In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted] and [redacted]

Appellants,

v.

CITIMORTGAGE, INC.,

Appellee.

ON APPEAL FROM THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND FACTS

I. Introduction

[redacted] and [redacted] Valdes (collectively, "the Homeowners") appeal the final judgment of foreclosure rendered in favor of CitiMortgage, Inc. ("the Bank") after a non-jury trial. The Homeowners present two issues for the Court's review:

- Whether the trial court abused its discretion denying them leave to answer the amended complaint or otherwise amend their *pro-se* answer.
- Whether the trial court erred in denying their motion for involuntary dismissal at trial;

II. Appellant's Statement of the Facts

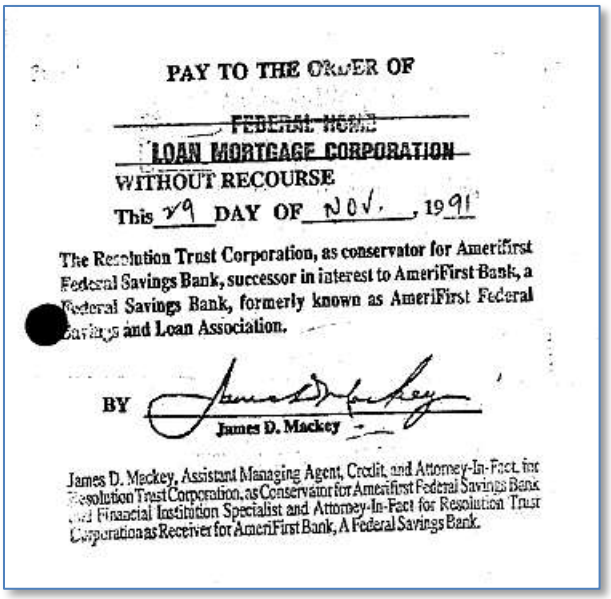
A. The Pleadings and the Discovery

The Bank initiated this action when it filed its one-count mortgage foreclosure complaint.[1] The allegations of the complaint were verified under penalty of perjury by an officer of the Bank.[2] These verified allegations included

[1] Complaint, March 14, 2012 (R. 8-30).

[2] Complaint, pg. 6, March 14, 2012 (R. 13).

an allegation that a copy of the original note was attached to the Bank's pleading.[3] The note attached to the complaint identified the lender as AmeriFirst Federal Savings and Loan Association ("AmeriFirst") and included a specific endorsement dated November 29, 1991 from Resolution Trust Corporation as conservator for Amerifirst Savings Bank, successor in interest to AmeriFirst (the original lender) to Federal Home Loan Mortgage Corporation ("Freddie Mac"):[4]



PAY TO THE ORDER OF

~~FEDERAL HOME~~
~~LOAN MORTGAGE CORPORATION~~
WITHOUT RECOURSE
This 29 DAY OF NOV., 1991

The Resolution Trust Corporation, as conservator for Amerifirst Federal Savings Bank, successor in interest to AmeriFirst Bank, a Federal Savings Bank, formerly known as AmeriFirst Federal Savings and Loan Association.

BY James D. Mackey

James D. Mackey, Assistant Managing Agent, Credit, and Attorney-In-Fact, for Resolution Trust Corporation, as Conservator for Amerifirst Federal Savings Bank and Financial Institution Specialist and Attorney-In-Fact for Resolution Trust Corporation as Receiver for AmeriFirst Bank, A Federal Savings Bank.

No other endorsement, either in blank or specifically to the Bank, was on the note.[5]

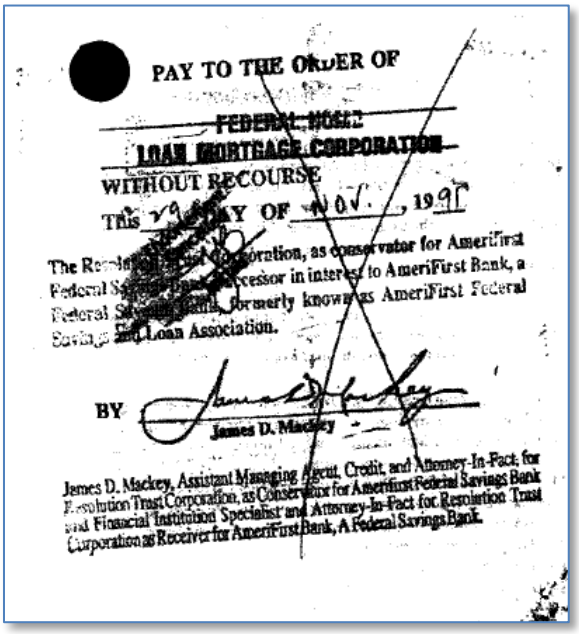
[3] Complaint, ¶3, March 14, 2012 (R. 8).

[4] Note attached to Complaint, March 14, 2012 (R. 16-18).

[5] *Id.*

The Homeowners' *pro-se* answer[6] pled that they were without knowledge of the Bank's allegation that it was entitled to enforce the note and therefore denied this allegation.[7]

The Bank subsequently asked the trial court for leave to file an amended complaint, claiming but one purpose: the need to add another defendant, Arbor Courts Association, Inc. ("the HOA").[8] However the amended pleading the Bank actually filed not only added the HOA as a defendant, but materially changed the copy of the note from one specifically endorsed to Freddie Mac, to one which cancelled that endorsement:


PAY TO THE ORDER OF

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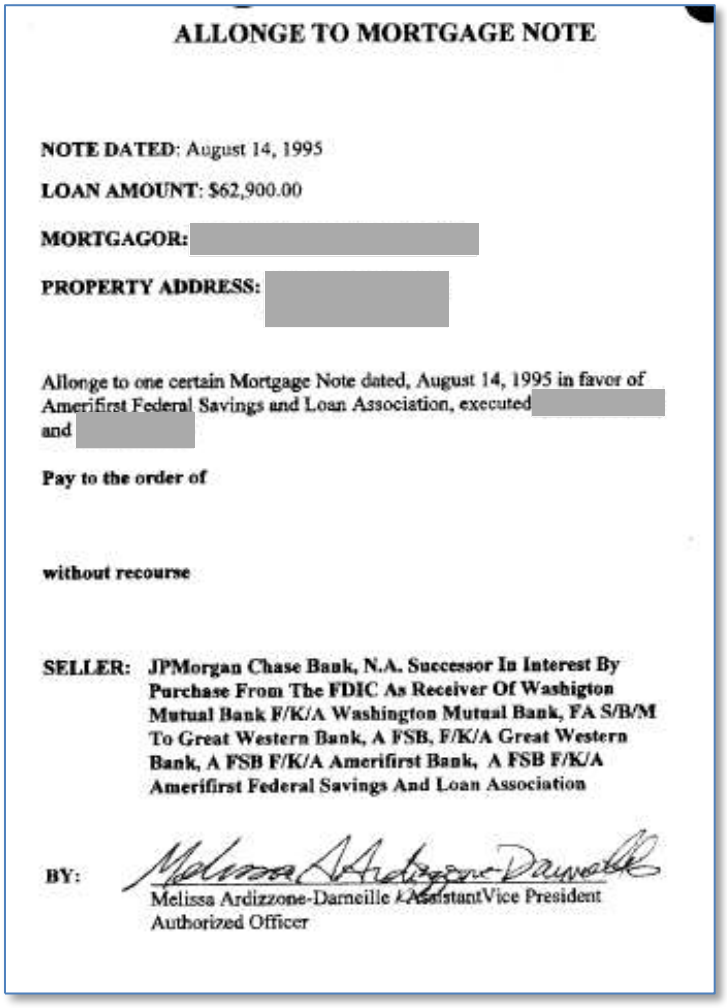
[6] Answer, April 16, 2012 (R. 34-36).

[7] Answer to Allegation 8, August 16, 2012 (R. 35).

[8] Motion for Leave to Amend Complaint, ¶3, November 8, 2012 (R. 94).

