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Note Prevails over Mortgage in the Event of a Conflict

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A recent decision from The Supreme Court of Florida (the "Florida Supreme Court") in *WVMF Funding v. Luisa Palmero, et al.* (Fl. S. Ct.; SC19-1920, June 24, 2021) held that, while a note and mortgage must be read together, in the event of a conflict between the two, the terms of the note would prevail.

Roberto and Luisa Palmero, a married couple, had initially applied as co-borrowers for a mortgage loan to be secured by a reverse mortgage on their primary residence, but ultimately did not close on such loan. However, a few months later, the husband, Roberto Palmero, applied as the sole borrower for the same type of reverse mortgage loan (the "Mortgage Loan"). In connection with the Mortgage Loan, Mr. Palmero executed five principal documents: (1) the loan application, (2) the home equity conversion loan agreement, (3) the note, (4) a non-borrower spouse ownership interest certification and (5) a reverse mortgage. The note, loan application and loan agreement were each only executed by Mr. Palmero and identified him as the sole borrower thereunder. Both he and his wife signed the non-borrower spouse ownership interest certification, which identified Mr. Palmero as the "Borrower" and Mrs. Palmero as the "Non-Borrower-Spouse." Both spouses also signed the reverse mortgage, which defined Roberto Palmero as the "Borrower," but also included a signature block at the end that was preprinted with the names of each of them and the word "Borrower."

Similar to other reverse mortgage loans, the death of the borrower would trigger acceleration of the Mortgage Loan prior to the maturity date identified in the note and the mortgage. After Mr. Palmero's death and the failure of his estate to repay the Mortgage Loan, OneWest Bank, FSB, the petitioner's predecessor, commenced mortgage foreclosure proceedings.

In response, Mrs. Palmero and her children argued that, since she still continued to reside at the property that secured such mortgage as her principal residence, the mortgage could not be foreclosed because "both the note and mortgage conditioned enforcement of the debt on the following: 'A Borrower dies and the [mortgaged] Property is not the principal residence of at least one surviving Borrower.'" (*OneWest Bank, FSB v. Palmero*, 283 So. 3d 346, 364 (Fla. 3d DCA2019))

Although the trial court found that the wife "was not a co-borrower," it still denied the lender's foreclosure based on a federal statute that governed the insurability of reverse mortgages by the Secretary of the Department of Housing and Urban Development. On appeal, Florida's Third District Court of Appeal (the "Third District") rejected the trial court's reliance on the federal statute in denying foreclosure but affirmed the denial of foreclosure, finding that Mrs. Palmero was a borrower under the Mortgage Loan as a "matter of law" (*Id.* at 350) and holding that the lender "failed to establish the occurrence of a condition precedent to its right to foreclose, *i.e.*, that the subject property is not the principal residence of Mrs. Palmero, a surviving co-borrower under the instant reverse mortgage." (*Id.* at 347)

The Florida Supreme Court reviewed the Third District's ruling *de novo*, finding that the Third District failed to follow well-established precedent dating back to decisions from 1907 and 1934, finding that "[t]he general rule for foreclosure actions [is that] if there is a conflict between the terms of a note and mortgage, the note should prevail." The Florida Supreme Court also disagreed with the Third District's holding that the location of the wife's signature on the mortgage "unambiguously and as a matter of law, … ma[de] her a co-borrower under the mortgage." The Florida Supreme Court instead found that both the note and mortgage defined the husband as the "Borrower" and the wife only joined in the mortgage because it "would have been required for the lender to have a valid security interest because the mortgaged

property was her homestead." The Florida Supreme Court also found that the Third Circuit did not need to look beyond "the note and mortgage to the other documents that were part of the same transaction to determine, as a matter of law, how the parties intended to define the term 'Borrower,'" since "the Court's foreclosure precedent requires courts to read the mortgage together with the note it secures ... and to look to the note to resolve any conflict."

But the Florida Supreme Court was divided in its ruling, with two of the justices dissenting. The dissenting justices agreed that a note should prevail over a mortgage, but that there was no authority that required the same result in a reverse mortgage context since "conventional mortgages are distinguishable from reverse mortgages because no personal liability is attached to a borrower in a reverse mortgage." But the Florida Supreme Court explained that it didn't matter that the Florida Supreme Court's precedent dealt with traditional mortgages rather than a reverse mortgage because "first principles – *i.e.*, the reason for the documents at issue – tell us why we should read a mortgage together with the note it secures regardless of the type of mortgage being foreclosed: '[T]he promissory note, not the mortgage, is the operative instrument in a mortgage loan transaction, since 'a mortgage is but an incident to the debt, the payment of which it secures, and its ownership follows the assignment of the debt.'" Since the Florida Supreme Court found that such precedent applied to a reverse mortgage, the case was sent back to the trial court.