In the District Court of Appeal
Second District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] & [redacted]
Appellants,

v.

AMERICAN HOME MORTGAGE SERVICING, INC., ET AL.,
Appellees.

ON APPEAL FROM THE 20TH JUDICIAL
CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND FACTS

I. Introduction

This appeal arises from a judgment of foreclosure entered against the Appellants and homeowners, [redacted] and [redacted] ("the [redacted] in favor of AMERICAN HOME MORTGAGE SERVICING, INC. (the "BANK"). The judgment was entered after a bench trial.

II. Appellant's Statement of the Facts

A. Over a month before trial is set, [redacted] moves to amend his Answer, which the court denies two weeks before trial.

[redacted] served a Motion for Leave to Amend Answer and Affirmative Defenses in late July of 2012[1]—days before the pretrial conference,[2] nearly a month before the order setting trial was issued,[3] and three months before trial.[4] The initial attempt to have this motion heard was nearly a month before

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[1] Motion for Leave to Amend Answer and Affirmative Defenses, dated July 27, 2012 (R. 193); Amended Motion for Leave to Amend Answer and Affirmative Defenses dated August 29, 2012 (R. 248).

[2] Order Setting Pre-Trial Conference (Foreclosure Cases Only), dated May 23, 2012 (setting the conference for August 6, 2012) (R. 123).

[3] Order for Non-Jury Trial, dated August 29, 2013 (R. 246).

[4] *Id*.

trial. At that time, Judge Schoonover required that the hearing be reset.[5] The motion was then called up before Judge Monaco six days later.[6]

At the hearing, the BANK complained that it would be prejudiced if the court were to allow the amendment because it was too close to trial.[7] Yet, when questioned about the one affirmative defense relevant to this appeal—standing—the BANK suggested it already had testimony sufficient to establish standing:

> THE COURT: …What are you going to do at a trial if the standing issue is challenged on the notes? Because she's indicating that there's at least two letters indicating that the owner of the note is improper under the -- I'm not quite sure why she wants to amend. If she can get to trial and prove that, you're -- it seems like you're subject to a directed verdict.
>
> MR. BROWN: Yes, Your Honor. I understand that. I believe through the testimony that we'll be able to prove.
>
> THE COURT: Motion is denied.[8]

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[5] *See*, Docket entries for October 5, 2012 attached to index to Record on Appeal.

[6] Hearing Before the Honorable Daniel R. Monaco, October 11, 2012 ("Monaco Tr.__") (R. 473).

[7] *Id*. at 22 (R. 494).

[8] *Id*. at 26 (R. 498).

B. At trial, [redacted] asks for reconsideration of the denial.

At the trial, [redacted] asked a third judge, Judge Lauren Brodie,[9] to reconsider the denial of his request to amend his pleading.[10] The judge denied the motion and the trial proceeded on the original answer.[11] Significant to this appeal, the proposed Amended Answer and Affirmative Defenses denied Paragraph 3 of the Complaint which had alleged that "Plaintiff owns and holds the

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[9] While not a point of error on appeal, the Court should be cognizant of the lack of efficiency and continuity that plagues foreclosure cases as a result of the "wheel of fortune" method of judge assignment. The record is replete with judicial commentary about the problem. Monaco Tr. 4 ("THE COURT: …I understand you had a hearing before Judge Schoonover already. … And how are you going to reiterate what you're arguing now if you didn't have the transcript then?"); Tr. 18 ("THE COURT: The real problem, obviously, is, since I was not the judge, I don't know what the record reveals…"); Tr. 19 ("THE COURT: …I'm incapable of knowing what was heard, and … I'm not sitting in an appellate capacity to review the transcript and make a ruling."); Tr. 20 ("THE COURT: So the question is -- I don't know the history of the case or -- I mean, or what's been filed and what's been heard.")

[10] Transcript of [Trial] Proceedings before the Honorable Lauren L. Brodie November 1, 2012 ("Tr. __"), p. 5, 16.

[11] Tr. 22.

Note."[12] Additionally, the proposed amendment asserted an affirmative defense regarding the BANK's standing at the inception of the case.[13]

C. The court excludes the [redacted] expert on standing.

At trial, the BANK made two arguments to exclude the [redacted] forensic mortgage examiner. First, the BANK argued that it was prejudiced because the expert had been disclosed late.[14] Specifically, according to the trial order, defense witnesses were to be disclosed August 16th.[15] The Amended Witness List containing the name of the expert was served October 12th[16]–three

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[12] [Proposed] Amended Answer and Affirmative Defenses, dated July 27, 2012, ¶3 (R. 195); Complaint for Foreclosure of Mortgage and For Damages, ¶ 3 (R. 1).

