

**IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER COUNTY, FLORIDA**

Reverse Mortgage Funding, LLC,

Plaintiff,

Case No.: **2016-CA-0655**
Division: **49**

vs.

**The unknown Heirs, devisees, Grantees,
Assignees, Lienors, Creditors, Trustees, or
Other Claimants claiming by, through, under,
or against, Harriet R. Callahan a/k/a Harriet
Pauley Callahan a/k/a Harriet Callahan,
Deceased; Sand Land and Water Co., et al.,**

Defendants.

FINAL JUDGMENT

THIS MATTER came to be tried before the Court without a jury upon the *Amended Complaint* (the "Amended Complaint"), filed by Plaintiff, Reverse Mortgage Solutions, Inc. At trial, both the Plaintiff and Defendant, Sand Land and Water Co.¹, were represented by counsel. On April 27th, 2017, the Clerk entered a default² against Defendant, Unknown heirs, devisees, grantees, assignees, lienors, creditors, trustees, or other claimants claiming by, through, under or against, Harriet R. Callahan aka Harriet Pauley Callahan aka Harriet Callahan, deceased. Defendant, United States of America acting on behalf of the Secretary of Housing and Urban Development, disclaimed³ any interest in the subject property arising out of the subject mortgage, and no other named Defendant appeared at trial. This cause is an action to foreclose a reverse mortgage after the mortgage had been accelerated due to the death⁴ of the borrower, Harriet R. Callahan. This Court has jurisdiction over the parties and the subject matter to this action and the trial was properly noticed and set for Non-jury Trial before the Court.

¹ Sand Land and Water Co. is a Florida corporation.

² On April 27th, 2017, the Clerk also entered *Default* against Unknown heirs, devisees, grantees, assignees, lienors, creditors, trustees, or other claimants claiming by, through, under or against, William J. Callahan, Jr., deceased, a non-party to this action.

³ See, *Disclaimer at to Amended Complaint of the United States of America*, filed March 23rd, 2017.

⁴ Plaintiff alleges that "[t]he Loan is in *default* due to the Borrower having passed away on December 3, 2011." (Emphasis added.) [Amended Complaint, ¶ 7.]

At trial, the Plaintiff introduced documentary evidence through a business records custodian (the "Witness"). An *Adjustable Rate Note* (the "Note"), *Adjustable Rate Home Equity Conversion Mortgage* (the "Mortgage"), *Assignment of Mortgage* from MERS⁵ to Sun West Mortgage Company (the "Sun West Assignment"), *Assignment of Mortgage* from Sun West Mortgage Company, Inc. to Reverse Mortgage Funding, LLC (the "Reverse Mortgage Funding Assignment"), and *Home Equity Conversion Loan Agreement* (the "Loan Agreement"), were accepted into evidence as "Composite Exhibit 1." A *Repayment Notice*, dated February 3, 2012, from Sun West Mortgage Company, Inc. addressed to the Estate of Harriet R. Callahan was accepted into evidence as "Exhibit 2." A *Balance History* covering the time period beginning with an effective date of April 30th, 2015 and ending with an effective date of May 31st, 2017 was accepted into evidence as "Exhibit 3."

During direct examination, the Witness testified that he was experienced with reverse mortgages. The Witness testified that there was a default in the Mortgage. When asked how the default occurred, the Witness testified, "the Borrower passed away⁶." The Witness provided judgment figures based on Exhibit 3.

When cross-examined, the Witness was unable to identify any business record entered into evidence and did not have personal knowledge indicating the original amount of money that was loaned when the reverse mortgage loan was originated. The Witness did not have any business records entered into evidence indicating the outstanding balance or transactions charged to the reverse mortgage loan from the time of origination on June 14th, 2008 until the beginning effective date of Exhibit 3⁷. The Witness testified that the Note does not give the amount borrowed but does show the maximum principal amount available. The Witness admitted that the Note does not show the amount that the borrower is promising to pay. The Witness testified that the borrower is not personally liable for the amounts advanced under the Note and the Mortgage does not impose personal liability for the Note. The Witness testified that the Note refers to the Loan Agreement to determine the amount of money advanced and under Note. The Witness

⁵ Mortgage Electronic Registration Systems, Inc., as nominee for Pacific Reverse Mortgage, Inc. dba Financial Heritage

⁶ The Court notes that while the death of the borrower could give rise to acceleration of the reverse mortgage loan, death of the borrower is not a "default" under the terms of the loan. The Note and Mortgage do not contain a promise by the borrower that borrower will not die.