Now, for the first time, the note was accompanied by an allonge which included a blank endorsement on an allonge executed by JP Morgan Chase Bank, N.A. ("Chase"), who purported to be the successor—not of Resolution Trust Corporation, but of AmeriFirst:[9]



ALLONGE TO MORTGAGE NOTE

NOTE DATED: August 14, 1995

LOAN AMOUNT: $62,900.00

MORTGAGOR: [redacted]

PROPERTY ADDRESS: [redacted]

Allonge to one certain Mortgage Note dated, August 14, 1995 in favor of Amerifirst Federal Savings and Loan Association, executed [redacted] and [redacted]

Pay to the order of

without recourse

SELLER: JPMorgan Chase Bank, N.A. Successor In Interest By Purchase From The FDIC As Receiver Of Washigton Mutual Bank F/K/A Washington Mutual Bank, FA S/B/M To Great Western Bank, A FSB, F/K/A Great Western Bank, A FSB F/K/A Amerifirst Bank, A FSB F/K/A Amerifirst Federal Savings And Loan Association

BY: Melissa Ardizzone-Darneille Assistant Vice President
Authorized Officer

Although the note that is the subject of this litigation was dated August 14, 1985, the allonge twice referred to the note as being dated August 14, 1995.

[9] Note attached to Verified Amended Complaint, November 8, 2012 (R. 76-77).

The Homeowners retained counsel who filed a motion to dismiss the Bank's amended complaint asserting that the pleading failed to state a cause of action.[10] Rather than rule on the merits of the motion, the trial court struck it asserting that the complaint was previously answered by the Homeowners and that the motion addresses issues not raised by the amended complaint.[11] The Homeowners' sought reconsideration of this order asserting that the *pro-se* answer could not serve as a response to the amended complaint and that the motion addresses substantive changes in the amended complaint.[12]

The Bank responded to this motion by explicitly alleging that it had amended its pleading "solely to add [the HOA]."[13] The trial court ultimately denied reconsideration in a one-sentence order.[14]

In an abundance of caution, the Homeowners nevertheless served an answer with affirmative defenses.[15] This pleading once again alleged that the

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[10] Defendants' Motion to Dismiss Amended Complaint, August 27, 2013 (R. 137-43).

[11] Order Denying Defendants' Amended Motion to Vacate Trial Order, November 18, 2013 (R. 189).

[12] Motion for Reconsideration of Order Entered November 18, 2013, November 21, 2013 (R. 192-97).

[13] Plaintiff's Response in Opposition to Defendants [*sic*] Motion For Reconsideration of Order Entered November 18, 2013, December 6, 2013 (R. 201).

[14] Order Denying Motion for Reconsideration, December 10, 2013 (R. 298).

Homeowners were without knowledge and therefore denied the Bank's allegation in its amended pleading that it was entitled to enforce the note.[16] The Homeowners also asserted the affirmative defense of lack of standing in this pleading[17] and the affirmative defense of lack of notice under Paragraph 19 of the mortgage.[18]

Included in this pleading was a request for leave to amend their *pro-se* pleading.[19] Initially, the trial court denied the Homeowners' request to amend their *pro-se* answer in a one-word order.[20] The Homeowners moved for reconsideration of this order, arguing once again that their *pro-se* answer could not be considered a response to the amended complaint and that, in any event, leave should freely be granted.[21]

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[15] Answer to Amended Complaint & Affirmative Defenses, December 9, 2013 (R. 277-86).

[16] Answer to Amended Complaint, ¶7, December 9, 2013 (R. 279).

[17] Third Affirmative Defense, Plaintiff Lacks Standing, December 9, 2013 (R. 282-83).

[18] Second Affirmative Defense, Plaintiff Failed to Comply with Conditions Precedent, December 9, 2013 (R. 280-81).

[19] Motion for Leave to Amend *Pro-Se* Answer, December 9, 2013 (R. 286-87).

[20] Order on Motion for Leave to Amend *Pro Se* Answer, January 28, 2014 (R. 349).

[21] Motion for Reconsideration of Order Denying Defendants' Motion for Leave to Amend *Pro Se* Answer, February 17, 2014 (R. 359-64).

The Bank responded to this motion by asserting, for a third time, that it had amended the complaint simply to add the HOA.[22] The trial court denied this motion, asserting that: 1) the issues between the original complaint and the amended complaint had not materially changed because the complaint was amended only to add a junior lienholder; and 2) the Homeowners' "delayed" in retaining counsel.[23] The matter was then set for trial.[24]

B. The Trial

Before testimony began, the Homeowners once again attempted to assert that the trial court had been led into error when it denied the Homeowners' motion to amend and the accompanying motion for reconsideration of that order:

> MR. ACKLEY [the Homeowners' counsel]: I believe the court is being led into error, Your Honor. The ruling of the court was based on a perception that the only change to the complaint was adding a junior lienholder.[25]

The trial court, however, refused to reconsider its position, asserting that this Court should correct the error:

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[22] Plaintiff's Response to in Opposition to Defendants [*sic*], [redacted] and [redacted] Valdes's Motion for Reconsideration of Order Denying Defendants' Motion for Leave to Amend Pro Se Answer, ¶3, March 31, 2014 (R. 393).

[23] Order Denying Motion for Reconsideration, etc., April 4, 2014 (R. 422).

[24] Order Re-Setting Non-Jury Foreclosure Trial, April 7, 2014 (R. 425-26).

[25] R. Supp. 8.

THE COURT: We had a hearing and I ruled.

MR. ACKLEY: Yes.

THE COURT: So if I'm wrong, there's people at the 3rd DCA that will straighten me out.

MR. ACKLEY: Yes, Your Honor.

THE COURT: Quickly.

MR. ACKLEY: Yes. I'm trying to avoid that.[26]

Ultimately, the trial court expressed frustration at having been asked to spend five minutes on this pre-trial issue rather than proceeding to trial. Indeed, the court scolded counsel for even raising the issue:

THE COURT: I'm in a jury trial, and that's actually one of my lawyers in the jury trial. I have spent at least a good five minutes going back and forth with you on matters that are really out of order.

You know, you're a good lawyer. You've argued things in front of me that have merit. I like you. I respect you. But today I really am disappointed.

MR. ACKLEY: I'm sorry to hear that, Your Honor.

THE COURT: You know why. Because we're both adults, and we're both schooled in the law. You know what you're doing today is wrong. So let's go to trial, please. Your witness is here?[27]

[26] R. Supp. 9.

[27] R. Supp. 10-11.

The Bank called its only witness, Nicole Lopez ("Lopez"), to the stand.[28] Over the Homeowners' hearsay and authenticity objections, the court admitted all the exhibits that constituted the entirety of the Bank's case:

- The alleged original note (Exhibit 1);[29]
- The mortgage (Exhibit 2);[30]
- Two assignments of mortgage (Exhibits 3 and 4);[31]
- Two merger documents (Exhibits 5[32] and 6[33]);
- An alleged default letter (Exhibit 7).[34]
- A loan modification (Exhibit 8);[35]
- A payment history (Exhibit 9).[36]

On cross-examination, Lopez admitted that the first time she reviewed any documents in this case was just three weeks before the trial; that she had no

[28] R. Supp. 11.

[29] R. Supp. 14, 20.

[30] R. Supp. 20, 35-37.

[31] R. Supp. 37, 38-39, 40.

[32] R. Supp. 48.

[33] R. Supp. 51.

[34] R. Supp. 52, 54.

[35] R. Supp. 55, 57-58.

[36] R. Supp. 58.

personal involvement with the loan; and that the only involvement she had was in anticipation for litigation.[37]

She also testified, pursuant to her research notes which the trial court refused to mark for identification, that the reason the allonge found in the amended complaint was done was to memorialize the chain of mergers between AmeriFirst and Chase.[38] She also testified that she had no idea why the note attached to the first complaint did not have an allonge.[39]

With respect to the payment history, Lopez admitted that the document started on May 16, 2007 and ran through May 1, 2014, and if there was any information regarding the document prior to May 16, 2007, it would be in the Bank's archived records.[40] Based on this testimony, the Homeowners also objected to the payment history under the rule of completeness.[41] This objection would later be reiterated by the Homeowners along with an objection on summary evidence grounds.[42] In overruling the objection, the trial court appeared to suggest

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[37] R. Supp. 71.

