PLAINTIFF BANK DID NOT DEMONSTRATE STANDING WITH ADMISSIBLE EVIDENCE AND THE LOST NOTE AFFIDAVIT WAS INSUFFICIENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank did not demonstrate standing with admissible evidence and the lost note affidavit was insufficient:

> … [T]he only business record entered into evidence to support DeCaro's [plaintiff's loan verification consultant's] testimony that the plaintiff was in possession of the note on the date of commencement was plaintiff's Exhibit 7, a computer screen printout of a database tracking system. However, plaintiff's Exhibit 7 failed to evince the facts for which it was relied upon. More specifically, while DeCaro contended that the document demonstrated that Wells Fargo, as custodian for the plaintiff, received the note July 16, 2005, and that the note was in Wells Fargo's vault from July 2005 until December 2009, the document, in itself, failed to establish those facts.
>
> Further, pursuant to UCC 3-804, which is intended to provide a method for recovering on instruments that are lost, destroyed, or stolen, a plaintiff is required to submit due proof of the plaintiff's ownership of the note, the facts which prevent the plaintiff from producing the note, and the note's terms … . Here, the lost note affidavit, which failed to establish when the note was acquired and failed to provide sufficient facts as to when the search for the note occurred, who conducted the search, or how or when the note was lost, failed to sufficiently establish the plaintiff's ownership of the note … . HSBC Bank USA, N.A. v Gilbert, 2020 NY Slip Op 07874, Second Dept 12-23-20

THE LOST NOTE AFFIDAVITS SUBMITTED BY THE PLAINTIFF IN THIS FORECLOSURE ACTION WERE INVALID; PLAINTIFF'S MOTION FOR LEAVE TO ENTER A DEFAULT JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff bank's motion to leave to enter a default judgment in this foreclosure action should not have been granted. The lost note affidavits were invalid:

> Pursuant to UCC 3-804, "[t]he owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his [or her] own name and recover from any party liable thereon upon due proof of his [or her] ownership, the facts which prevent his [or her] production of the instrument and its terms."
>
> Here, although the plaintiff submitted sufficient evidence establishing that it was the owner and holder of the note and establishing the note's terms, the lost note affidavits submitted by the plaintiff failed to establish the facts that prevent the production of the original note … . Neither affidavit identifies who conducted the search for the lost note or explains "when or how the note was lost" … . Capital One, N.A. v Gokhberg, 2020 NY Slip Op 07345, Second Dept 12-9-20

STRICT FORECLOSURE AT THE DIRECTION OF THE MAJORITY BONDHOLDERS WHICH CANCELLED THE NOTES PRECLUDED RECOVERY BY THE PLAINTIFFS WHO PURCHASED SOME OF THE NOTES IN THE SECONDARY MARKET (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, reversing the Appellate Division, over a three-judge dissent, determined the strict foreclosure at the direction of the majority bondholders which cancelled the notes precluded plaintiffs from recovering on notes purchased in the secondary market. The decision is fact-specific, dependent on the wording of documents, and cannot be fairly summarized here:

> After the issuer defaulted, plaintiffs, the holders of a minority in principal amount of senior secured debt, brought this lawsuit against the debtor and its guarantors to recover payment of principal and interest. We are called upon to determine whether plaintiffs' right to sue for payment on the notes survived a strict foreclosure, undertaken by the trustee at the direction of a group of majority bondholders over plaintiffs' objection, that purported to cancel the notes. We hold that it did … . …
>
> In December 2005, defendant Cleveland Unlimited, Inc. (Cleveland Unlimited), a telecommunications company, issued $150 million of "senior secured" debt in the form of "Notes" pursuant to an indenture agreement (the Indenture). The Notes had a five-year term and required Cleveland Unlimited to pay interest to holders of the Notes (Noteholders or Holders) on a quarterly basis up to and including the maturity date, at which point the principal also became due. The Indenture named Cleveland Unlimited as the "Issuer"

of the Notes, eighteen of Cleveland Unlimited's subsidiaries and affiliates as the "Guarantors," and U.S. Bank National Association (U.S. Bank) as the Indenture "Trustee." At the same time the Indenture was executed, the Issuer, the Guarantors, and the Trustee executed a Collateral Trust Agreement and a Security Agreement (collectively, Indenture Documents) ... . In April 2010, plaintiffs purchased approximately $5 million of the Notes in the secondary market, amounting to 3.33% of the outstanding principal value.