[13][Proposed] Amended Answer and Affirmative Defenses, dated July 27, 2012, ¶¶ 32- 40 (R. 197-99); [Proposed] Amended Answer and Affirmative Defenses, dated August 29, 2012, ¶¶ 32- 40 (R. 248).

[14] Objection to Expert Witness Testimony, dated October 29, 2012, (R. 508); Tr. 4.

[15] Order Setting Non-Jury Trial, dated August 29, 2012, adopting deadlines from prior Order Setting Pre-trial Conference, (R. 246, 123)

[16] Defendant [redacted] Amended Witness and Exhibit List, dated October 12, 2012. This document is in the docket but not the Index of the Record on Appeal. It was referenced by the court during the trial at Tr. 12. If the BANK contests whether this document was filed or the contents of the document, the [redacted] reserve the right to supplement the record.

weeks before trial. The [redacted] also served a Motion to Permit or Clarify Calling of Defense Witnesses a week before trial.[17]

At trial, the judge was inclined to permit the witness to testify despite the tardy disclosure,[18] but gave the BANK the option of taking a continuance to depose the witness first.[19] The BANK, however, declined the offer of a continuance.[20]

The BANK's other argument for excluding the expert witness was that, in the absence of an affirmative defense on standing, the testimony was irrelevant.[21] The court agreed and excluded the testimony on the grounds of relevance.[22]

D. The [redacted] ask to amend the Answer to conform to the evidence—which is denied.

When confronted with the argument that the expert witness should be excluded as irrelevant, the [redacted] moved to amend the Answer to conform

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[17] Defendants [redacted] and [redacted] Motion to Permit or Clarify the Calling of Defense Witnesses dated October 25th, 2012 (R. 467) (mentioned at Tr. 5).

[18] Tr. 15.

[19] Tr. 14, 15.

[20] Tr. 15.

[21] Objection to Expert Witness Testimony, dated October 29, 2012, (R. 508); Tr. 91.

[22] Tr. 95.

to the evidence.[23] The BANK responded that the court had already ruled on the amendment and that, in any event, fairness would dictate that the BANK also be granted leave to amend its Complaint to identify a completely different plaintiff.[24] The trial court denied the [redacted] motion, citing the parties' inability to agree on the competing motions to amend.[25]

E. After the [redacted] point out a deficiency in the BANK's evidence, the court instructs the BANK to retrieve the evidence that it had not brought and had never disclosed.

To prove that it had met the condition precedent of sending a "breach letter" (the "notice of acceleration" required by Paragraph 22 of the mortgage[26]), the BANK disclosed and introduced a letter dated June 16, 2010.[27] The case, however, was filed nearly two and half years earlier.[28] After the BANK rested its case, the [redacted] moved for an involuntary dismissal[29] arguing, among other

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[23] Tr. 84.

[24] Tr. 86.

[25] Tr. 87.

[26] Tr. 76; Mortgage (attached to the Complaint), ¶ 22 (R. 23).

[27] Tr. 33, Plaintiff Exhibit 3.

[28] Complaint (R. 1).

[29] Tr. 75. Trial counsel for the [redacted] stated she was moving for a "judgment on the pleadings," but the BANK and the court appear to have correctly treated this as a motion for involuntary dismissal.

things, that the breach letter did not satisfy the condition precedent.[30] In response, the BANK's counsel asked to recall his witness "for brief testimony regarding the breach letter."[31] The [redacted] objected that the BANK had already rested its case,[32] and the judge correctly observed that the BANK had previously declined her offer of a continuance.[33] The court nevertheless allowed the BANK to recall its witness.[34]

When the witness took the stand, the BANK solicited testimony about other breach letters the witness claimed to have seen in the BANK's records. The court properly sustained the [redacted] objection to this hearsay testimony.[35] After more argument, however, the trial court asked the BANK's counsel why he cannot simply "go get them."[36] The trial court then instructed that the BANK's

[30] Tr. 76.
[31] Tr. 78.
[32] Tr. 80.
[33] Tr. 81.
[34] Tr. 88.
[35] Tr. 88-90.
[36] Tr. 90.

representative "should go find a way to get them [other breach letters] printed and we'll call your witness..."[37]

The court waited for the BANK's witness to return[38] with a new document, which he claimed to be another breach letter dated October 2, 2007.[39] Counsel for the [redacted] objected based on surprise and ambush:

> MS. DIEFIK: My client has been asking for this discovery for five years, and we asked for copies of the exhibits repeatedly over the last two months, and I was only provided with copies of their exhibits the week of October 23rd, and the only thing they gave me was the letter that was referenced.[40]

The [redacted] also objected on the grounds that the BANK's witness could not be qualified to lay the foundation for the business record exception to hearsay, because he did not work for the BANK at that time.[41] The court admitted the document with the comment that the issues raised by the [redacted] would "go to the weight."[42]

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[37] Tr. 91.

