Must Have Promissory Note Cases

McCay v. Capital Resources Company, LTD. 96-200 S.W.2d 1997
Where appellee apparently never possessed appellants' original note as provided in Ark. Code Ann. 4-3-309(a)(i) (Repl. 1991), but was required, even if it had, to have proven all three factors specified in 4-3-309(a) and did not do so, appellee could not enforce the original note's terms by the use of a copy; even if all three requirements in 4-3-309(a) had been proven, the trial court was still obligated to ensure that appellee provided adequate protection to the appellants from any future claim, and this, too, was not done. First, as previously discussed, we mention the unfairness in these circumstances that, if a duplicate was allowed in place of the original note, the McKays could later be subjected to double liability if the actual holder of the note appeared. Next, we add that the Rules of Evidence are rules of the court involving legal proceedings, while the UCC is composed of statutes of law that established the rights and liabilities of persons. Again, as previously discussed, Capital Resources, as an assignee of the McKays' note, could not sue on the underlying debt the McKays owed to Landmark Savings. For Capital Resources to have prevailed in enforcing the McKays' note, it was required either to produce the original or satisfy the requirements for a lost negotiable instrument under 4-3-309(a) and (b). Because Capital failed to do either, we must reverse and remand.

Mortgage Securities Inc. v. Hartley Lord. No. 4D02-4051. July 23, 2003
Mortgagee by assignment brought foreclosure action. The Circuit Court, 15th Judicial Circuit, Palm Beach County, Edward Fine and John Wessel, JJ., entered summary judgment for mortgagor. Mortgagee appealed. The District Court of Appeal, Stone, J., held that mortgagee could not maintain cause of action to enforce missing promissory note or foreclose mortgage, in absence of proof that mortgagee or assignor ever had possession of note.

Lorraine C. Tillman v. Virginia Savage Smith (07/25/85)
The purpose of the section is well expressed by commentator Carl W. Ehrhardt as follows: [21] The drafters of the Code excluded from the general rule of admissibility of duplicates these documents because the possessor of the documents is the owner of the obligation that they represent and the party who may bring a cause of action based on the document. Therefore, the person who possesses the duplicate may not possess the cause of action. For example, if A makes a xerox copy of a promissory note and subsequently negotiates the original to B, under section 90.953(1), A, the transferor, is not able to sue on the xerox copy of the promissory note. [22] Ehrhardt, Florida Evidence § 953.1 (2d ed. 1984). See also Lowery v. State, 402 So.2d 1287 (Fla. 5th DCA 1981). To fall under section 90.953(1), the agreement would have not only to evidence a right to the payment of money, but be "of a type that is transferred by delivery in the ordinary course of business with any necessary endorsement or assignment" (emphasis added).

Mason v. Rubin, 727 So.2d 283, 37 UCC Rep.Serv.2d 1087 (Fla.App. Dist.4 02/10/1999)
Establishing a lost negotiable instrument is governed by a different statute, section 673.3091, Florida Statutes (1993). The latter statute contains more stringent requirements than the former, and the trial court correctly concluded that the husband did not satisfy section 673.3091

Figueredo v. Bank Espirito Santo No. 88-1808.Jan. 31, 1989. FL Third District.
The plaintiff failed to produce for admission into evidence the original copy of a negotiable promissory instrument as is expressly required by section 90.953(1), Florida Statutes (1987). For this reason, the final judgment of foreclosure is vacated with directions for the trial court to receive the original promissory note in evidence

