In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR HARBOR VIEW MORTGAGE LOAN TRUST MORTGAGE LOAN PASSTHROUGH CERTIFICATES, SERIES 2006-7,

Appellees.

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

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

I. Introduction

("Ms. appeals the final judgment of foreclosure rendered in favor of Deutsche Bank National Trust Company, as trustee for Harborview Mortgage Loan Trust Passthrough Certificates, Series 2006-7 ("the Bank") after a non-jury trial. Ms. presents three reasons the evidence is insufficient to support the judgment:

- The evidence does not establish the Bank's standing at the inception;
- The evidence does not support the measure of damages awarded to the Bank;
- The evidence does not support compliance with Paragraph 22 of the mortgage.

II. Appellant's Statement of the Facts

A. The Pleadings and Discovery

The Bank initiated this action when it filed a two-count complaint which pled for re-establishment of a lost promissory note and mortgage foreclosure.[1] A copy of the mortgage attached to the complaint identified Mortgage Electronic

[1] Complaint, April 1, 2009 (R. 2-27).

Registration Systems, Inc. ("MERS") as the mortgagee[2] and American Brokers Conduit ("American Brokers") as the lender.[3] No note was attached to the Complaint.

The Bank later filed an affidavit of lost note which averred, under penalty of perjury, that the original note had been lost or destroyed.[4] Additionally, the Bank filed an assignment of mortgage which post-dated the complaint by twelve days.[5] Despite having filed its lost note affidavit, the Bank proceeded to file a notice of withdrawal of its re-establishment count.[6]

Ms. [redacted] filed an answer in which she stated she was without knowledge as to each and every allegation of the complaint and therefore denied the allegations.[7] Ms. [redacted] also raised the affirmative defense of lack of standing in her responsive pleading.[8] This affirmative defense was struck by the trial court.[9]

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[2] Subsection (C) of the Definitions section of the mortgage attached to the Complaint, April 1, 2009 (R. 1060).

[3] Subsection (D) of the Definitions section of the mortgage attached to the Complaint, April 1, 2009 (R. 1060).

[4] Affidavit of Lost Note, ¶2, October 13, 2009 (R. 64).

[5] Assignment of Mortgage, October 12, 2010 (R. 117-118).

[6] Notice of Withdrawal of Count I, February 22, 2011 (R. 244-278).

[7] Answer, ¶1, December 8, 2010 (R. 152).

[8] Affirmative Defense VI "Lack of Standing," December 8, 2010 (R. 158).

[9] Order granting the Bank's motion to strike, July 26, 2011 (R. 300).

B. The Trial

The Bank called a single witness, Harrison Whittaker, to testify regarding every aspect of the Bank's case. The witness testified that he was employed by Ocwen Loan Servicing ("Ocwen") but did not testify that he was the custodian of Ocwen's records or that he had prior knowledge of any of the prior servicers or their records of the loan. He did not even testify what his own job title was.[10]

The witness was asked to identify the original note,[11] and then was asked to identify the entity that owned the note on the day the lawsuit was filed based on the his review of business records.[12] While the witness testified that it was the Bank who owned the note on that day,[13] when the Bank's attorney requested that the trial court take judicial notice of the document from which this statement was apparently derived, Ms. [redacted] objection was sustained.[14]

[10] Supp. R. 22.

[11] Supp. R. 26.

[12] *Id.*

[13] Supp. R. 27.

[14] Supp. R. 27-29.

The witness then identified the mortgage,[15] a demand letter,[16] a payment history,[17] and a "loan inventory."[18] The witness's direct examination ended with testimony that the final judgment the Bank sought to enter included attorneys' fees, although the Bank offered no testimony from its attorney regarding the hours worked or from an expert witness regarding the reasonableness of the requested fees.[19]

The Bank's lawyer thereafter asked that the trial court admit its exhibits into evidence at which time Ms. [redacted] counsel objected because, among other reasons, the witness lacked the requisite knowledge of the prior servicer's records.[20] The court overruled Ms. [redacted] objection and admitted the exhibits.[21]

Ms. [redacted] then proceeded to cross-examine the witness.[22] During cross-examination, Ms. [redacted] asked Whittaker whether he had seen the assignment of

[15] Supp. R. 29.

[16] Supp. R. 31.

[17] Supp. R. 32.

[18] Supp. R. 33.

[19] Supp. R. 34-35.

[20] Supp. R. 35.

[21] Supp. R. 36.