[38] Tr. 99. After eight transcript pages of additional argument on other issues, the court declared a recess "until Mr. Vent [the BANK's witness] comes back…" Tr. 99.

[39] Tr. 99, 102.

[40] Tr. 99.

[41] Tr. 101.

[42] Tr. 102.

F. The BANK neglects to admit testimony or exhibits containing the amounts due and owing.

When the BANK rested its case, it had never introduced—or even attempted to introduce—any bank records of mortgage payments, escrow disbursements, insurance premiums, tax bills or attorney fee statements. Nor did the BANK's representative try to read such information to the factfinder from any bank records that were in the courtroom. Instead, the BANK's counsel handed his witness a document which he identified as a "final judgment" and asked the witness to agree that the figures purportedly listed there "seem accurate."[43] This document was never marked for identification and never moved into evidence.

At the end of the day, the figure of $960,660.96 that appears on the final line of the judgment was never mentioned at trial and was never in evidence by way of testimony or exhibit. Nor are any of the underlying amounts anywhere in the record before this Court.

* * *

The trial court entered judgment in favor of the BANK[44] from which the [redacted] took this timely appeal.[45]

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[43] Tr. 34.

[44] Final Judgment of Foreclosure, dated December 12, 2012 (R. 512).

[45] Notice of Appeal, dated December 21, 2012 (R. 532).

SUMMARY OF THE ARGUMENT

The BANK failed to introduce a scintilla of testimonial or documentary evidence of the dollar amounts that appeared, as if from thin air, in the final judgment. The judgment, therefore, is not supported by competent evidence and must be reversed.

The BANK also failed to introduce any evidence in its case-in-chief that it had complied with a condition precedent to bringing suit—the sending of a breach letter. The trial court erred in failing to grant an involuntary dismissal on that ground, and further, abused its discretion in directing the BANK to go (in the midst of trial) and bring back a different breach letter that had never been disclosed.

Lastly, the BANK failed to prove its standing because it conceded that its only allegation of standing—that it owned the debt—was false. The trial court erred in failing to grant an involuntary dismissal on standing, and to the extent evidence from the [redacted] was necessary, abused its discretion in excluding their expert witness. Because standing need not be preserved by an affirmative defense, it was unnecessary to amend [redacted] Answer. But even it were necessary, the trial court abused its discretion in disallowing an amendment prior to trial or an amendment to conform to the evidence.

ARGUMENT

I. There Was Not a Scintilla of Evidence to Support a Dollar Amount for the Judgment.

A. Standard of Review

In a non-jury case, sufficiency of the evidence may be raised for the first time on appeal. Fla. R. Civ. P. 1.530(e). Findings of fact by the trial court must be set aside when totally unsupported by competent, substantial evidence. *See Crawford Residences, LLC v. Banco Popular N. Am.*, 88 So. 3d 1017, 1019 (Fla. 2d DCA 2012). If a trial court's decision is manifestly against the weight of the evidence or totally without evidentiary support, it becomes the duty of the appellate court to reverse. *Randy Intern., Ltd. v. Am. Excess Corp.*, 501 So. 2d 667, 670 (Fla. 3d DCA 1987); *see also, Blazina v. Crane*, 670 So. 2d 981, 983 (Fla. 2d DCA 1996) (reversing where there was no record support for the trial court's findings of fact).

B. The amounts due and owing were never put in evidence.

In this case, the BANK completely neglected to adduce evidence—whether by way of a document or testimony—of the amounts owed by the [redacted]. In a bizarre ritual quite foreign to any evidentiary rules, the BANK's counsel handed his witness a document which he identified as a "final judgment" and asked

the witness to agree that the figures purportedly listed there "seem accurate."[46] The BANK never asked the witness to read the numbers into evidence. Nor would any such attempt survive a hearsay or best evidence objection. *Sas v. Fed. Nat. Mortg. Ass'n*, 112 So. 3d 778, 779 (Fla. 2d DCA 2013) (error to permit bank witness to testify about the contents of business records when the records were not in evidence).

