERTIFICATES, SERIES 2004-WMC2

Stephen W. Rider
Timothy G. Byrd, Jr.

COUNSEL FOR DEFENDANT/APPELLANT,
MARC GERARD BARBE'

Marc Gerard Barbe'

LILJEBERG, J.

Defendant, Marc Barbe, *pro se*, appeals the trial court's grant of summary judgment in favor of plaintiff, Wells Fargo, NA, as Trustee for the Pooling and Servicing Agreement dated as of March 1, 2004 Merrill Lynch Mortgage Investors Trust Mortgage Loan Asset-Backed Certificate Series 2004-WMC2 ("Wells Fargo") in this mortgage loan foreclosure action. We reverse the trial court's August 18, 2021 judgment because we find that Wells Fargo failed to meet its initial burden to establish that it is a party entitled to enforce the promissory note at issue.

FACTS AND PROCEDURAL HISTORY

On January 26, 2018, Wells Fargo filed a Petition to Enforce Promissory Note With Recognition of Mortgage seeking to enforce a promissory note executed by Mr. Barbe in favor on WMC Mortgage Corp. in the original principal sum of \$211,500.00.¹ Wells Fargo alleged that it obtained possession of the note after WMC endorsed the note in blank, thereby rendering the note bearer paper as defined in La. R.S. 10:3-109.² Wells Fargo further alleged that it is the present holder and possessor of the promissory note. The promissory note is secured by an act of mortgage encumbering immovable property located in Metairie, Louisiana.

¹ Wells Fargo also named Renada A. Eastling Barbe as a defendant in its petition. The trial court did not enter judgment against Ms. Barbe, and Ms. Barbe did not appeal the August 18, 2021 judgment.

² La. R.S. 10:3-109 provides that

(a) A promise or order is payable to bearer if it:

- (1) states that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;
- (2) does not state a payee; or
- (3) states that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.

* * *

(c) . . . An instrument payable to an identified person may become payable to bearer if it is indorsed in blank pursuant to R.S. 10:3-205(b).

La. R.S. 10:3-205(b) explains, in pertinent part, that an instrument endorsed in blank becomes payable to bearer and can be negotiated by transfer of possession alone:

- (b) If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a "blank indorsement." When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.

Wells Fargo further stated in its petition, that on March 26, 2012, Mr. Barbe executed a loan modification agreement wherein the parties agreed to modify the repayment terms and add certain sums to the amount due under the promissory note. According to Wells Fargo, Mr. Barbe defaulted on the note and mortgage by failing to pay the monthly installment due on March 1, 2017, and remained in default by failing to pay all successive monthly installments. Wells Fargo alleged that it sent Mr. Barbe a 30-day notice of default, and prayed for judgment against defendants in the amount of \$245,226.89, as well as recognition of the mortgage securing the note. Wells Fargo attached a copy of the promissory note, loan modification agreement, mortgage, and notice of default to its petition. Mr. Barbe filed an answer to the petition on March 29, 2018, questioning the authenticity of the documents attached to the petition and requesting that the court order Wells Fargo to produce the original promissory note.

On May 24, 2018, Wells Fargo filed a motion for summary judgment seeking the relief prayed for in its petition, except that it altered its prayer to seek an *in rem* judgment. Wells Fargo attached the following exhibits in support of its motion for summary judgment: 1) a copy of the petition with the attached loan documents outlined above; 2) an Affidavit of Amounts Due signed by Yvonne S. Belcher, a contract management coordinator for Ocwen Loan Servicing, LLC, the servicer for Wells Fargo; 3) an Affidavit of Publication of Lost Note; and 4) an Affidavit of Non-Military Status. In its memorandum supporting the motion for summary judgment, Wells Fargo argued that it is the owner of the promissory note at issue and that it supported the allegations in its petition through the affidavits attached to its motion. Wells Fargo argued that no genuine issues of fact existed and that it was entitled to judgment against defendants for the amounts past due.

The motion for summary judgment was continued and reset several times in 2018 and 2019. On February 18, 2020, Wells Fargo filed a motion to appoint a

private process server after the sheriff was unable to serve defendants. On September 16, 2020, Wells Fargo filed a motion to appoint a curator alleging that the private process server was also unable to serve defendants. The trial court appointed a curator, and on October 27, 2020, the curator filed a note of evidence indicating that she made contact with Mr. Barbe and provided him with a certified copy of the motion for summary judgment.