[38] R. Supp. 73.

[39] R. Supp. 74.

[40] R. Supp. 77.

[41] *Id.*

[42] R. Supp. 82-83.

that the document was admissible because payment histories are always admissible in every case:

> THE COURT: You know in every mortgage foreclosure, every single one, they introduce a payment history. Every single one. Every single one. I can say that in French and in Spanish.[43]

Additionally, while the Homeowners attempted to ask specific questions regarding the line items of the payment history, the trial court prohibited this line of questioning because of a jury trial that was waiting to start:

> THE COURT: I don't care. Next question. I have a courtroom full of people and a jury trial. You're asking her to testify about every single payment? Here. I got one for you. The record speaks for itself. Sound familiar? Let's go.[44]

The court also prohibited the Homeowners from asking specific questions regarding the court costs the Bank sought to collect and went so far as to suggest that the court had already decided the case in favor of the Bank:

> THE COURT: Okay. Next question. I'm not going to nickel and dime 70 bucks. If you want, we can have a hearing on the final judgment documents on the line items. If you want to take a deposition on the line items, you can do that. In the meantime, it's not going to stall a writ of possession and all that stuff. So let's go.[45]

Later, Lopez conceded that the default letter admitted into evidence was not the copy of the letter that was generated and put into the envelope and was actually

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[43] R. Supp. 83.

[44] R. Supp. 78.

[45] R, Supp. 82.

a computer regeneration of the letter.[46] She also admitted that she did not have any document with her which proves that the notice was actually mailed.[47]

After cross-examination concluded, the Homeowners attempted to call [redacted] but the trial court refused to allow him to take the stand because he had not attended the Bank's portion of the case:

> THE COURT: Call your first witness.
>
> MR. ACKLEY: May I get my client here, Your Honor?
>
> THE COURT: Not if he's not in this courtroom right now where we have been for two hours. You get no witness.
>
> MR. ACKLEY: He's just nearby.
>
> THE COURT: Too bad, so sad. Call your next witness.
>
> MR. ACKLEY: I don't have a witness here today, Your Honor.
>
> THE COURT: You rest? You don't bring your witness to trial in a courtroom that is a packed courtroom. That is your strategy, and it was unwise. Let's go. …[48]

The Homeowners moved for an involuntary dismissal on the grounds that the Bank's evidence was inadmissible and that the Bank failed to make a *prima facie* showing for foreclosure since there was no showing of standing, compliance

[46] R. Supp. 90-91.

[47] R. Supp. 91.

[48] R. Supp. 92.

with conditions precedent, and damages.[49] The motion was denied and judgment was entered in favor of the Bank.[50] The trial court then inquired whether the Bank was seeking attorney's fees and then granted both entitlement and amount of fees solely on the basis of affidavits submitted to the court over the Homeowners' objection.[51]

This appeal follows.

[49] R. Supp. 95.

[50] *Id.*

[51] R. Supp. 95-98.

SUMMARY OF THE ARGUMENT

The trial court denied the Homeowners due process when it struck their motion to dismiss the amended complaint and refused to permit them to answer the amended complaint or otherwise amend their *pro se* answer. The Homeowners had not abused the privilege of amending, the Bank was not prejudiced by the proposed amendments, and the proposed amendments were not futile. The trial court abused its discretion in denying leave to file an amended answer.

Additionally, the trial court should have granted the Homeowners' motion for involuntary dismissal because the Bank failed to prove a *prima facie* case for foreclosure. Initially, the Bank failed to prove its standing because it failed to prove that it was in physically possession of the original note endorsed in blank on the day the lawsuit was filed. The Bank also failed to establish compliance with conditions precedent since there was no evidence whatsoever that the notice of default was actually sent to the Homeowners.

And finally, the trial court abused its discretion in admitting the Bank's exhibits over the Homeowners' hearsay and authenticity objections where the witness was not qualified to lay the business records exception to hearsay.

STANDARD OF REVIEW

And a trial court's decision to permit or deny amendment is reviewed for abuse of discretion. *Lasar Mfg. Co., Inc. v. Bachanov*, 436 So. 2d 236, 237 (Fla. 3d DCA 1983).

A trial court's ruling of a motion for involuntary dismissal is reviewed *de novo*. *Deutsche Bank Nat'l Trust Co. v. Clarke*, 87 So. 3d 58, 60 (Fla. 4th DCA 2012). Likewise, a party's standing to bring a foreclosure action is reviewed *de novo*. *LaFrance v. U.S. Bank Nat. Ass'n*, 141 So. 3d 754, 755 (Fla. 4th DCA 2014).

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). 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)

An appellate court reviews a trial court's decision to admit evidence for abuse of discretion. *Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008). However, the *de novo* standard applies when the issue is whether the trial court erred in applying a provision of the Florida Evidence Code (here, § 90.803(6), Fla. Stat.). *See Shands Teaching Hosp. and Clinics, Inc. v. Dunn*, 977 So. 2d 594, 598 (Fla. 2d

DCA 2007); *Lucas v. State*, 67 So. 3d 332, 335 (Fla. 4th DCA 2011); *see also Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006) (question of whether evidence falls within the statutory definition of hearsay is a matter of law subject to *de novo* review).

ARGUMENT

I. The trial court misconstrued the Florida Rules of Procedure when it struck the Homeowners' motion to dismiss and refused to permit amendment to their *pro-se* answer.

A. The trial court should have resolved, rather than stricken, the Homeowners' motion to dismiss the Bank's amended complaint.

The Homeowners' *pro-se* answer was unequivocally directed at the Bank's initial complaint.[52] This pleading, however, could not carry over as an answer to the Bank's amended complaint. *Caraffa v. Carnival Corp.*, 34 So. 3d 127, 130 (Fla. 3d DCA 2010) ("Once a plaintiff files an amended complaint, the defendant is required to plead all defenses it seeks to assert – prior pleadings are superceded by the amendment."); *Geer v. Jacobsen*, 880 So.2d 717, 720 (Fla. 2d DCA 2004) (holding that a notice and motion does not carry over as a response to the amended complaint); *Abrams v. Paul*, 453 So.2d 826, 827 (Fla. 1st DCA 1984) (stating that an answer to the original complaint does not carry over as a response to the amended complaint). And the Homeowners had the right to defend against the amended complaint at any time before a default was entered against them. Fla. R. Civ. P. 1.500(c). This right to defend clearly encompassed the Homeowners' right to test the sufficiency of the amended complaint's allegations to state a cause of

[52] Answer (R. 34-36).

action through a motion to dismiss. Fla. R. Civ. P. 1.140(b)(6) (defense of failure to state a cause of action may be made by motion).

The Homeowners' motion to dismiss sought dismissal because the amended complaint failed to state a cause of action.[53] And while the trial court found that the Bank's amended complaint did not pertain to the "issues" addressed in the Homeowners' motion,[54] in reality, the amended complaint attached a copy of the subject promissory note that was significantly different than that attached to the original complaint. It now showed that the specific endorsement to Freddie Mac had been crossed out and an allonge (with an endorsement in blank) had been purportedly affixed to the instrument.[55] One of the very issues raised in the Homeowners' motion to dismiss was the fact that the newly disclosed endorsement on the allonge was executed by an entity outside the ownership chain.[56] While the Bank led the court into this error by repeatedly representing that the only change was the addition of the HOA, it was, nonetheless error.

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[53] Defendants' Motion to Dismiss Amended Complaint, August 27, 2013 (R. 137-143).

[54] Order on Defendants' Amended Motion to Vacate Trial Order, November 18, 2013 (R. 189).

[55] Verified Amended Complaint, November 8, 2012 (R. 76-77).

[56] Defendants, [redacted] Valdes and [redacted] [redacted] Motion to Dismiss Amended Complaint, p. 4, n. 1. (R. 140).

B. The trial court compounded the problem by forcing the Homeowners to go to trial on their *pro-se* answer.

For the same reason, the trial court abused its discretion in denying the Homeowners' the right to respond to the new complaint, or at a minimum, amend the existing *pro se* answer.