SMS Financial LLc. v. Abco Homes, Inc. No.98-50117 February 18, 1999 (167 F. 3d. 235; 5th Circuit Court of Appeals.)
Where the complaining party can not prove the existence of the note, then there is no note. To recover on a promissory note, the plaintiff must prove: (1) the existence of the note in question; (2) that the party sued signed the note; (3) that the plaintiff is the owner or holder of the note; and (4) that a certain balance is due and owing on the note. Since no one is able to produce the "instrument" there is no competent evidence before the Court that any party is the holder of the alleged note or the true holder in due course. New Jersey common law dictates that the plaintiff prove the existence of the alleged note in question, prove that the party sued signed the alleged note, prove that the plaintiff is the owner and holder of the alleged note, and prove that certain balance is due and owing on any alleged note. **Federal Circuit Courts have ruled that the only way to prove the perfection of any security is by actual possession of the security. See;** *Matter of Staff Mortg. & Inv. Corp., 550 F.2d 1228 (9th Cir 1977),* **"Under the Uniform Commercial Code, the only notice sufficient to inform all interested parties that a security interest in instruments has been perfected is actual possession by the secured party, his agent or bailee."** Bankruptcy Courts have followed the Uniform Commercial Code. In *Re Investors & Lenders, Ltd. 165 B.R. 389 (Bkrtcy.D.N.J.1994)*, **Unequivocally the Court's rule is that in order to prove the "instrument", possession is mandatory. In addition to the note, another element of proof is necessary – an accounting that is signed and dated by the person responsible for the account. Claim of damages, to be admissible as evidence, must incorporate records such as a general ledger and accounting of an alleged unpaid promissory note, the person responsible for preparing and maintaining the account general ledger must provide a complete accounting which must be sworn to and dated by the person who maintained the ledger. See** *Pacific Concrete F.C.U. V. Kauanoe, 62 Haw. 334, 614 P.2d 936 (1980), GE Capital Hawaii, Inc. v. Yonenaka 25 P.3d 807, 96 Hawaii 32, (Hawaii App 2001), Fooks v. Norwich Housing Authority 28 Conn. L. Rptr. 371, (Conn. Super.2000), and Town of Brookfield v. Candlewood Shores Estates, Inc. 513 A.2d 1218, 201 Conn.1 (1986).*

See § 90.953, West's Fla. Stat. Annot. (1979) (Sponsor's Note); C. Ehrhardt, Florida Evidence § 953.1, at 605 & n.5; Lowery v. State, 402 So.2d 1287, 1288-89 (Fla. 5th DCA 1981). 90.953(1),
Florida Statutes, is misplaced. The purpose of that subsection is to require production of the original where there is an action on a negotiable instrument. In such instances, the original instrument must be brought forward both to demonstrate the right to payment and to preclude the possibility that the instrument has already been negotiated.

[11] State Street sought to establish the promissory note and mortgage under section 71.011, Florida Statutes. State Street alleged that Hartley executed the note and mortgage and that, after multiple assignments, the documents were assigned to State Street by EMC Mortgage Corporation. Although State Street alleged in its pleading that the original documents were received by it, the record established that State Street never had possession of the original note and, further, that its assignor, EMC, never had possession of the note and, thus, was not able to transfer the original note to State Street. [12] The trial court correctly concluded that as State Street never had actual or constructive possession of the promissory note, State Street could not, as a matter of law, maintain a cause of action to enforce the note or foreclose the mortgage. The right to enforce the lost instrument was not properly assigned where neither State Street nor its predecessor in interest possessed the note and did not otherwise satisfy the requirements of section 673.3091, Florida Statutes, at the time of the assignment. See Slizyk v.

Smilack, 825 So. 2d 428, 430 (Fla. 4th DCA 2002). In Mason v. Rubin, 727 So. 2d 283 (Fla. 4th DCA 1999), the appellant brought a foreclosure action on a second mortgage, the trial court denied the foreclosure, and this court affirmed on the basis that the appellant had failed to establish the lost note under section 673.3091. Likewise, here, where State Street failed to comply with section 673.3091, the trial court correctly entered summary judgment denying its foreclosure claim. *fn1 In contrast, here, the undisputed evidence was that EMC, the assignor, never had possession of the notes and, thus, could not enforce the note under section 673.3091 governing lost notes. Because EMC could not enforce the lost note under section 673.3091, it had no power of enforcement which it could assign to State Street.

Raymond E. Shores and Marcene G. Shores v. First Florida Resource Corporation
(10/11/72) Appellants are entitled to assurance that they will not later be sued by a holder of these instruments…. If there are parties having any claim to these instruments they should be brought into the action and the matter determined. The instruments should then be reestablished, recorded and an appropriate judgment entered.