Additionally, the BANK never asked that the document be marked for identification and never moved that it be admitted into evidence. The trial court never admitted the document as evidence. Nor could it have. It would be difficult to imagine a document that would fit the description of "prepared for the purpose of litigation" more than a proposed final judgment. Such documents do not qualify for the business records exception—or any other exception—to hearsay. *See McElroy v. Perry*, 753 So. 2d 121, 125-26 (Fla. 2d DCA 2000) ("when a record is made for the purpose of litigation, its trustworthiness is suspect and should be closely scrutinized").

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[46] Tr. 34. Even if the record established what figures may have been on this document, at best, the testimony merely asserted that, in some vague, overall sense, they "seem accurate." Because "seem" is noncommittal, and by definition, expresses uncertainty (or even that the figures have an outward appearance of accuracy that may be false), such testimony would not be sufficient to meet the BANK's burden of proof.

Worse, even if the BANK had thought to request that the document be admitted, it is a back-door attempt to do what this Court disallowed in *Sas v. Fed. Nat. Mortg. Ass'n*. In saying that the figures "seem accurate" when compared to the BANK's computer records that he reviewed, the witness is merely testifying about numbers that allegedly appear in documents that are not before the court. Moreover, the "final judgment" would also be nothing more than a summary of data, which is inadmissible without first complying with §90.956 Fla. Stat., which the BANK did not do here.[47]

Stated simply, the figure of $960,660.96 that appears on the final line of the judgment was mentioned nowhere at trial and appears in no document in evidence. Nor are any of the underlying amounts anywhere in the record before this Court.

C. There was no evidence presented to support an award of attorneys' fees.

A prime example of one of these unproven addends is the attorney fees of $1,300 that were awarded "based upon 8 hours at $162.50 per hour." There was

[47] "The party intending to use such a summary must give timely written notice of his or her intention to use the summary, proof of which shall be filed with the court, and shall make the summary and the originals or duplicates of the data from which the summary is compiled available for examination or copying, or both, by other parties at a reasonable time and place." § 90.956, Fla. Stat.

no testimony that the BANK paid attorney fees, what amount of time the attorneys worked, what the BANK's counsel charged per hour, or whether those hourly fees were reasonable. There was no expert witness testimony that the fees were reasonable. *See Sourcetrack, LLC v. Ariba, Inc.*, 34 So. 3d 766, 768 (Fla. 2d DCA 2010) (adhering to rule that independent expert testimony is required regarding reasonableness of fees).

D. The BANK had its day in court.

The BANK failed to prove any particular amount of damages in this case. Nor did it make more than a half-hearted attempt to even adduce evidence of such damages. Damages, or course, are a crucial element of what is essentially a breach of contract claim that underlies the request to foreclose the security lien on the home. *Rollins, Inc. v. Butland*, 951 So. 2d 860, 876 (Fla. 2d DCA 2006) (listing "damages resulting from the breach" as one of the elements of a breach of contract action). Litigants are not permitted "mulligans" or "do-overs" when it comes to trial. *See Pain Care First of Orlando, LLC v. Edwards*, 84 So. 3d 351, 355 (Fla. 5th DCA 2012) (Reversing damages award but finding new trial unwarranted because "[h]aving proceeded to judgment on legally insufficient proof, Appellee does not get a do-over."); *J.J. v. Dep't of Children & Families*, 886 So. 2d 1046,

1050 (Fla. 4th DCA 2004) ("No statute or rule permitted the trial court to give the [plaintiff] a "do-over" after a three and a half-day trial.").

The trial court, as the factfinder, should have placed a zero in the nonjury-equivalent of the "verdict form" which is the final judgment. This Court should remand for entry of just such a judgment.

II. The Trial Court Abused Its Discretion in Admitting a "Breach Letter" That Had Never Been Disclosed Before Trial.

A. Standard of Review

While the standard of review for admissibility of evidence is abuse of discretion (*Florida Inst. for Neurologic Rehab., Inc. v. Marshall*, 943 So. 2d 976, 978 (Fla. 2d DCA 2006)), a trial court's discretion is limited by the rules and statutes governing the admission. *Castaneda ex rel. Cardona v. Redlands Christian Migrant Ass'n, Inc.*, 884 So. 2d 1087, 1090 (Fla. 4th DCA 2004).

B. The BANK's mid-trial "do-over" with an assist by the court.

Although it was never disputed that the sending of a "breach letter" was a condition precedent to bringing the action, the only such letter in evidence when the BANK rested its case was dated more than two years after the case was filed.[48]

[48] Tr. 32-33, 75.