On November 4, 2020, Mr. Barbe filed a response to the summary judgment motion arguing, *inter alia*, that Wells Fargo did not acquire rights to the promissory note and is not the proper party to enforce the note. He further requested that the trial court order Wells Fargo to provide evidence that it was in possession of the note when it filed its petition and contested the amount Wells Fargo sought to recover from him.

The motion for summary judgment was set for hearing on November 10, 2020. At the hearing, Mr. Barbe complained that Wells Fargo failed to provide him with a “chain of title” to prove its right to enforce the note. In response, counsel for Wells Fargo referred to a lost note affidavit allegedly attached to the summary judgment motion and further argued that the note is payable to the bearer. Following oral argument, the trial court continued the motion without date to allow Mr. Barbe time to conduct discovery.

On May 19, 2021, Wells Fargo filed a motion to reset the hearing on the summary judgment motion and attached an updated Affidavit of Amounts Due signed by Sergio Olmo, a contract management coordinator for PHH Mortgage Corporation, the new loan servicer for Wells Fargo. The affidavit stated that the principal amount owed under the note was \$245,226.89, plus additional amounts for interest, late fees, taxes, insurance and other specified costs increasing the total amount owed by Mr. Barbe to \$292,902.70. The language in the Affidavit of Amounts Due previously executed by Yvonne Belcher and the updated affidavit

signed by Mr. Olmo are identical except for the increase in the amounts due in the updated affidavit. Neither affidavit declared that Wells Fargo was the current holder of the promissory note. Furthermore, neither affidavit alternatively stated that the note was lost and enforceable pursuant to the requirements set in La. R.S. 10:3-309 discussed more fully below. Instead, both affidavits state in a conclusory manner that the affiants reviewed the business records relating to the loan and that Wells Fargo “is the party entitled to enforce the promissory note and mortgage at issue in this proceeding.”

We further observe that the exhibit Wells Fargo identified as an “Affidavit of Publication of Lost Note” is a one-page document entitled Certificate of Publication and signed by Donna Laird of NOLA Media Group, a division of The Times Picayune, LLC. The document merely states that a copy of the advertisement published in the Times Picayune on the listed dates is attached as Exhibit A. However, Exhibit A was not attached to the document.³

The trial court held a hearing on the merits of the summary judgment motion on August 18, 2021. Following oral argument, the trial court granted the summary judgment motion and entered a written judgment *in rem* in favor of Wells Fargo and against Mr. Barbe in the amount of \$245,226.89, together with interest from February 1, 2017, until paid at an interest rate of 2.00001% per annum, as well as attorney’s fees not to exceed \$2,500.00, without leave of court. The judgment also awarded the following unspecified amounts to Wells Fargo: “any applicable amounts provided for by the Act of Mortgage and applicable law such as late charges, escrow advances, corporate advances, and other fees,” and “all expenses

³ La. R.S. 13:3741 provides the requirements for advertising a lost instrument.

incurred in enforcing the Loan Repayment and Security Agreement and mortgage.”⁴

On October 7, 2021, Mr. Barbe filed a “Notice of Intent to Appeal” seeking a suspensive appeal. The trial court signed an order granting the suspensive appeal on October 14, 2021, and set an appeal bond in the amount of \$248,000.00. The record does not indicate that Mr. Barbe filed an appeal bond, and we further find that the request for a suspensive appeal was not timely. The August 18, 2021 judgment indicates Mr. Barbe waived notice of judgment at the hearing on that date, and Mr. Barbe did not file a motion for new trial. Therefore, the deadline to meet the requirements for a suspensive appeal was September 28, 2021. *See* La. C.C.P. art. 2123 (requiring suspensive appeal and security to be filed within 30 days from the expiration of the seven-day delay to file a motion for new trial if no application is filed). However, Mr. Barbe is entitled to a devolutive appeal since the “Notice of Intent to Appeal” was filed on October 7, 2021, which is within 60 days from the expiration of the seven-day delay for applying for a new trial. *See* La. C.C.P. art. 2087. Therefore, we convert the suspensive appeal to a devolutive appeal and address the merits of the case.

