

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

WILMINGTON SAVINGS FUND SOCIETY, FSB,
d/b/a CHRISTIANA TRUST, not individually but as
trustee for PRETIUM MORTGAGE ACQUISITION TRUST,

Appellant,

v.

CHARM-B, INC.; JENNIFER M. PAYTON; ASBEL ESTATES
HOMEOWNERS ASSOCIATION, INC.; EDMUND J. PAYTON; and
UNKNOWN TENANT IN POSSESSION OF
THE SUBJECT PROPERTY,

Appellees.

No. 2D22-1532

June 16, 2023

Appeal from the Circuit Court for Pasco County; Susan G. Barthle,
Judge.

Michael W. Smith of Burr & Forman, LLP, Orlando, for Appellant.

Matthew D. Wolf of Ivanov & Wolf, PLLC, Tampa, for Appellee Charm-B,
Inc.

No appearance for remaining Appellees.

ROTHSTEIN-YOUAKIM, Judge.

Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust,
not individually but as trustee for Pretium Mortgage Acquisition Trust
(Wilmington), appeals an order granting Charm-B, Inc.'s motion for
involuntary dismissal and dismissing with prejudice Wilmington's

foreclosure action. We agree with Wilmington that the trial court erred in concluding that Wilmington had failed to establish standing to enforce a lost note notwithstanding its lost note affidavit and evidence of the note's unbroken chain of assignment. We therefore reverse and remand for a new trial.

In August 2019, Nationstar Mortgage, LLC filed a foreclosure action naming Charm-B and others as party defendants. Nationstar's complaint alleged that it was an entity not in possession of the note who is entitled to enforce the note under section 673.3091, Florida Statutes (2019). Nationstar attached to its complaint a lost note affidavit, a copy of the note indorsed in blank by the original lender, M/I Financial Corporation, and a series of assignments of the note and mortgage.

The affidavit, from bailee Choice Legal Group, P.A., averred that the bailee had received the original note in June 2008 and had placed the note in its original-documents vault. The first assignment in the series of assignments establishes that M/I Financial still held the note at that time. The affidavit averred further that the original note had been in the bailee's possession when it was lost, that the note could not be reasonably obtained since its whereabouts could not be determined after diligent search, and that the note's loss was not the result of a transfer or lawful seizure.¹

After filing suit, Nationstar assigned the note to Wilmington and successfully moved to substitute Wilmington as plaintiff. At trial, Wilmington entered into evidence the lost note affidavit and the series of documents establishing an unbroken chain of assignments of both the

¹ The affidavit thus established those requirements for reestablishing a lost note that are set forth in section 673.3091(1)(b) and (c).

note and mortgage. These assignments showed that M/I Financial Corporation was the original lender; that its nominee, MERS, assigned the note and mortgage to Chase Home Finance, which later merged with JP Morgan Chase Bank; that JP Morgan then assigned both the note and mortgage to Fannie Mae, which in turn assigned both to Nationstar before Nationstar filed suit; and that Nationstar thereafter assigned both to Wilmington.

After Wilmington rested its case, Charm-B moved for involuntary dismissal, arguing that because Wilmington had not established who was entitled to enforce the note at the time of its loss pursuant to section 673.3091(1)(a), Wilmington had failed to establish standing.² Though Wilmington replied by pointing to the unbroken chain of note assignments admitted into evidence, the court granted Charm-B's motion for involuntary dismissal.

We review de novo a trial court's entry of an involuntary dismissal based on lack of standing. *See Deutsche Bank Nat'l Tr. Co. v. Kummer*, 195 So. 3d 1173, 1175 (Fla. 2d DCA 2016) ("We review an order granting a motion for involuntary dismissal at the close of a case under a de novo

² At oral argument, however, Charm-B's counsel insisted that reestablishing a lost note is *not* a matter of standing but an independent cause of action with its own, separate elements. We have previously—and unequivocally—rejected that argument. *See Forty One Yellow, LLC, v. Escalona*, 305 So. 3d 782, 789 (Fla. 2d DCA 2020) (agreeing with the First District that "[s]ection 673.3091 does not create a standalone cause of action apart from a breach" (quoting *Mielke v. Deutsche Bank Nat'l Tr. Co.*, 264 So. 3d 249, 253 (Fla. 1st DCA 2019))); *Mielke*, 264 So. 3d at 253 ("The language of section 673.3091 demonstrates that it is not intended to create a cause of action to reestablish a lost note. Rather, it only recognizes that an entity not possessing an instrument is still entitled to enforce it if the entity meets certain conditions. The cause of action is the enforcement itself; section 673.3091 only sets forth special requirements if the plaintiff does not possess the instrument.").

standard of review."); *St. Clair v. U.S. Bank Nat'l Ass'n*, 173 So. 3d 1045, 1046 (Fla. 2d DCA 2015) ("This court reviews issues of standing in foreclosure cases using the de novo standard of review.").