The public policy of this State favors the liberal amendment of pleadings and courts should always resolve all doubts in favor of allowing the amendment so that the case can be decided on their merits. *S. Developers & Earthmoving, Inc. v. Caterpillar Fin. Servs. Corp.*, 56 So.3d 56, 62 (Fla. 2d DCA 2011). Thus, while the right to amend is not absolute, it is rarely refused. *Volpicella v. Vlopicella* 136 So. 2d 231 (Fla. 2d DCA 1962). As a result of these policies, a trial court abuses its discretion in denying a motion to amend unless: 1) the amendment would prejudice the opposing party; 2) the privilege to amend has been abused; or 3) the amendment would be futile. *Spradley v. Stick*, 622 So. 2d 610, 613 (Fla. 1st DCA 1993).

Initially, the trial court simply denied the Homeowners' motion for leave without any explanation.[57] Later, in its order denying the Homeowners' motion for reconsideration, it adopted the same rationale it had used for striking the motion to

[57] Order on Defendants' motion for leave to amend *pro se* answer, January 28, 2014 (R. 349).

dismiss—the erroneous belief that the issues between the original complaint and the amended complaint were not materially changed since the complaint was amended only to add a junior lienholder. It bolstered the ruling with its opinion that the Homeowners' "delayed" in retaining counsel.[58]

As to the first point, again, the trial court was led into error by the repeated representations of the Bank that its amended complaint merely added a junior lienholder.[59] But the Bank did not just add the HOA; it materially changed what the purported original note looked like.

Had the Bank not amended its pleading, the Homeowners' could have waited until trial and moved to dismiss the complaint for failure to state a cause of action. Fla. R. Civ. P. 1.140(b)(6); *Schopler v. Smilovits*, 689 So. 2d 1189, 1189 (Fla. 4th DCA 1997). And since the note attached to the original complaint materially conflicted with the Bank's allegation that it was the holder, the trial court would have had to grant the Homeowners' motion. *Fladell v. Palm Beach County Canvassing Bd.*, 772 So.2d 1240 (Fla. 2000) ("If an exhibit facially negates

[58] Order Denying Motion for Reconsideration, etc., April 4, 2014 (R. 422).

[59] Motion for Leave to Amend Complaint, ¶3, November 8, 2012 (R. 94); Plaintiff's Response in Opposition to Defendants['] Motion For Reconsideration of Order Entered November 18, 2013, December 6, 2013 (R. 201); Plaintiff's Response to in Opposition to Defendants, [redacted] and [redacted] Valdes's Motion for Reconsideration of Order Denying Defendants' Motion for Leave to Amend Pro Se Answer, ¶3, March 31, 2014 (R. 393).

the cause of action asserted, the document attached as an exhibit controls and must be considered in determining a motion to dismiss."); *Appel v. Lexington Ins. Co.*, 29 So. 3d 377 (Fla. 5th DCA 2010) ("Where a document on which the pleader relies in the complaint directly conflicts with the allegations of the complaint, the variance is fatal and the complaint is subject to dismissal for failure to state a cause of action"); *Health Application Systems v. Hartford Life*, 381 So. 2d 294, 297 (Fla. 1st DCA 1980) ("We parenthetically observe that under the Florida Rules of Civil Procedure, and case law interpreting the rule, exhibits attached to a pleading become a part for all purposes; and if an attached document negates the pleader's cause of action or defense, the plain language of the document will control and may be the basis for a motion to dismiss.")

Further, the fact that the Homeowners did not retain counsel until sixteen months after the case was filed and fifteen months after their *pro-se* answer had been served provides no basis for denying them the right to amend. *See e.g. Laurencio v. Deutsche Bank Nat. Trust Co.*, 65 So. 3d 1190, 1193 (Fla. 2d DCA 2011) (holding that the trial court abused its discretion in denying a homeowner leave to amend his *pro-se* answer in foreclosure case even where leave was sought by a newly retained counsel nearly sixteen months later and two days before summary judgment hearing.)

In short, the Bank failed to establish any of the three requisites necessary to deny the Homeowners' motion and the trial court violated the Homeowners' procedural due process rights in actually denying the motion. This order should therefore also be reversed.

II. The trial court should have granted The Homeowners' motion for involuntary dismissal.

When confronted with the Homeowners' motion for involuntary dismissal, the trial court was required to determine whether the Bank had made a *prima facie* showing of foreclosure based on competent, substantial evidence. *Valdes v. Association Ined, HMO, Inc.*, 667 So. 2d 856, 856-57 (Fla. 3d DCA 1996). Because no view of the evidence or testimony presented at trial establishes this, the trial court erred in denying the motion.

A. The Bank failed to establish that it had standing to sue on the day the lawsuit was filed.

1. The pleadings and pre-trial filings evidenced that the Bank lacked standing on the day the lawsuit was filed.

The party seeking foreclosure must prove that it had standing to enforce the note on or before the day the lawsuit was filed. *Boyd v. Wells Fargo Bank, N.A.*, 143 So.3d 1128 (Fla. 4th DCA 2014) (reversing summary judgment of foreclosure because foreclosing lender failed to produce documentation establishing that it had standing at the time it filed the foreclosure complaint); *LaFrance*, 141 So. 3d at

755 (Fla. 4th DCA 2014) ("A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose…Standing to foreclose is determined at the time the lawsuit is filed.) (Citations omitted).

If the foreclosing plaintiff is not the original lender, standing (to enforce the note[60]) may be established by submitting the promissory note with a blank or special endorsement, an assignment of the note, or an affidavit that proves the plaintiff's noteholder status. *Focht v. Wells Fargo Bank, N.A.*, 124 So.3d 308, 310 (Fla. 2dDCA 2013). Nevertheless, this evidence must be established on the day the foreclosure lawsuit was filed. *Id.*; *Wright v Deutsche Bank Nat'l Trust Co.*, Case No. 4D13-3221 (Fla. 4th DCA January 7, 2015) (reversing final judgment after trial because note attached to complaint was not endorsed, endorsement was not dated, and bank failed to present testimony or evidence as to date of endorsement); [redacted] *v. BAC Home Loans Servicing, LP*, Case No. 4D12-4137 (Fla. 4th DCA January 7, 2015) (reversing with instructions to vacate the final

[60] Many written opinions simply state, without analysis or careful draftsmanship, that establishing oneself as a holder of the note under Article 3 of the Uniform Commercial Code ("UCC") is sufficient to foreclose as if the UCC applies to non-negotiable instruments such as mortgages. In reality, the plaintiff must also prove itself to be the mortgagee to enforce the mortgage lien. Although mortgages are said to "follow the note," equity contemplates that only the owner, not the holder, of the note could be the beneficiary of such automatic transfers.

judgment and enter a dismissal of the complaint after trial because "the plaintiff produced no evidence to show that it owned the note or mortgage on the date of the filing of the complaint."); *Fischer v. U.S. Bank National Association*, Case No. 4D13-3798 (Fla. 4th DCA January 7, 2015) (reversing with instructions to enter final judgment in favor of defendant because bank failed to prove that it had standing at the time the complaint was filed); *Deutsche Bank Nat'l. Trust Co. v Boglioli*, Case No. 4D13-2323 (Fla. 4th DCA January 7, 2015) (affirming final judgment in favor of borrower because bank failed to present competent, substantial evidence at trial to prove that it had standing at time complaint was filed).

Attached to its complaint was what the Bank alleged, under penalty of perjury, was a correct copy of the original note which was made payable to AmeriFirst and contained a specific endorsement to Freddie Mac.[61] There was also no allonge attached to the complaint, either affixed to the note or otherwise incorporated into the Bank's pleading. [62] Therefore, because the note was

[61] Complaint, March 14, 2012 (R. 16-18).