LAW AND DISCUSSION

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. *Pouncy v. Winn–Dixie*

⁴ This language awarding unspecified charges and fees does not constitute valid decretal language because it does not identify the specific types of fees or charges or the specific amounts due. While the 2021 amendments to La. C.C.P. art. 1918 require this Court to remand matters to district courts to amend judgments involving “decretal language” issues, the August 18, 2021 judgment herein is not defective solely due to lack of decretal language. Although the district court determined that Wells Fargo may be owed additional sums under the loan documents, those amounts have yet to be fixed and will require additional actions by the parties as well as the court, which constitute a change to the substance of the judgment prohibited by La. C.C.P. art. 1951, rather than a mere amendment. *See U.S. Bank National Association as Trustee for RFMSI 2005S7 v. Dumas*, 21-585 (La App. 1 Cir. 12/22/21), 340 So.3d 246, 248-51; *Wilmington Savings Fund Society, FSB as Trustee of Stanwich Mortgage Loan Trust A v. Davis*, 21-1456, pp. 4-5 (La. App. 1 Cir. 7/29/22), 2022 WL 3009748. A judgment that awards a sum to which must be added the costs of additional expenses that are yet to be calculated is generally not a final judgment over which this court can exercise appellate jurisdiction. *Id.* However, we find that we have jurisdiction to consider the merits of this appeal because the trial court certified the August 18, 2021 judgment as a final judgment pursuant to La. C.C.P. art. 1915(B). On remand, the amounts of all fees and charges awarded under the loan documents must be quantified by the trial court in order to constitute a valid final judgment.

La., Inc., 15-189 (La. App. 5 Cir. 10/28/15), 178 So.3d 603, 605. The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2). After an opportunity for adequate discovery, summary judgment shall be granted if the motion, memorandum, and supporting documents, including the pleadings, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations and admissions, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3) and (4).

The initial burden on a motion for summary judgment is on the mover to show that no genuine issue of material fact exists and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(D)(1). The burden then shifts to the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. *Id.* If the adverse party fails to do so, then summary judgment shall be granted. La. C.C.P. art. 966(A)(3).

Appellate courts review a judgment granting or denying a motion for summary judgment *de novo*, using the same criteria that governs the trial court's determination of whether a summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. *Whitney Bank v. Garden Gate New Orleans, L.L.C.*, 17-362 (La. App. 5 Cir. 12/27/17), 236 So.3d 774, 780, *writ denied*, 18-174 (La. 3/23/18), 239 So.3d 298.

In his *pro se* appellant brief, Mr. Barbe raises several issues, including the argument raised before the trial court that Wells Fargo is not entitled to enforce the promissory note at issue because it failed to prove ownership and possession of the instrument.

La. R.S. 10:3-308(b) requires a plaintiff seeking to recover against a defendant for amounts due under a promissory note to prove its entitlement to enforce the promissory note:

(b) If the validity of signatures is admitted or proved and there is compliance with Subsection (a), a plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under R.S. 10:3-301, unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim.⁵

La. R.S. 10:3-301 explains that a “person entitled to enforce” an instrument means one of following:

- (i) the holder of the instrument;
- (ii) a nonholder in possession of the instrument who has the rights of a holder; or
- (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to R.S. 10:3-309 or 10:3-418(d).

A “holder” is defined in pertinent part, as “the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.” La. R.S. 10:1-201(21)(A).

In *American Bank v. Saxena*, 553 So.2d 836, 846 (La. 1989), the Supreme Court held that summary judgment is an appropriate procedural device to enforce a negotiable instrument when the defendant establishes no defense against enforcement. Once the plaintiff, as *holder* of a promissory note, proves the maker’s signature, or the maker admits it, the holder has made out his case by mere

⁵ La. R.S. 10:3-308(a) provides:

(a) In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature. If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person under R.S. 10:3-402(a).

production of the note and is entitled to recover in the absence of any further evidence. *Whitney Bank*, 236 So.3d at 780-81; *Johnson v. Drury*, 99-608 (La. App. 5 Cir. 6/2/00), 763 So.2d 103, 109-110. Once the plaintiff has met his burden of proof, the burden shifts to the defendant to prove the existence of a defense or triable issue of material fact. *Saxena*, 553 So.2d at 845-46. In a suit on a promissory note, the payee who produces the note sued upon makes out a *prima facie* case of its claim to enforce the note. *Consumer Solutions, LLC v. Thompson*, 20-1359 (La. 2/9/21), 309 So.3d 730, 730-31 (finding that plaintiff established a *prima facie* case of its claim to enforce the note by producing the original note); *see also* La. R.S. 10:3-308(b).