At issue in this case are certain provisions in the Indenture Documents governing the rights of the Noteholders to receive payment, the remedies available in the event of default, and the power of a majority of Noteholders to direct the Trustee's choice of remedy. CNH Diversified Opportunities Master Account, L.P. v Cleveland Unlimited, Inc., 2020 NY Slip Op 05976, Ct App 10-20-20

IN THIS DEFICIENCY JUDGMENT ACTION, THE PLAINTIFF DID NOT PRESENT SUFFICIENT PROOF OF THE AMOUNT OWED BY THE DEFENDANT OR THE REASONABLENESS OF THE SALE OF THE COLLATERAL (FOURTH DEPT).

The Fourth Department, vacating the damages award in this action on a motor vehicle retail installment contract, determined the plaintiff did not present evidence sufficient to determine the correct amount of the deficiency judgment or the reasonableness of the sale of the collateral:

> ... [T]he court should have denied plaintiff's motion insofar as it sought summary judgment on the amount of damages. Plaintiff did not meet its initial burden of establishing the amount of the alleged deficiency as a matter of law ... . We note in particular that plaintiff failed to provide evidence of defendant's payment history, and failed to establish whether it applied certain applicable credits, including an unearned credit service charge pursuant to Personal Property Law §§ 305 and 315.
>
> Moreover, plaintiff's moving papers failed to establish that the vehicle was sold in a commercially reasonable manner ... . A "secured party seeking a deficiency judgment from the debtor after sale of the collateral bears the burden of showing that the sale was made in a commercially reasonable manner" (... see generally UCC 9-627 [b]). We conclude that, "[h]aving failed to set forth any of the facts and circumstances surrounding the sale, plaintiff failed to satisfy a prerequisite to obtaining a deficiency judgment and is not entitled to summary judgment" with respect to damages ... . Ally Fin. Inc. v Jonathan, 2020 NY Slip Op 05630, Fourth Dept 10-9-20

LOST NOTE AFFIDAVIT INSUFFICIENT TO ESTABLISH STANDING; PROOF OF COMPLIANCE WITH RPAPL 1304 INSUFFICIENT; OUT OF STATE AFFIDAVIT LACKED A CERTIFICATE OF CONFORMITY; NEITHER PLAINTIFF NOR DEFENDANT ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff-bank's motion for summary judgment in this foreclosure action should not have been granted. The lost note affidavit was insufficient to establish standing the proof of compliance with the notice requirements of RPAPL 1304 was insufficient and the out of state affidavit lacked a certificate of conformity. Defendants' cross-motion for summary judgment, however, was properly denied:

> ... [T]he plaintiff failed to proffer evidence establishing that the note was assigned to it, and the affidavit of lost note submitted in support of its motion failed to establish the facts that prevented the plaintiff from producing the original note (see UCC 3-804 ...). We also note that the out-of-state affidavit from the vice president of loan documentation for Wells Fargo lacked a certificate of conformity as required by CPLR 2309(c), although such defect by itself would not be fatal to the plaintiff's motion ,,, ,
>
> ... [A]lthough the plaintiff submitted a copy of the 90-day notice purportedly sent to the defendants, it failed to submit an affidavit of service or other proof of mailing establishing that it properly served them by registered or certified mail and first-class mail in accordance with RPAPL 1304 ... .
>
> The defendants' bare denial of receipt of the RPAPL 1304 notice, without more, was insufficient to establish their prima facie entitlement to judgment as a matter of law ... . Trust v Moneta, 2020 NY Slip Op 05181, Second Dept 9-30-20

BANK WHICH ISSUED AN "OFFICIAL CHECK" DRAWN ON A DIFFERENT BANK, AFTER THE CUSTOMER'S FUNDS WERE WIRED TO THAT OTHER BANK (PURSUANT TO AN AGREED ARRANGEMENT), WAS NOT LIABLE UNDER THE UNIFORM COMMERCIAL CODE OR UNDER A MONEY HAD AND RECEIVED THEORY FOR THE SUBSEQUENT MISAPPROPRIATION OF THE CHECK (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Friedman, determined the defendant Signature Bank was not liable under the Uniform Commercial Code or under a money had and received theory for the misappropriation of an "official check" for $292,000:

> According to the affidavit of Patrick Manzi, Signature's senior vice president and director of bank operations, "[a]t the time in question, Signature did not issue its own official checks." ... [U]nder an agreement between Signature and Integrated Payment Systems Inc. (IPS), Signature customers were provided by IPS with computer software and check forms that gave them the capability, upon Signature's approval, to print out a Signature "Official Check" at their own offices. Although such a check bore Signature's logo and the signatures of Signature officers, and designated Signature as the "Drawer," the check also indicated in the lower left corner that it was "Issued by Integrated Payment Systems Inc., Englewood, Colorado" through "JPMorgan Chase Bank, N.A., Denver, Colorado." In addition, the check bore Chase's ABA routing number.
>
> In sum, when a Signature customer requested the issuance of an official check, Signature would debit the customer's account in the requested amount, wire the same amount to the IPS account at Chase, and notify the customer that it had permission to print out the check. In essence, official checks of this kind were drawn by Signature, not on its own account, but on the IPS account at Chase.
>
> Using the above-described procedure, R & L [the Signature customer] procured the issuance of a Signature "Official Check" in the amount of $292,000, payable to ... settlement agent, Steven J. Baum P.C.. The check identified R & L as the "Remitter."... According to a principal of R & L, R & L "forwarded the $292,000 bank check to Kim Saunders, the title closer, who undertook on behalf of the title company . . . to forward this check to Steven J. Baum, P.C. to pay off the seller's [sic] mortgage."
>
> It is undisputed that Steven J. Baum P.C., the payee of the check, never received it. The check was, through some unknown chain of events, misappropriated, improperly endorsed, and deposited into the joint account that the sellers of the underlying real property (defendants Richards and Massias) maintained at defendant TD Bank, N.A. The check was subsequently presented for payment to Chase, the drawee bank, which paid it ... . OneWest Bank, FSB v Deutsche Bank Natl. Trust Co., 2020 NY Slip Op 03483, First Dept 6-18-20

THE UCC CRITERIA FOR PROOF OF POSSESSION OF A LOST NOTE WERE NOT MET; PLAINTIFF BANK THEREFORE DID NOT DEMONSTRATE IT HAD STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate it had standing to bring the foreclosure action. The UCC's requirements for demonstrating ownership of a lost note were not met:

> ... [T]he affidavit of possession of the original note, sworn to by a vice president of loan documentation for the plaintiff, does not contain any details of delivery of the note, except for the claim that it was delivered to the plaintiff sometime after its execution, and that the plaintiff "had possession of the Promissory Note on or before ... the date that this action was commenced." The lost note affidavit of another vice president of loan documentation employed by the plaintiff stated vaguely, and in a conclusory manner, that the note was "inadvertently lost, misplaced or destroyed," that the plaintiff had not "pledged, assigned, transferred, hypothecated or otherwise disposed of the note," and that the plaintiff had made "a diligent and extensive search of its records in a good faith effort to discover the lost note in accordance with its procedures for locating the lost note." The lost note affidavit did not provide any facts as to when the search for the note occurred, who conducted the search, or when or how the note was lost ... . Thus, it "failed to sufficiently establish the plaintiff's ownership of the note" ... .
>
> Since the plaintiff failed to demonstrate its ownership of the lost note (see UCC 3-804), or that it had standing, "as the lawful holder or assignee of the subject note on the date it commenced this action, to commence the action ... . Wells Fargo Bank, N.A. v Meisels, 2019 NY Slip Op 08243, Second Dept 11-13-19

PLAINTIFF BANK DID NOT PRESENT SUFFICIENT EVIDENCE OF THE LOSS OF THE NOTE IN THIS FORECLOSURE ACTION; THE MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not present sufficient evidence concerning the allegedly lost note. The bank's motion for summary judgment in this foreclosure action should not have been granted:

> Among the evidence offered by the plaintiff was a lost note affidavit, signed by a representative of Beneficial Homeowner Service Corporation (hereinafter Beneficial), the purported predecessor-in-interest to the plaintiff, stating that the note was deemed lost as of November 14, 2013, and that Beneficial was "in possession of the original Note prior to its whereabouts becoming undeterminable." The evidence does not establish that the plaintiff was ever in physical possession of the subject note … .
>
> The plaintiff also failed to demonstrate its ownership of the subject note by written assignment. The plaintiff submitted a document dated June 12, 2015, purporting to be a written assignment of the appellants' mortgage and underlying note to the plaintiff by Beneficial, signed by Caliber Home Loans, Inc. (hereinafter Caliber), as Beneficial's "attorney in fact." However, the plaintiff failed to demonstrate as a matter of law the validity of the written assignment, because the plaintiff did not produce sufficient evidence of Caliber's authority to execute the assignment as Beneficial's attorney-in-fact … . …
>
> Moreover, the plaintiff failed to demonstrate, prima facie, the facts that prevented production of the lost note … . The affidavit submitted by the plaintiff failed to identify who conducted the search for the lost note … , and failed to explain "when or how the note was lost" … , but instead described only approximately when the search for the note was conducted and when the loss was discovered, which was "on or about" the date the affidavit was executed.
>
> In light of the plaintiff's failure to satisfy the requirements of UCC 3-804, we need not reach the parties' further contentions regarding the plaintiff's standing to commence this action … . U.S. Bank Trust, N.A. v Rose, 2019 NY Slip Op 07440, Second Dept 10-16-19

BANK'S EVIDENCE OF DEFAULT WAS INADMISSIBLE HEARSAY; INSUFFICIENT PROOF THE NOTE WAS ENDORSED IN BLANK; THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's motion for summary judgment in this foreclosure action should not have been granted. There was insufficient evidence the note was endorsed in blank and there was insufficient evident of defendant's default:

> … [I]t is undisputed that a copy of the underlying note was annexed to the complaint. However, notwithstanding the plaintiff's assertion in its appellate brief that "[t]he note, as attached to the complaint, was indorsed in blank on the reverse side of the signature page (and not a separate allonge)," it cannot be ascertained from the copy of the note annexed to the complaint whether the separate page that bears the endorsement in blank was stamped on the back of the note, as alleged by the plaintiff, or on an allonge, in which case the plaintiff would have to prove that the endorsement was "so firmly affixed thereto as to become a part thereof," as required under UCC 3-202(2).
>
> … [W]hile Panganiban's [plaintiff bank's vice president's] affidavit was sufficient to establish a proper foundation for the admission of a business record pursuant to CPLR 4518(a) … , the plaintiff failed to submit copies of the business records themselves. "[T]he business record exception to the hearsay rule applies to a writing or record' (CPLR 4518[a]) . . . [and] it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" … . "While a witness may read into the record from the contents of a document which has been admitted into evidence , … a witness's description of a document not admitted into evidence is hearsay" … . JPMorgan Chase Bank, N.A. v Grennan, 2019 NY Slip Op 06761, Second Dept 9-25-19

PRODUCTION OF THE ORIGINAL NOTE AND ENDORSEMENTS WAS "MATERIAL AND NECESSARY" TO THE DETERMINATION WHETHER THE BANK HAS STANDING TO BRING THE FORECLOSURE ACTION, DEFENDANT'S MOTION TO COMPEL DISCOVERY SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion pursuant to CPLR 3124 to compel the bank in this foreclosure action to produce the original note and endorsements should have been granted. Defendant had challenged the bank's standing to bring the foreclosure action and the production of the original note and endorsements was "material and necessary" to resolve the standing question:

> It is undisputed that a copy of the underlying note was annexed to the complaint. However, it cannot be ascertained from the copy of the note provided by the plaintiff whether the separate page that bears the endorsement in blank was stamped on the back of the note, as alleged by the plaintiff, or on an allonge, and if on an allonge, whether the allonge was "so firmly affixed as to become a part thereof," as required under UCC 3-202(2). Since the answers to these questions are "material and necessary" to the defense of lack of standing, the Supreme Court should have granted that branch of the defendant's motion which was pursuant to CPLR 3124 to compel the plaintiff to produce the original note and endorsements ... . Bayview Loan Servicing, LLC v Charleston, 2019 NY Slip Op 06463, Second Dept 9-11-19