This was the only such letter listed on the exhibit list and the only one ever provided to opposing counsel.[49]

When it appeared that the [redacted] would be entitled to a dismissal of the action due to a complete lack of evidence that the BANK had met this condition precedent, the BANK asked to reopen its case and recall its witness—a request which the court granted. The proposed testimony was that there were other breach letters they had not bothered to bring to trial or provide opposing counsel in advance.[50] The trial court correctly sustained an objection that the BANK witness could not testify about documents not in evidence.[51]

The trial court, however, then inserted itself in the litigation, first by proposing, and then instructing, that the BANK have its witness go retrieve the missing documentary evidence and then waiting for the BANK's witness to do just that.[52] When a judge becomes a participant in judicial proceedings, "a shadow is cast upon judicial neutrality…" *J.F. v. State*, 718 So. 2d 251, 252 (Fla. 4th DCA 1998) (error for the trial court to directing a witness for the state to obtain

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[49] Tr. 99.

[50] Tr. 88.

[51] Tr. 88-90.

[52] Tr. 90-91, 99.

additional evidence and *sua sponte* continuing the hearing pending the results); *see also B.J. v. State*, 869 So. 2d 745, 747 (Fla. 2d DCA 2004) (where trial court elicited key testimony on unproven element of case, it departed from a position of neutrality, necessitating reversal of the verdict); *Jones v. State*, 54 So. 3d 503 (Fla. 1st DCA 2010) ("a trial judge should not suggest a line of questioning to trial counsel."); *McFadden v. State*, 732 So. 2d 1180 (Fla. 4th DCA 1999) (the trial judge improperly prodded the prosecution to introduce evidence).

This Court has suggested that it is an abuse of discretion for the trial court to allow a party to present proof of a missing element of their case where, as here, the opposing party has already identified the deficiency. *Burton v. State*, 596 So. 2d 733, 735 (Fla. 2d DCA 1992); *see also Lyles v. State*, 742 So. 2d 842, 843 (Fla. 2d DCA 1999) (trial court committed fundamental error by, *inter alia*, bifurcating the hearing to allow additional testimony); *Cagle v. State*, 821 So. 2d 443, 444 (Fla. 2d DCA 2002) (a court assuming the role of a litigant violates the cornerstone of due process and that "[s]uch conduct amounts to fundamental error that may be raised for the first time on appeal.").

C. The [redacted] were unfairly prejudiced by the BANK's nondisclosure of the purported breach letter.

Aside from the fundamental error of the court's active participation in the presentation of the BANK's case, it was an abuse of discretion to permit the BANK to use evidence that it had never identified in its exhibit list and never provided to opposing counsel. *See Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981) (defendant entitled to new trial when plaintiff's failure to disclose witness prejudiced defendant in presentation of case); *Claussen v. State, Dept. of Transp.*, 750 So. 2d 79, 82 (Fla. 2d DCA 1999) (use of letter not disclosed as required in pre-trial order was a "return to the ambush method of civil litigation" and required reversal); *Southstar Equity, LLC v. Lai Chau*, 998 So. 2d 625, 630 (Fla. 2d DCA 2008) (finding trial court did not abuse its discretion in excluding surprise witness, and commenting that "a decision permitting the witness to testify may well have been an abuse of discretion").

Lest the irony be lost in the shuffle, it is noteworthy that it was the BANK who sought to enforce the pretrial order to exclude the [redacted] expert witness because he was disclosed late.[53] The BANK's argument suggested that the

[53] Tr. 6.

prejudice of such late disclosure was all but "obvious"[54] even though there was at least some pretrial disclosure (in contrast to the breach letter which the BANK never disclosed) and even though the BANK had three weeks to depose the witness.[55] And while the Court was willing to overlook the [redacted] tardiness in identifying the expert, it was only after offering the BANK a continuance to depose the witness.[56] (Ultimately, the court excluded the witness anyway on the grounds of relevance.[57])

When it was the BANK who committed a much more serious violation of the pretrial order, the court admitted the breach letter into evidence without any offer of a continuance. The court gave the [redacted] no opportunity to investigate the authenticity of the letter or the manner in which it was allegedly sent. In fact, the letter indicates it was sent certified mail,[58] which means tracking records would have been available to be found to show whether it was in fact sent or received.

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[54] Tr. 8.

[55] Tr. 13, 14, 15.

[56] Tr. 14, 15.

[57] Tr. 95.

[58] Tr. 102-103.