[62] *Id*. An allonge is a piece of paper annexed to a promissory note on which to write an endorsement when there is no more room to write the endorsement on the note itself; this paper must be so firmly affixed to the note that it becomes a part of the instrument. *Isaac v. Deutsche Bank Nat. Trust Co.*, 74 So 3d 495, 496 n. 1 (Fla. 4th DCA 2011); *Taylor v. Deutsche Bank Nat. Trust Co.*, 44 So. 3d 618, 623

specifically endorsed to Freddie Mac, Freddie Mac was the only entity with standing to enforce the instrument. Fla. Stat. §673.2051(1); *Dixon v. Express Equity Lending Group, LLP*, 125 So. 3d 965, 967 (Fla. 4th DCA 2013).

In their *pro-se* answer, the Homeowners pled that they were without knowledge of the Bank's allegation that it was entitled to enforce the note and therefore denied this allegation.[63] Additionally, in their answer to the Bank's amended complaint the Homeowners once again alleged that they were without knowledge and therefore denied the Bank's allegation in its amended pleading that it was entitled to enforce the note.[64] The Homeowners also asserted the affirmative defense of lack of standing in this pleading. [65]

While the Homeowners were continuously—and impermissibly—denied leave to have their answer and affirmative defenses to the amended complaint deemed filed, because the Homeowners had already denied the Bank's right to enforce the note in their *pro-se* answer, this was still an issue the Bank had to prove. *Carapezza v. Pate*, 143 So.2d 346, 347 (Fla. 3d DCA 1962); *Gee v. U.S.*

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n. 2 (Fla. 5th DCA 2010). This definition, particularly that an allonge must be "affixed" to the note, is the crux of the Homeowners' argument.

[63] Answer to Allegation 8, August 16, 2012 (R. 35).

[64] Answer to Amended Complaint, ¶7, December 9, 2013 (R. 279).

[65] Third Affirmative Defense, Plaintiff Lacks Standing, December 9, 2013 (R. 282-283).

Bank Nat. Ass'n, 72 So. 3d 211, 214 (Fla. 5th DCA 2011) ("When Ms. Gee denied that U.S. Bank had an interest in the Mortgage, ownership became an issue that U.S. Bank, as the plaintiff, was required to prove.")

Further, the issue of lack of standing may be raised by motion rather than by pleading it as an affirmative defense in order to preserve the issue for appeal:

> The borrowers argue that the record does not conclusively show that Freddie Mac had standing at the time it filed the original complaint on March 11, 2009. Freddie Mac first responds that the issue is not preserved because the borrowers did not raise lack of standing as an affirmative defense. While that may have been preferable, the issue was nevertheless raised before the circuit court. As this court has explained, the issue of standing may be raised by motion rather than by pleading an affirmative defense.

McLagan v. Fed. Home Loan Mortg. Corp., 145 So. 3d 943, 945 (Fla. 2d DCA 2014), *but see Jaffer v. Chase Home Finance, LLC*, Case No. 4D13-1597 (Fla. 4th DCA January 7, 2014) (observing that, in the Fourth District, standing must be raised by affirmative defense) and dissenting opinion J. Conner (explaining that defense of failure to state a cause of action can be raised at trial). Since the Homeowners argued the Bank's lack of standing in their motion for involuntary dismissal, the Bank's standing to sue has also been adequately preserved for appellate review by way of motion.

Thus, at the time the matter was set for trial, the record reflects a sworn pleading filed by the Bank identifying a note with a specific endorsement to

Freddie Mac; a *pro-se* answer by the Homeowners denying the Bank's right to enforce the note; a subsequent answer to the amended complaint by the Homeowners (that the court should have officially recognized) again denying the Bank's right to enforce the note; and the improperly stricken affirmative defense of lack of standing. The Bank was therefore required to prove, through competent and substantial evidence, that it was the owner of the note on the day the lawsuit was filed. This it failed to do.

2. The evidence and testimony at trial failed to prove the Bank's standing at inception.

At trial, the Bank argued that it established its standing through the assignments of mortgage and "merger" documents that the trial court impermissibly accepted into evidence.[66] Putting aside the fact that the witness was incompetent to testify to these documents (which she was), and the fact that the trial court improperly "returned" these documents to the Bank's lawyer (which it did), the documents fail to establish an essential, necessary fact—that the note was endorsed in blank when the case was filed (i.e. that the specific endorsement to Freddie Mac had been cancelled and that the allonge with the endorsement in blank had been affixed to the note at the lawsuit's inception).

[66] Supp. R. 75.

This fact is crucial because where, as here, a foreclosing plaintiff's standing hinges on an allonge, it must prove that the allonge "took effect" on or before the day the lawsuit was filed. *Cutler v. U.S. Bank*, 109 So. 3d 224, 226 (Fla. 2d DCA 2012). And in order for an allonge to "take effect," it must be affixed to the note it accompanies. Fla. Stat. §673.2041 (1) ("[f]or the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument"); *Issac*, 74 So. 3d at 496 n. 1.

At trial, the Bank failed to prove when the allonge was affixed to the note, such that it had no more legal effect than any other stray piece of paper. In fact, all Lopez testified was that the "date" of the allonge was August 14, 1995 and that "to the best of her knowledge," the allonge was attached on August 14, 1995.[67] But the witness could not have had any knowledge that the allonge was affixed to the note in 1995 because she admitted that the first time she reviewed a copy of the note was three weeks before the trial – and nearly twenty years after the allonge was purportedly affixed to the note.[68]

But more importantly, merely comparing the date of the specific endorsement on the note to the allonge and Lopez's testimony reveals that August

[67] R. Supp. 73.

[68] R. Supp. 72.

14, 1995 is not the date of the allonge nor is it even possible that this could have been the day the allonge was executed. Initially, the August 14, 1995 date explicitly comes after the words "**NOTE DATED**."[69] (Emphasis original). And the text of the allonge itself explicitly states that the date of August 14, 1995 is that of the note (not the allonge):

> Allonge to one certain Mortgage Note dated, August 14, 1995 in favor of Amerifirst Federal Savings and Loan Association, executed [redacted] Valdez and [redacted] [redacted]

However, the subject note is not dated August 14, 1995, so either the allonge does not belong with the note or, more likely, it was intended to refer to August 14, 1985 (the date the note was executed). Thus, the allonge was neither dated August 14, 1995 nor affixed to the note on that date. Rather, August 14, 1995 merely references (albeit incorrectly) the date the note was executed.[70]

Lopez's explanation why there was a change from the specific endorsement to Freddie Mac to the blank endorsement on the allonge also provides no competent, substantial evidence that the allonge was either affixed or properly endorsed on the day the lawsuit was filed. In essence, the witness testified that the endorsement was created to memorialize a series of bank mergers that had

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[69] Allonge attached to Amended Complaint, November 8, 2012 (R. 77).

[70] It would be a strange coincidence indeed that the note was dated and affixed exactly ten years to the day the note was executed.

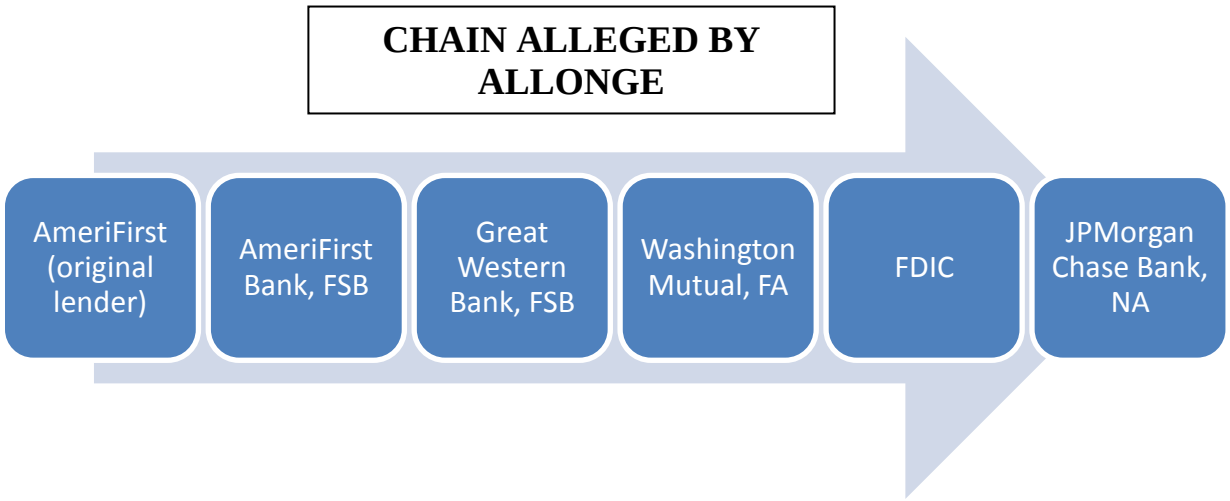
occurred from the AmeriFirst, the original lender, to JPMorgan Chase, the maker of the allonge.[71] But this explanation does not address why—if the allonge had been affixed in 1995 as she claimed—it did not appear on the version filed with the complaint sixteen years and seven months later.