⁷ The Witness opined that the reverse mortgage loan most likely began with a \$45,000.00 balance. The Witness was familiar with the operation of a reverse mortgage loan and that a reverse mortgage loan is usually a line of credit that the borrower can obtain advances up to the maximum principal amount.

testified that he relies on the Sun West Assignment and the Reverse Mortgage Funding Assignment to show that Plaintiff was the owner of the reverse mortgage loan. The Witness testified that MERS was never the owner of the Note and never owned the reverse mortgage loan and was merely acting as nominee for the originator. The Witness also testified that neither the Sun West Assignment or the Reverse Mortgage Funding Assignment contained language that assigned the Note.

On redirect examination, the Witness testified that there is an Allonge attached to the Note indicating and indorsement “in blank” and that Plaintiff received possession of the Note at or before the date of the Reverse Mortgage Funding Assignment.

The Amended Complaint alleges that Plaintiff “is the holder of [the] Note,” [Amended Complaint, ¶ 4.] Defendant’s *Answer and Affirmative Defenses* denies, with specificity, that Plaintiff has standing to bring the action because the Note is not a negotiable instrument making the Allonge not effective to transfer the Note. There was no other admissible evidence regarding *ownership of or entitlement to* enforce the Note.

ANALYSIS

STANDING TO FORECLOSE / NEGOTIABILITY OF THE NOTE

Plaintiff relies on possession of the Note with the Allonge attached, indorsed “in blank,” at the time this action was filed, to show it is the “holder” of the Note and entitled to enforce the terms of the Note. Plaintiff asserts that since Plaintiff is entitled to enforce the Note under Florida Statute § 673.3011(a) as the holder, Plaintiff is the proper party to foreclose the Mortgage. The Court disagrees.

In order to be a negotiable instrument under Florida Statute § 673⁸, the document must be an “unconditional promise . . . to pay a fixed amount of money, . . .” Fla. Stat. § 673.1041(1). A promise to pay is “unconditional unless it states: (a) [a]n express condition to payment; (b) [t]hat the promise . . . is subject to or governed by another writing; or (c) [t]hat rights or obligations with respect to the promise or order are stated in another writing.” Fla. Stat. § 673.1061(1).

The Note, Section 2 states:

In return for amounts to be advanced by Lender up to a maximum principal amount of [\$195,000.00], to or for the benefit of Borrower under the terms of a Home Equity Conversion Loan Agreement dated March 26, 2010 (“Loan Agreement”), Borrower promises to pay to the order of Lender a principal amount

⁸ Florida Statute § 673.1021(1) states, “[t]his chapter applies to negotiable instruments. . . .”

equal to the sum of all Loan Advances made under the Loan Agreement with interest.

This language shows very plainly that Note is not for a *fixed amount of money* as required by the definition of a negotiable instrument in Florida Statute § 673.1041(1).

The Note, Section 4(C) states:

Borrower shall have no personal liability for payment of the debt. Lender shall enforce the debt only through the sale of the Property covered by the Security Instrument (“Property”).

The Note, Section 10 states, “Lender may enforce its rights under this Note only through sale of the Property.”

The language of these two sections of the Note show very plainly that the Note is not an *unconditional promise to pay* as required by the definition of a negotiable instrument in Florida Statute § 673.1041(1).

Section 6 of the Note provides that the immediate payment-in-full can be required if the Borrower dies, Borrower transfers the Property, Borrower ceases to use the Property as Borrower’s residence, Borrower fails to physically occupy the Property for a period of 12 consecutive months, or fails to complete an obligation contained in the Mortgage. There are no other payment obligations contained in the Note. These provisions are *express conditions to payment* as defined under Florida Statute § 673.1061(1)(a).

The language of Section 2 of the Note states that the promise to pay is governed by another writing, specifically, the Loan Agreement. This is another *express condition to payment* as defined by Florida Statute § 673.1061(1)(b). Section 2 of the Note also states that amounts due and sums advanced, or obligations with respect to the promise, are stated in the Loan Agreement. This is an additional *express condition to payment* as defined by Florida Statute § 673.1061(1)(c).

The Court recognizes that there are many cases in Florida law indicating that “mortgage notes are negotiable instruments.” *Am. Home Mortg. Servicing, Inc. v. Bednarek*, 132 So. 3d 1222, 1223 (Fla. 4th DCA 2014) (“Because a promissory note is a negotiable instrument,”) (quoting *Stone v. BankUnited*, 115 So. 3d 411, 413 (Fla. 2d DCA 2013) (quoting *Mazine v. M & I Bank*, 67 So. 3d 1129, 1131 (Fla. 1st DCA 2011)); *Taylor v. Deutsche Bank Nat'l Trust Co.*, 44 So. 3d 618, 622 (Fla. 5th DCA 2010) (“Because a promissory note is a negotiable instrument, and because a mortgage provides the security for the repayment of the note,”). (Additional

cases not cited.) None of the cases standing for the generalization that mortgage notes are negotiable instruments analyze the note against Florida Statute § 673.1041 to determine negotiability. This Court has found no Florida case that supports the generalization that “mortgages notes are negotiable instruments” *after* doing an analysis of the specific note against section 673.1041.