Accordingly, if this Court does not reverse and remand for entry of judgment in favor of the [redacted] it should reverse and remand for a new trial on the conditions precedent issue.

III. The BANK Did Not Have Standing at the Inception of the Case.

A. Standard of Review

A trial court's decision regarding a party's standing to file suit is reviewed using the de novo standard of review. *Found. for Developmentally Disabled, Inc. v. Step By Step Early Childhood Educ. & Therapy Ctr., Inc.*, 29 So. 3d 1221 (Fla. 2d DCA 2010).

B. The trial court erred in denying the [redacted] motion for involuntary dismissal on the issue of standing.

In the Complaint, the BANK alleged that it "owns and holds the Note."[59] It also alleged that it "owns and holds the mortgage," but is also an assignee of the mortgage.[60] At trial, however, the BANK proved that another entity was the owner of the note[61] and never attempted to introduce an assignment of mortgage into

[59] Complaint, ¶ 3 (R. 1).

[60] Complaint, ¶¶ 10-11 (R. 2).

[61] Tr. 35.

evidence (much less, the notoriously self-serving "MERS"[62] assignment attached to the complaint). According to the BANK's own evidence, the note was conveyed to a trust on or before July 12, 2007.[63]

To the extent that the BANK meant to say that it was the Article III holder of the note,[64] it never established when, if ever, the owner transferred possession to the BANK. *See Green v. JPMorgan Chase Bank, N.A.*, 109 So. 3d 1285, 1288 (Fla. 5th DCA 2013) ("the indorsement in blank did not establish that the Bank had the right to enforce the note when it filed suit, because the indorsement was undated").

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[62] MERS is Mortgage Electronic Registration Systems, Inc., an association created by, and made up of, the banking institutions themselves. "Certifying Officers" of MERS are employees of the assignee bank who execute assignments to their own employer. *See generally*, Robinson, *The Case Against Allowing Mortgage Electronic Registration Systems, Inc. (MERS) To Initiate Foreclosure Proceedings*, 32 Cardozo Law Review, Vol. 32, No. 4, p. 1621, 2011.

[63] Tr. 35.

[64] That the BANK would use the same "owns and holds" language for both the note and the mortgage calls into question whether the BANK ever intended to claim that it was a holder of the note under Article III of the Uniform Commercial Code (§673.1011 et seq. Fla. Stat.), since a mortgage has never been a negotiable instrument. The phrase "owns and holds" is an ubiquitous legalism used in many contexts outside of negotiable instruments. Unlike the Article 3 "holder," the person who "owns and holds" an instrument is its owner. For example, when Form 1.934 Fla. R. Civ. P. (Promissory Note Complaint) was amended in 1980, the Florida Supreme Court added the same words found in the foreclosure form—"the Plaintiff owns and holds the note"—specifically "to show ownership of the note." Committee Note to Form 1.934 Fla. R. Civ. P. adopted by *The Florida Bar, In re Rules of Civil Procedure*, 391 So. 2d 165 (Fla. 1980).

Indeed, the Complaint states that the note was lost at that time[65] and the documents that purport to be the original note and mortgage were not filed until March 1, 2011—over three years after the case was filed.[66]

And while the BANK's evidence shows, at least circumstantially, that it was the servicer for the owner, it never pleaded that its entitlement to foreclose was based on such an agency relationship. Having asserted the right solely in its own name, the case was subject to dismissal. *Smith v. Kleiser*, 107 So. 262, 263 (Fla. 1926) (Foreclosure suit "should be in the name of the real owner of the debt secured" and should be dismissed where plaintiff sued as "owner and holder" but was actually the agent of the owner.); Fla. R. Civ. P. 1.210 ("Every action may be prosecuted in the name of the real party in interest…" with certain exceptions inapplicable here.) The BANK even acknowledged this flaw in its pleadings when it asked to amend its Complaint in the middle of trial.[67]

Moreover, the BANK did not present an agency agreement, power of attorney, or pooling and servicing agreement to prove its authority to act as the

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[65] Complaint, p. 3 (R. 3).

[66] Tr. 25.

[67] Tr. 86 (The BANK's counsel: Your Honor, if they want to amend the pleadings, then we have the right to amend the pleadings in order to say the investor is the plaintiff and AHMSI is the servicer. It works both ways.")

owner's agent when it filed the Complaint. *Cf. Deutsche Bank Nat. Trust Co. v. Prevratil*, 38 Fla. L. Weekly D1123 (Fla. 2d DCA 2013) (servicer permitted to verify complaint on behalf of note owner, because valid power of attorney authorized such action).