Therefore, a threshold issue in this matter is whether Wells Fargo is a holder or otherwise a person entitled to enforce the promissory note pursuant to La. R.S. 10:3-301. In its petition, Wells Fargo alleged that the original lender endorsed the promissory note in blank, thereby rendering it bearer paper and enforceable by the person in possession of the promissory note. Wells Fargo attached a copy of the note with the blank endorsement to its petition and further alleged in its petition that it is the holder of the promissory note. Wells Fargo alleged in its summary judgment motion that it is the owner of the promissory note. However, the supporting evidence, that is the affidavits submitted on behalf of Wells Fargo in support of the summary judgment motion, do not state that Wells Fargo is the current holder of the promissory note. Rather, as explained above, they only state in a conclusory manner that after reviewing the loan documents, Wells Fargo is the party entitled to enforce the promissory note and mortgage. While we do not find that Wells Fargo is necessarily required to produce the original note to establish its right to enforce the note, a copy of a note attached to the petition and a conclusory statement in an affidavit that Wells Fargo is a party entitled to enforce the note, is not sufficient evidence to establish that Wells Fargo is a holder in possession of the

promissory note pursuant to La. R.S. 10:3-301(i) and 10:1-201(21)(A).⁶ *See, e.g., Bank of America, N.A. v. Alexander*, 19-290 (La. App. 5 Cir. 1/29/20), 289 So.3d 1200.

To further complicate the issue, Wells Fargo also appears to indicate in its summary judgment motion that it is entitled to enforce the note pursuant to La. R.S. 10:3-301(iii), as a person not in possession of the instrument who is entitled to enforce the instrument pursuant to R.S. 10:3-309, which governs situations when a promissory note is lost.⁷ While not explicitly stating the promissory note is lost, Wells Fargo attached an affidavit of publication of lost note, thereby indicating that it is no longer in possession of the promissory note. However, Wells Fargo did not provide an affidavit of lost note that establishes compliance with the requirements of La. R.S. 10:3-309, and the affidavit of publication does not provide a copy of the advertisement regarding the lost note to establish compliance with La. R.S. 13:3741. If the promissory note is in fact lost and no longer in the possession of Wells Fargo, it failed to provide an affidavit or other evidence satisfying the requirements of these applicable provisions.

In its appellate brief, Wells Fargo argues that it was not required to present the original note because Mr. Barbe waived the requirement of presentment in

⁶ The affidavits do not attach copies of any of the loan documents.

⁷ According to La. R.S. 10:3-301(iii), a person who is not currently in possession of an instrument can enforce the note by complying with the requirements of La. R.S. 3-309, which provides as follows:

- (a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.
- (b) A person seeking enforcement of an instrument under Subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, R.S. 10:3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

See also La. R.S. 13:3740.

Paragraph 10 of the promissory note. Wells Fargo cites to the following language from this paragraph: “I and any other person liable under this Note waive the rights of Presentment and Notice of Dishonor.” Wells Fargo does not include the following sentence which explains that “‘Presentment’ means the right to require the *Note Holder* to demand payment of amounts due.” [Emphasis added.]⁸ While this language may relieve Wells Fargo of an obligation to demand payment prior filing suit, it does not satisfy Wells Fargo’s obligation to establish a *prima facie* case that it is a person entitled to enforce the promissory note.

Because Wells Fargo failed to submit evidence to establish its initial burden of proving it is a person entitled to enforce the promissory note at issue, we find that the burden did not shift to Mr. Barbe to establish a defense or genuine issues of material fact. Accordingly, we find that the trial court erred by granting summary judgment in favor of Wells Fargo, and we reverse the August 18, 2021 judgment entered in its favor and against defendant, Marc Barbe. The matter is remanded for further proceedings.

REVERSED AND REMANDED

⁸ La. R.S. 10:3-501 provides that “‘Presentment’ means a demand made by or on behalf of a person entitled to enforce an instrument. . . .”

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
STEPHEN J. WINDHORST
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JUDGES



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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **SEPTEMBER 13, 2022** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CURTIS B. PURSELL
CLERK OF COURT

22-CA-31

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)

HONORABLE JUNE B. DARENSBURG (DISTRICT JUDGE)

STEPHEN W. RIDER (APPELLEE)

TIMOTHY G. BYRD, JR. (APPELLEE)

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