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The Mystery of the Missing Promissory Note

By: Roger H. Miller III
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There is a popular misconception circulating among the general public that holds if a lender cannot produce the original promissory note, then the lender cannot enforce the note. A promissory note is the written evidence of a debt owed by one party to another and the terms of repayment. A promissory note is considered a negotiable instrument, not unlike a check from one party to another. A promissory note can be transferred if it is endorsed or assigned to the transferee.

In the context of a mortgage foreclosure, the original promissory note is required to be tendered to the court at the time the court enters judgment in foreclosure. The judgment takes the place of the note, and to prevent the possibility of another party attempting to enforce the note in the future, the court takes possession of the original note and cancels the note.

As with anything, on occasion, promissory notes are lost, stolen or destroyed. What happens when the payee under a promissory note cannot find the note to enforce it? Can the owner of the note that cannot be found still enforce the note? In a word: Yes.

Some people are under the mistaken impression that if a lender cannot find the original note, or even a copy, then they cannot enforce the note, and consequently, cannot foreclose the mortgage. The right to reestablish lost instruments, including promissory notes, has been recognized in common-law courts and courts of equity. Chapters 71 and 673, of the Florida Statutes, both provide statutory authority for the reestablishment of instruments. Chapter 673 applies to negotiable instruments, like promissory notes.

Any person with an interest in the instrument to be reestablished may reestablish it. Before an instrument is reestablished, the contents of the instrument must be clear and satisfactory. The party seeking to reestablish and enforce the instrument in question should be prepared to prove that it was in possession of the instrument and entitled to enforce the instrument at the time of its loss. If the party seeking to enforce the instrument



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was not in possession of it at the time of its loss, then it will have to prove that it was assigned the right to enforce the instrument from a party that was in possession with rights to enforce at the time of loss. So, just because a promissory note or other instrument cannot be found or has been destroyed, all is not lost.

As always, when seeking to enforce or reestablish a promissory note or other instrument, it is a good idea to seek the advice of an attorney.

Punta Gorda Office:
99 Nesbit Street
Punta Gorda, FL 33950
Phone: 941.639.1158
Fax: 941.639.0028

Englewood Office:
33 S. Indiana Avenue
Englewood, FL 34223
Phone: 941.460.9334
Fax: 941.460.9443

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