One of the bases for [redacted] motion for involuntary dismissal was that the BANK had failed to prove standing, and in fact, had conceded that another entity owned the debt.[68] The trial court erred in denying that motion.

C. The trial court abused its discretion in denying [redacted] motion to amend his answer three weeks prior to trial and excluding their expert.

The trial court hobbled the [redacted] defense on the issue of standing when it disallowed testimony from their expert, a forensic mortgage examiner.[69] The court excluded the testimony as irrelevant, because, in the court's view, standing had not been preserved in the original answer.[70] However, this ruling

[68] Tr. 83-84.

[69] Tr. 9-10.

[70] Tr. 95.

merely compounded the court's previous error in denying [redacted] motion to amend his answer three weeks before trial.[71]

The [redacted] also seek review of this error. Leave of court to amend must be freely given. Fla. R. Civ. P. 1.190 (a); *Laurencio v. Deutsche Bank Nat. Trust Co.*, 65 So. 3d 1190, 1193 (Fla. 2d DCA 2011) (In a foreclosure case, it was error to deny the homeowner's motion to amend the answer even though the motion was filed two days before the summary judgment hearing.) A trial court's refusal to permit an amendment of a pleading is an abuse of discretion unless it is clear that: (1) the amendment would prejudice the opposing party, (2) the privilege to amend has been abused, or (3) the amendment would be futile. *Id*. All doubts should be resolved in favor of allowing amendment. *Craig v. E. Pasco Med. Ctr., Inc.*, 650 So. 2d 179, 180 (Fla. 2d DCA 1995).

Moreover, the BANK opened the door to the issue when it volunteered specific factual assertions designed to give a misleading impression that it had

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[71] Order on Defendant [redacted] Amended Motion for Leave to Amend Answer and Affirmative Defenses, October 11, 2012. This document is in the docket but not the Index of the Record on Appeal. If the BANK contests whether this document was filed or the contents of the document, the [redacted] reserve the right to supplement the record.

standing at the inception of the case.[72] Considerations of fairness and the truth-seeking function of trial allow the admission of otherwise inadmissible evidence to qualify or explain the testimony. *Rodriguez v. State*, 753 So. 2d 29, 42 (Fla. 2000).

D. The trial court abused its discretion in denying the [redacted] motion to amend the pleadings to conform to the evidence.

This same evidence from the BANK's witness demonstrates that the issue was tried by implied consent from the BANK (but without the benefit of the [redacted] evidence). The court even explicitly stated in the final judgment that "The Court finds that Plaintiff has standing to seek and receive the relief obtained herein."[73] The trial court erred, therefore, when it denied the [redacted] motion to amend the pleadings to conform to the evidence.[74]

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Fla. R. Civ. P. 1.190. If, as here, evidence is objected to at trial on the grounds that it is not within the issues made by the pleadings, leave to

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[72] Tr. 25 (BANK's counsel asking questions regarding the endorsement in blank); T. 34 (BANK's counsel made no objections to questions as to how the BANK acquired the note and who currently owned the note).

[73] Final Judgment, ¶13 (R. 514) (emphasis added).

[74] Tr. 84-87.

amend the pleadings to conform to the evidence shall be given freely when it permits the merits of the cause to be more effectively presented and the objecting party cannot demonstrate unfair prejudice. *Id*.; *cf*. *Smith v. Landy*, 402 So. 2d 441 (Fla. 3d DCA 1981) (affirming decision in favor of mortgagor in foreclosure action on estoppel grounds although it was not raised as an affirmative defense in the answer, because it was supported by the evidence and tried by the implicit consent of the parties); *Thompson v. Gross*, 353 So. 2d 191, 192 (Fla. 3d DCA 1977) (affirming decision to permit an amendment of the answer to conform with the evidence where plaintiffs did not object to testimony aimed at establishing the missing affirmative defenses and did not show they would be prejudiced).

This Court's opinion in *Howell F. Davis & Associates, Inc. v. Laabs*, 389 So. 2d 1249, 1251 (Fla. 2d DCA 1980) is particularly instructive. In that case, the trial court denied a motion to amend the pleadings to conform to the evidence. This Court reversed with the explanation that the pleading, though less than stellar, was sufficient even without an amendment to permit admission of the evidence in question. *Id.* But if the trial court thought that an amendment was required, it should have granted the motion to amend. *Id.* And if the trial court thought that the opposing party would be prejudiced by the amendment "it should have granted a continuance to enable them to prepare to litigate [the issue]." *Id*. This Court even

noted that, "[s]ince this was a nonjury case, a continuance would not have affected that part of the trial already conducted." *Id*.