A plaintiff in a foreclosure action must establish standing to enforce the note both at the time the complaint was filed and at trial. *See, e.g., Dickson v. Roseville Props., LLC*, 198 So. 3d 48, 50–51 (Fla. 2d DCA 2015). When the note is lost, a plaintiff must establish standing by reestablishing the note pursuant to section 673.3091. *See Peters v. Bank of N.Y. Mellon*, 227 So. 3d 175, 178 (Fla. 2d DCA 2017). A plaintiff may establish the requirements for reestablishing a lost note "by affidavit or by testimony." *Fed. Nat'l Mortg. Ass'n v. Trinidad*, 358 So. 3d 754, 759 (Fla. 4th DCA 2023). It is not necessary, however, that the affidavit or testimony establish "exactly when, how, and by whom the note was lost." *Boumarate v. HSBC Bank USA, N.A.*, 172 So. 3d 535, 537 (Fla. 5th DCA 2015).

Section 673.3091(1)(a) requires that a plaintiff show that it "was entitled to enforce the instrument when loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred." "Where, as in this case, the plaintiff cannot prove that it was entitled to enforce a note when it was lost, 'the plaintiff may submit evidence of an assignment from the payee to the plaintiff'" *Peters*, 227 So. 3d at 179 (quoting *Boumarate*, 172 So. 3d at 538); *see also Focht v. Wells Fargo Bank, N.A.*, 124 So. 3d 308, 310 (Fla. 2d DCA 2013) ("A plaintiff who is not the original lender may establish standing to foreclose a mortgage loan by submitting a note with a blank or special [i]ndorsement, an assignment of the note, or an affidavit otherwise proving the plaintiff's status as the holder of the note.").

Here, Nationstar attached to its complaint and Wilmington introduced at trial documents establishing the unbroken chain of assignments of the blank-indorsed note from the original lender to Wilmington. Because that chain was unbroken, it necessarily encompassed the person entitled to enforce the note at the time of its loss. The evidence, therefore, established exactly *who* had the authority to enforce the note at any given moment, from the note's execution to the filing of the foreclosure suit to the trial—the only unknown was exactly *when* the bailee lost the note. None of this could be said in *Lewis v. US Bank National Ass'n*, 298 So. 3d 72 (Fla. 4th DCA 2020), on which Charm-B heavily relies. We therefore emphasize that that opinion arose out of an entirely different context, and we are not persuaded by Charm-B's insistence that it mandates affirmance in this case, let alone that it changed the analysis applicable to lost-note cases in general.

Consequently, Wilmington needed show no further details surrounding the note's loss to satisfy section 673.3091(1)(a). *See Boumarate*, 172 So. 3d at 537 ("[P]roving the 'circumstances of [the Note's] loss' is necessary only if it is required to prove that the plaintiff was entitled to enforce it when the loss occurred." (quoting *Beaumont v. Bank of N.Y. Mellon*, 81 So. 3d 553, 554–55 (Fla. 5th DCA 2012))). Indeed, demanding more would require us to depart from a plain reading of the statute. Subsection (1)(a) requires only that a plaintiff in Wilmington's shoes establish that it "directly *or indirectly* acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred." § 673.3091(1)(a) (emphasis added). By its terms, then, this section does not require that a plaintiff relying on an assignment establish with specificity *which*

person in an unbroken chain of ownership was entitled to enforce the note when the loss occurred.

We therefore hold that because Wilmington's evidence of an unbroken chain of assignments of the note satisfied section 673.3091(1)(a), the trial court erroneously granted Charm-B's motion for involuntary dismissal. Accordingly, we reverse and remand for a new trial.

Reversed and remanded for further proceedings.

NORTHCUTT and KHOUZAM, JJ., Concur.

Opinion subject to revision prior to official publication.