Florida cases that analyze specific notes do support the statutory definition of a negotiable instrument. *Nagel v. Cronebaugh*, 782 So. 2d 436, 439 (Fla. 5th DCA 2001)(“In order for an instrument to be negotiable under the UCC, it must contain an unconditional promise to pay a sum certain.”); *United Nat’l Bank v. Airport Plaza Ltd. P’ship*, 537 So. 2d 608, 609 (Fla. 3d DCA 1988)(“In order to qualify as a negotiable instrument a promissory note must contain an unconditional covenant to pay a sum certain in money.”); *GMAC v. Honest Air Conditioning & Heating, Inc.*, 933 So. 2d 34, 37 (Fla. 2d DCA 2006)(“[T]he exclusionary language of section 673.1041(1)(c), [] provides that a negotiable instrument ‘does not state any other undertakings’ in addition to the payment of money . . . [a] negotiable instrument should be ‘simple, certain, unconditional, and subject to no contingencies.’”); *Mason v. Flowers*, 107 So. 334, 335 (Fla. 1926)(“It appears to be a well settled rule of law that a necessary quality of a negotiable paper is that it shall be simple, certain, unconditional and subject to no contingencies. As some writers have said, it must be a “courier without luggage.”).

The note in *Nagel* contained a promise to pay “the principal sum of To be determined at the time of contengencies [sic] below /100 DOLLARS (\$ unknown)” 782 So. 2d at 437. The Court held that since the note did not provide a fixed principal amount it was not a negotiable instrument. The subject Note is for “principal amount equal to the sum of all Loan Advances made under the Loan Agreement with interest,” or in other words, “to be determined” like the *Nagel* note. *Nagel v. Cronebaugh*, 782 So. 2d 436, 438 (Fla. 5th DCA 2001).

The note in *Airport Plaza* contained a clause that provided:

It is expressly understood and agreed by each original and successive owner or holder of this Note that nothing herein contained shall be construed as creating any personal liability on Borrower, or any Shareholders therein, to pay this Note or any interest that may accrue hereunder, all such liability, if any, being expressly waived.

537 So.2d at 609.

The *Airport Plaza* Court held:

Because the note made by Airport Plaza specifically provides that the borrower shall have no personal liability, recourse for payment in the event of a default is limited to foreclosure against the secured property. The promissory note is thus rendered conditional. A conditional instrument is not negotiable.

United Nat'l Bank v. Airport Plaza Ltd. P'ship, 537 So. 2d 608, 610 (Fla. 3d DCA 1988).
(Internal citation omitted.)

Like the *Airport Plaza* note, the subject Note contains specific language stating that Defendant shall have *no personal liability* for the amount owed.

It is extremely clear to the Court that the Note is not simple, it requires looking at another document to determine many of its terms, it is conditional, and subject to contingencies and therefore *cannot* be a negotiable instrument under Florida's Uniform Commercial Code.

Without the ability to transfer the right to enforce the Note by endorsement and physical transfer of possession, Plaintiff's ability to enforce the Note must come from somewhere other than Florida Statute § 673.3011. The assignments of mortgage do not transfer to or otherwise give Plaintiff entitlement to enforce the Note. Plaintiff has provided no evidence tending to show Plaintiff is entitled to enforce the Note under any other provision of Florida law. Without more, the Court can only conclude that the originator, Pacific Reverse Mortgage, Inc. dba Financial Heritage, is entitled to enforce the terms of the Note and Mortgage.

THEREFORE, the Court finds that Plaintiff has failed to prove by a preponderance of the evidence that Plaintiff has standing to bring this action.

The Court being otherwise fully advised in the premises it is:

ORDERED AND ADJUDGED that:

Plaintiff, Reverse Mortgage Solutions, Inc. shall take nothing by this action.

Defendant, Sand Land and Water Co., shall go hence without day.

Defendant, Sand Land and Water Co. is the prevailing party in this action.

The Lis Pendens filed against Defendant's real property is and the same is hereby canceled.

The Court retains jurisdiction under the Florida Rules of Civil Procedure to determine entitlement to and amount of attorney's fees to be awarded, if any.

The parties shall proceed accordingly.

DONE AND ORDERED in Flagler County, Bunnell, Florida, this 23rd day of June, 2017.





Scott C. DuPont, Circuit Court Judge

Service List Attached.

7/11/2017 1:05 PM 2016 CA
e-Signed 7/11/2017 1:05 PM 2016 CA
000655

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