Here, the trial court did exactly that: it offered the BANK a continuance to depose the [redacted] expert as a means of averting any prejudice occasioned by concededly tardy witness disclosure.[75] The BANK declined the offer.[76] It expressly chose to forge ahead despite any claimed prejudice. Thus the BANK waived any claim that it would have been prejudiced by an amendment to the answer that would have brought the expert's testimony within the pleadings.

In *Anglo Am. Auto Auctions, Inc. v. Tuminello*, 732 So. 2d 1218 (Fla. 5th DCA 1999), the defendant had moved prior to trial to amend its answer to assert an additional affirmative defense—just as [redacted] did here. In that case, the trial court initially granted the motion, but later struck the amended answer before trial. At trial, after the plaintiff adduced evidence relevant to the stricken affirmative defense, the defendant moved to amend the answer to conform to the evidence—just as [redacted] did here. The appellate court reversed the judgment in favor of the plaintiff because "it was an abuse of discretion to deny appellants the opportunity to amend their pleadings to assert the

[75] Tr. 8, 15.

[76] Tr. 15.

[affirmative defense]." *Id*. at 1221. The appellate court found—as this Court should here—that the plaintiff could not have been surprised or prejudiced by the affirmative defense since the issue had been raised before trial began. *Id.*

Here, not only was the BANK aware of the standing defense, it expressly indicated it was prepared to meet that defense. At the hearing in which the court denied [redacted] Amended Motion to Amend (over two weeks before trial), the BANK rejected the judge's suggestion that adding a standing defense might cause a hardship for the BANK:

> THE COURT: …What are you going to do at a trial if the standing issue is challenged on the notes? Because she's indicating that there's at least two letters indicating that the owner of the note is improper under the -- I'm not quite sure why she wants to amend. If she can get to trial and prove that, you're -- it seems like you're subject to a directed verdict.
>
> MR. BROWN: Yes, Your Honor. I understand that. I believe through the testimony that we'll be able to prove.
>
> THE COURT: Motion is denied.[77]

E. It was unnecessary to amend the Answer to admit the expert testimony, because the issue of standing does not have to be raised by affirmative defense.

Standing may be raised at any time, even after judgment, as long as it is raised prior to appeal. The Florida Supreme Court in *Love v. Hannah*, 72 So. 2d

[77] Monaco Tr. 26 (R. 498).

39 (Fla. 1954) confirmed that a defendant may raise a challenge to standing as late as post-trial, even if it is raised in an otherwise impermissible filing, because the test for waiver is whether the party "brought such fact to the [trial] Court's attention during the term." This Court applied the holding of *Love* to confirm that a party does not waive its challenge to standing even if it is raised for the first time in a motion to set aside the judgment. *Maynard v. Florida Bd. of Educ. ex rel. Univ. of S. Florida*, 998 So. 2d 1201, 1206 (Fla. 2d DCA 2009).

In *Kumar Corporation v. Nopal Lines*, LTD., 462 So. 2d 1178 (Fla. 3d DCA 1985), the court recognized that standing cannot be waived because it operates as a limitation on the court's subject matter jurisdiction:

> In this sense, standing is treated as "an element of the constitutional requirement that there be a 'case or controversy'; when thus applied, it acts as a limitation on the subject matter jurisdiction of the federal courts. In this context, objections to standing, unlike [real party in interest] objections, cannot be waived and may be raised by a federal court sua sponte." 6 C. Wright & A. Miller, supra § 1542, at 642-43 (footnotes omitted). The quoted statement is, of course, equally applicable to Florida courts.

Id. at 1185, n. 3. Accordingly, if this Court finds that the BANK made a *prima facie* showing of standing (despite having conceded that the debt was owned by another entity), then the trial court abused its discretion in excluding the testimony

of the [redacted] expert. In that event, the case should be reversed for a new trial on standing.

CONCLUSION

Due to: 1) the complete absence of any evidence of amounts due and owing; 2) the complete absence of any evidence that the BANK satisfied conditions precedent (when it rested its case); and 3) the BANK's concession that another entity owned the note (in contradiction of its own pleadings), the trial court should have granted an involuntary dismissal. This Court, therefore, should reverse and remand with instructions to enter judgment in favor of the [78]

[78] Short of that, for the other reasons discussed in the brief, the Court should reverse and remand for a new trial.

Dated: July 22, 2013

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this July 22, 2013 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties.

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