More importantly, the sequence of bank mergers stated on the allonge is merely hearsay—it is not the operative part of the instrument. Indeed, the Bank needed to prove all the mergers or acquisitions stated there for the allonge to have any legal effect. In other words, if JPMorgan Chase was never actually proven to be a successor of AmerFirst, its endorsement on the note is meaningless.

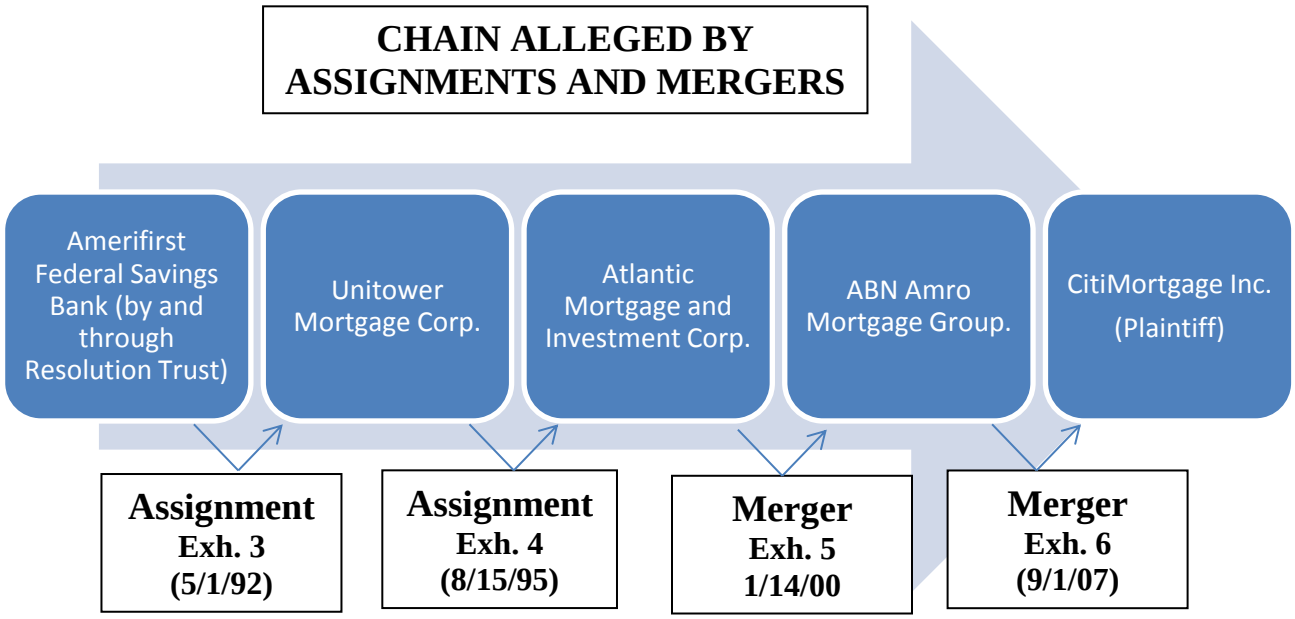
Moreover, the sequence stated on the allonge conflicts with the other record evidence the Bank submitted in support of its standing. Specifically, the sequence of mergers mentioned on (but not established by) the allonge is: [72]

[71] R. Supp. 73. Notably, the terms of the two mergers are not disclosed in Exhibits 5 and 6. Whether certain assets such as the subject loan were included in the acquisitions cannot be assumed by the mere fact that a merger occurred.

[72] The allonge alleges that Chase was the successor in interest to Washington Mutual via a purchase from the FDIC as receiver of Washington Mutual. While outside the record, it is judicially noticeable that Chase did not acquire the banking operations of Washington Mutual from the FDIC until September 25, 2008, more than thirteen years after the allonge was allegedly dated and affixed to the note. *JP Morgan Chase Acquires Banking Operations of Washington Mutual*, FDIC Press Release, September 25, 2008 (available online at https://www.fdic.gov/news/news/press/2008/pr08085.html).



However, the assignments and merger documents introduced as Exhibits 3 through 6 purport to show a transfer of the loan documents through an entirely different set of banks:



Further, according to the assignments, Resolution Trust transferred the loan to Unitower in 1992, while the original endorsement indicates that Resolution

transferred it to Freddie Mac in 1991. Even if Resolution somehow regained ownership of the loan from Freddie Mac (for which there is not a scrap of evidence), Resolution assigned away its rights to Unitower in 1992. This means that JPMorgan Chase, which could only have been a successor of Resolution (despite its absence from the chain mentioned on the allonge), would never have had the authority or ability to endorse the allonge in 1995. Lopez provided absolutely no testimony on these discrepancies.

The evidence and testimony therefore failed to establish the Bank's standing at the inception of the lawsuit because the Bank was required to prove not only its "physical possession" of the note prior to the day the lawsuit was filed, but that the note was also properly endorsed. *Kiefert v. Nationstar Mortgage, LLC*, 39 Fla. L. Weekly D2591 (Fla. 1st DCA Dec. 16, 2014); *Sosa v. U.S. Bank National Association*, 39 Fla. L. Weekly D2554 (Fla. 4th DCA December 10, 2014) (judgment reversed and case remanded for involuntary dismissal where bank failed to prove date of endorsement). Without testimony or evidence that the allonge was physically affixed to the note on or before the day the lawsuit was filed—and endorsed by an entity with the right to do so—the Bank failed to present a *prima facie* case for mortgage foreclosure. The trial court was required to grant the Homeowners' motion for involuntary dismissal. *May v. PHH Mortgage*, 150 So.

3d 247 (Fla. 2d DCA 2014) ("May's motion for involuntary dismissal could only have been denied if the court found that the bank presented competent substantial evidence to establish a prima facie case.")

3. The proper remedy on remand is involuntary dismissal.

Where a foreclosing plaintiff fails to establish its standing at the inception of the lawsuit, reversal of the final judgment and entry of an involuntary dismissal on remand is appropriate. *See Lacombe*, 149 So. 3d 152, 156 (Fla. 1st DCA 2014); *Correa v. U.S. Bank, N.A.*, 118 So. 3d 952, 955 (Fla. 2d DCA 2013); *cf. Guerrero v. Chase Home Fin., LLC*, 83 So. 3d 970, 973 (Fla. 3d DCA 2012) (remanding with specific directions to allow the plaintiff to properly reestablish the note upon a proper pleading—but only because the evidence "confirmed the current owner/holder's entitlement to foreclose the mortgage attached to the complaint").

Therefore, on remand, the trial court should be instructed to enter an involuntary dismissal.

B. The Bank failed to prove compliance with conditions precedent to foreclosure.

1. There is no evidence that the notice was sent in accordance with the terms of the mortgage.

Prior to filing the foreclosure action, the Bank was required to send the Homeowners a notice of default and opportunity to cure which complied with Paragraph 19 of the mortgage. The Bank, however, failed to present any

competent substantial evidence that this notice was sent and therefore the trial court should have granted the Homeowners' motion for involuntary dismissal.

The Bank adduced a single document—purportedly a copy of the notice itself—to prove that it sent a notice. Lopez, however, testified that this exhibit was not even a photocopy of the letter; rather she admitted that the document was nothing more than a computer regeneration of the purported letter.[73] Most importantly, on cross-examination, the witness admitted that she did not have any record with her during the trial which would prove that the notice was actually mailed.[74] Rather, the entire basis of her testimony was a document which Lopez admittedly did not bring into court with her. [75] But since the document which this testimony was based was not admitted into evidence, Lopez's hearsay testimony regarding the contents of this document cannot be considered competent, substantial evidence that the notice was actually mailed. *Sas v. Federal Nat. Mortg. Ass'n*, 112 So. 3d 778 (Fla. 2d DCA 2013) (reversing final judgment of foreclosure after trial because trial court permitted bank witness to testify, over objection, to contents of business record without first introducing the record into evidence.)

[73] R. Supp. 90-91.

[74] R. Supp. 91.

[75] R. Supp. 87.

This fact is critical because Paragraph 14 of the mortgage requires that all notices sent pursuant to the mortgage are deemed to have been given either mailed by first class mail or actually delivered to the Homeowners.[76] Here, there was no evidence to find that the conditions had been satisfied for the notice to "be deemed to have been given" because there was no evidence that that the letter was sent by first class mail. In fact, the notice itself does not say anything about the manner in which it might have been sent.

And while the witness generally testified about the Bank's alleged procedure for mailing,[77] this testimony was insufficient to warrant the inference that the notice in the Homeowners' case was actually mailed. Specifically, Lopez was incompetent to testify as to the Bank's general business practices regarding mailing because she was neither in charge of the Bank's mailing process nor did she establish that she was well enough acquainted with the mailing process to give testimony. *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980) ("[I]n order to prove a fact of evidence of usual business practices, it must first be established that the witness is either in charge of the activity constituting the usual business practice or is well enough acquainted with the activity to give

[76] Mortgage, pg. 3, ¶14, Amended Complaint, November 8, 2012 (R. 80).
[77] R. Supp. 91.

testimony.") Therefore, her testimony regarding the Bank's practice of mailing was insufficient to warrant the Bank the presumption that the notice had been mailed.

The trial court was simply unconcerned that Lopez did not have the document proving that the notice was actually mailed to the Homeowners because she had "the letter, the breach letter. That's all you need."[78] Emphasis added. But finding that the Bank actually sent a notice in accordance with the mortgage requires more than the mere existence of some piece of paper and parroting testimony from a witness. There must be proof that the notice was actually sent as required by Paragraph 14 of the mortgage. Since the Bank failed to present any testimony or evidence indicating that the notice was sent as required, there is no competent, substantial evidence that the Bank complied with the mortgage's notice provisions. The Homeowners' motion for involuntary dismissal should therefore have been granted.

2. The proper remedy on remand is involuntary dismissal.

The demand letter was a key element of the Bank's *prima facie* foreclosure case. *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825, 826 (Fla. 3d DCA 2014) ("To establish its entitlement to foreclosure, [the bank] needed to introduce the

[78] R. Supp. 89.

subject note and mortgage, an acceleration letter, and some evidence regarding the [borrowers'] outstanding debt on the note.") Therefore, in order for there to be sufficient evidence to support the judgment, it necessarily follows that the Bank sent the Homeowners a sufficient Paragraph 19 notice. Short of this, involuntary dismissal must be entered on remand. *Rashid v. Newberry Fed. S & L Ass'n.*, 526 So. 2d 772 (Fla. 3d DCA 1988) (holding that implicit in a prior decision by this Court reversing summary judgment of foreclosure for failure to give the required notice of default prior to instituting the foreclosure proceeding was that the case be dismissed on remand.)

C. The Bank should not have been awarded attorney's fees solely on the basis of the affidavits over the Homeowners' objection.

The final judgment found the Homeowners liable for $7,707.50 in attorney's fees.[79] However, the Bank's attorney did not testify as to the number of hours spent on the case nor was there any expert witness testimony as to the reasonableness of the fee. Rather, the trial court merely accepted an affidavit of "reasonableness" of fees and decided that the scheduled amounts were reasonable.[80]

[79] Final Judgment, pg. 2, May 16, 2014 (R. 478).

[80] Supp. R. 97-98.

However, the Homeowners clearly objected to the use of affidavit in determining the fees and requested an evidentiary hearing on the issue.[81] And while the trial court opined that such a hearing might be to the Homeowners' "detriment"[82] it was simply not at liberty to deny the Homeowners an evidentiary hearing on the issue. *Dhondy v. Schimpeler*, 528 So.2d 484 (Fla. 3d DCA 1988) (reversing fee award and remanding for an evidentiary hearing on the issue where defendant objected to the use of affidavit in awarding the fee); *Demaso v. Demaso*, 345 So. 2d 391 (Fla. 3d DCA 1977). *See also Geraci v. Kozloski*, 377 So.2d 811, 812 (Fla. 4th DCA 1979) ("In an adversary proceeding such as this the determination of an attorneys fee for the mortgagee based upon affidavits over objection of the mortgagor is improper. Evidence should be adduced so that the full range of cross examination will be afforded both parties."); S*oundcrafters, Inc. v. Laird*, 467 So. 2d 480, 481 (Fla. 5th DCA 1985) ("the trial court erred in permitting Laird's sole expert to testify by way of affidavit over Soundcrafters' objection.")

The trial court therefore erred in awarding attorney's fees without testimony of the attorney as to the number of hours spent on the case or testimony from an

[81] Supp. R. 96.

[82] *Id.*

expert witness as to the reasonableness of the fee. *Miller v. The Bank of New York Mellon*, Case No. 4D13-3576 (Fla. 4th DCA November 5, 2014) (reversing final judgment of foreclosure because the attorney's fee award was not supported by expert testimony); *Raza v. Deutsche Bank Nat. Trust Co.*, 100 So. 3d 121 (Fla. 2d DCA 2012) (affirming denial of motion for attorney's fees in foreclosure action because attorney failed to present evidence of number of hours spent); *Saussy v. Saussy*, 560 So. 2d 1385, 186 (Fla. 2d DCA 1990) ("To support a fee award, there must be the following: 1) evidence detailing the services performed and 2) expert testimony as to the reasonableness of the fee.")

D. The trial court erred in admitting the Bank's trial exhibits over the Homeowners' objections.

1. The witness could not authenticate any of the exhibits the Bank offered into evidence.

To properly authenticate hearsay documents under the "business records" exception, the proponent must establish that

1) The hearsay document was made at or near the time of the event;

2) The hearsay document was made by or from information transmitted by a person with knowledge;

3) The hearsay document was kept in the ordinary course of a regularly conducted business activity;

4) It was a regular practice of that business to make such the hearsay document; and

5) The circumstances do not show a lack of trustworthiness.

§ 90.803(6), Fla. Stat.; *Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008).

Furthermore, a witness purporting to establish this predicate at trial must have personal knowledge of the record-keeping practices to be qualified to lay a foundation for their admission into evidence under the business records exception. *Yang v. Sebastian Lakes Condo. Ass'n*, 123 So. 3d 617, 621 (Fla. 4th DCA 2013) (holding that despite witness's use of "magic words"—the elements of a business records exception to hearsay—records were inadmissible because the witness did not have the personal knowledge required to lay a foundation for business records of an entity for whom she had never worked and about whose record-keeping practices she had no personal knowledge). The personal knowledge required to introduce a company's records is not familiarity with what the records say, but with the facts of how, when, and why the records were created and kept. *Id*.

But to even be permitted to testify to these threshold facts, the witness must be a records custodian or an otherwise "qualified" witness—that is, one who is in charge of the activity constituting the usual business practice or sufficiently experienced with the activity to give the testimony. *Hunter v. Aurora Loan Servs., LLC*, 137 So. 3d 570, 573 (Fla. 1st DCA 2014) (finding witness unqualified where the witness "lacked particular knowledge of a prior servicer's record-keeping

procedures and "[a]bsent such personal knowledge, he was unable to substantiate when the records were made, whether the information they contain derived from a person with knowledge, whether [the previous servicer] regularly made such records, or, indeed, whether the records belonged to [the previous servicer] in the first place."); *Burdeshaw v. Bank of New York Mellon*, 148 So. 3d 819 (Fla. 1st DCA 2014) (reversing and remanding for dismissal because bank failed to establish any foundation qualifying the exhibit as a business record or its witness "as a records custodian or person with knowledge of the four elements required for the business records exception"); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So. 3d 152 (Fla. 1st DCA Oct. 14, 2014) (reversing and remanding for dismissal because bank's witness was not a records custodian for the current servicer or any of the previous servicers); *Holt v. Calchas, LLC*, 39 Fla. L. Weekly D2305 (Fla. 4th DCA November 5, 2014) (witness was not qualified to introduce bank's payment records over hearsay objection).[83] *See also Mazine v. M & I Bank*, 67 So. 3d 1129, 1131 (Fla. 1st DCA 2011) (holding that a witness was not qualified

[83] Notably, in *sua sponte dicta*, the panel in *Holt* declared that an assignment of mortgage and a notice of acceleration would be admissible over a hearsay objection as "verbal acts." *Id*. at *7, n. 2. This decision was simply incorrect because the date on the notice of acceleration was offered for the truth of the matter asserted (the implied assertion being that it was mailed on that day), and therefore, was not a verbal act. *See*, Law Revision Council Note—1976 for § 90.801, Fla. Stat., Subsection (1)(c) and cases cited therein.

because the witness "had no knowledge as to who prepared the documents submitted at trial by the bank as he is not involved in the preparation of documents such as the ones proffered by the bank, that he does not keep records as a records custodian, that he has no personal knowledge as to how the information…was determined…"); *Lassonde v. State*, 112 So. 3d 660, 662 (Fla. 4th DCA 2013) ("The customer service clerk's testimony does not meet the requirements of *Yisrael*. While the clerk was able to testify as to how the store re-rings merchandise stolen from the store, this was not his duty nor within his responsibilities."); *Snelling & Snelling, Inc. v. Kaplan*, 614 So. 2d 665, 666 (Fla. 2d DCA 1993) (holding that a witness who relied on ledger sheets prepared by someone else was not sufficiently familiar with the underlying transactions to testify about them or to qualify the ledger as a business record); *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980) (holding that an adjuster was not qualified to testify about the usual business practices of sales agents at other offices). *See also Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121, 1122 (Fla. 2d DCA 1988) (testimony was insufficient under the business records exception to hearsay because the witness was not the custodian, and was not in charge of the activity constituting the usual business practice); *Thomasson v. Money Store/Florida, Inc.*, 464 So. 2d 1309, 1310 (Fla. 4th DCA 1985) (statement that demonstrates no more

than that the documents in question appear in the company's files and records is insufficient to meet the requirements of the business record hearsay exception); *Holt v. Grimes*, 261 So. 2d 528, 528 (Fla. 3d DCA 1972) (records properly excluded where there was "no testimony as to the mode of preparation of these records nor was the witness testifying in regard to the records in the relationship of 'custodian or other qualified witness'"); *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825 (Fla. 3d DCA 2014) (holding that without the proper foundation, the documents relied upon by the professional witness were indisputably hearsay.)

Here, Lopez testified that when a case is "assigned" to her, she reviews such things as the note, the mortgage, the assignments, and the merger documents.[84] But she admitted on cross-examination that the first time she reviewed any documents was a mere three weeks before the trial occurred; that she had no personal involvement with the loan; and that therefore her only involvement was solely in anticipation of litigation.[85]

The trial court's explained its rationale for permitting Lopez to testify over the Homeowners' hearsay and authenticity objections during the following exchange with the Homeowners' counsel:

[84] R. Supp. 16.

[85] R. Supp. 72.

> MR. ACKLEY [the Homeowners' attorney]: Your Honor, the problem is there are witnesses that have been hired by the banks to basically do nothing but testify.
>
> THE COURT: That's her job. Yes. Guess what? We are in a foreclosure crisis in the United States of America. They have hired this woman, Nicole Lopez, to research loans in default. She testified that it is part of her job to look at all the relevant documents that are in the file at the bank regarding this loan.[86]

The trial court, therefore, recognized that Lopez's only connection with the documents at issue was that she had read them. She was not a records custodian nor an "other qualified witness" because she was neither in charge of any of the activities constituting a normal business practice nor reasonably enough acquainted with the activity to give testimony. The court opined, however, that a perceived "foreclosure crisis" in the United States would justify an abandonment of the tried and true rules of evidence.

Therefore, she was incompetent to authenticate the Bank's exhibits admitted into evidence. These documents remained inadmissible hearsay without this proper authentication. *Kelsey*, 131 So. 3d at 826; *Bank of New York v. Calloway*, Case No. 4D13-2224 (Fla. 4th DCA January 7, 2015) (holding that witness was qualified to lay the business records exception so long as the testimony is not from a "'robo' witness").

[86] R, Supp, 22.

2. The payment history should have also been excluded under the rule of completeness.

Additionally, the payment history should have been excluded into evidence based on the Homeowners' proper objection on completeness and summary evidence grounds.[87] When part of a document is introduced during a trial, the "rule of completeness" allows the adverse party to require the movant to produce any other part of the document which, in fairness, should be considered by the trier of fact. Fla. Stat. §90.108(1); *Long v. State*, 610 So. 2d 1276 (Fla. 1992). The purpose of the rule is to avoid misleading impressions by taking statements out of context. *Larzelere v. State*, 676 So. 2d 394 (Fla. 1996).

The payment history was admittedly incomplete because it only reflected transactions from May 16, 2007 through May 1, 2014.[88] But Lopez testified that the note originated on August 14, 1985[89] and the Bank's lawyer represented that the loan was modified back in 2000.[90] Lopez also admitted that any information

[87] R. Supp. 77.

[88] *Id.*

[89] R. Supp. 17.

[90] R. Supp. 57.

regarding the payment history prior to May 16, 2007 would have been in the Bank's archived records.[91]

Fairness required that the Bank produce the complete payment history because this document was the only exhibit offered by the Bank to prove the damages it alleged was owed. If any of the Bank's archived records that it failed to produce contradicted any of the numbers reflected on the payment history, the payment history would have given the trial court a misleading impression as to what was actually owed under the loan documents by taking the payment history's numbers out of context.

3. The proper remedy on remand is involuntary dismissal.

The Bank therefore brought no admissible evidence of its standing, its compliance with conditions precedent to acceleration and foreclosure, or the amount of damages to which it would have been entitled. A party may not neglect to bring evidence to prove elements of its damages and be given another bite at the evidentiary apple. *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 39 Fla. L. Weekly D1159 (Fla. 2d DCA May 30, 2014) ("[A]ppellate courts do not generally provide parties with an opportunity to retry their case upon a failure of proof." [internal quotation omitted]).

[91] R. Supp. 77.

A personal injury plaintiff, for example, cannot ask the appellate court for another chance at proving medical bills he did not bring to the trial. *See Pain Care First of Orlando, LLC v. Edwards*, 84 So. 3d 351, 355 (Fla. 5th DCA 2012) ("Having proceeded to judgment on legally insufficient proof, Appellee does not get a do-over."); *Van Der Noord v. Katz*, 481 So. 2d 1228, 1230 (Fla. 5th DCA 1985) ("Having failed to introduce competent, substantial evidence in regard to this issue, the buyer is not entitled to a second bite at the apple."); *Loiaconi v. Gulf Stream Seafood, Inc.*, 830 So. 2d 908, 910 (Fla. 2d DCA 2002) (same); *J.J. v. Dep't of Children & Families*, 886 So. 2d 1046, 1050 (Fla. 4th DCA 2004) (where Department did not seek a continuance to secure additional evidence, "[n]o statute or rule permitted the trial court to give the Department a 'do-over'…").

Therefore, this Court should not give the Bank a second bite at the apple on remand. The proper remedy is thus involuntary dismissal.

CONCLUSION

The Court should reverse the judgment and remand for entry of dismissal of the case with prejudice or, in the alternative, with instructions that the trial court vacated its orders striking the Homeowners' motion to dismiss and motion for leave to amend their *pro-se* answer.

Dated: January 9, 2015

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this January 9, 2015 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. I also certify that this brief has been electronically filed this January 9, 2015.

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