[22] Supp. R. 36-44.

mortgage the Bank had filed (which had been executed after the Bank filed its Complaint), but the trial court sustained the Bank's relevancy objection.[23]

After Ms. [redacted] concluded her cross-examination of the witness, the Bank rested. Ms. [redacted] presented a proffer to the trial court,[24] which included reference to the belated assignment of mortgage.[25] During the middle of Ms. [redacted] proffer, the Bank's attorney began identifying exhibits to the trial court and an unidentified order.[26] This sidebar activity prompted Ms. [redacted] attorney to interrupt his proffer to verify whether the court was listening:

> MR. ARCIA [Ms. [redacted] counsel]: And finally, Your Honor, we would submit the assignment of mortgage in this case which Your Honor precluded us from making reference to which shows that there was a -- an assignment date of --
>
> Excuse me, Your Honor.
>
> THE COURT: I am listening.[27]

Moments later, and still during Ms. [redacted] proffer, the Judge and the Bank's lawyer entered into a colloquy regarding what the judge mistakenly thought was the proposed judgment in this case.[28] When the judge located the correct

[23] Supp. R. 40-41.

[24] Supp. R. 44-47.

[25] Supp. R. 47.

[26] Supp. R. 46-47.

[27] Supp. R. 47.

[28] Supp. R. 47-48.

proposed judgment, he announced "Okay. Judgment has been entered."[29] Ms. [redacted] had never rested her case and the court had never entertained closing arguments or motions.

This appeal followed.

[29] Supp. R. 48.

SUMMARY OF THE ARGUMENT

The sufficiency of the evidence admitted at the nonjury trial, an issue which may be raised for the first time on appeal, does not support the final judgment for three reasons. First, the five exhibits accepted into evidence and the testimony of the witness does not establish that the Bank had standing to sue on the day the lawsuit was filed.

Second, the evidence does not support the damages awarded to the Bank. The principal amount awarded in the judgment was greater than the amount stated on the note without proper evidence or testimony to justify the amount of this increase. Further, the note contained an adjustable rate but there was insufficient evidence of what the rate was for the years preceding the judgment. Additionally, the trial court erred in awarding the Bank attorneys' fees without testimony or evidence detailing the services rendered and expert witness testimony regarding the reasonableness of the fee requested.

Third, the Bank failed to establish that the demand letter was sent in accordance with the notice provisions of the mortgage. Further, even if sent, the notice does not comply with the applicable mortgage provisions.

Because the Bank's failure of proof should not warrant a second bite at the apple, the proper remedy on remand is involuntary dismissal.

STANDARD OF REVIEW

"Whether a party is the proper party with standing to bring an action is a question of law to be reviewed de novo." *LaFrance v. U.S. Bank Nat. Ass'n*, 141 So. 3d 754, 755 (Fla. 4th DCA 2014); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 39 Fla. L. Weekly D2156 (Fla. 1st DCA Oct. 14, 2014) ("We review the sufficiency of the evidence to prove standing to bring a foreclosure action *de novo.*").

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).

ARGUMENT

I. The evidence admitted at trial is insufficient to support the judgment and therefore the judgment must be reversed with instructions to enter an involuntary dismissal.

As shown by the transcript, the trial court entered judgment precipitously—even before Ms. [redacted] had announced that she was resting her case. The transcript also suggests that the court did not devote its full attention to Ms. [redacted] proffer.[30] After conferring with the Bank's attorney that what it was about to sign was the proposed judgment pertaining to this case, the trial court simply entered the judgment the Bank presented to it and set a sale date.[31] Given that over five-hundred pages of exhibits came into evidence, mostly during the later stages of this hour and forty-three minute trial, there is nothing to indicate that the trial court paused to review them—much less make any independent factual findings based on them—before signing the Bank's proposed judgment.

The trial court, therefore, improperly abdicated its fact-finding role. *Perlow v. Berg-Perlow*, 875 So. 2d 383 (Fla. 2004) (trial court's verbatim adoption of proposed final judgment suggested that trial court did not independently make factual findings and legal conclusions, created appearance of impropriety, and was reversible error); *see Walker v. Walker*, 873 So. 2d 565, 566 (Fla. 2d DCA 2004) (a

[30] Supp. R. 46-48.

[31] *Id.*

proposed judgment cannot substitute for a thoughtful and independent analysis of the facts, issues, and law by the trial judge.)

Because the fact-finder did not independently verify that the exhibits correlate to the findings in the judgment, it should not be surprising that, in fact, the documents in evidence do not support the judgment. As a result, the judgment must be reversed.

A. The Bank failed to present competent, substantial evidence at trial that it had standing on the day if filed the lawsuit.

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, NA*, 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[32]) 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. 2d DCA 2013). Nevertheless, this evidence must be established on the day of the foreclosure lawsuit was filed. *Id.*

The Bank attached a copy of the mortgage to its complaint, but tellingly, did not attach a copy of the note. In fact, the Bank affirmatively alleged that the original note had been lost.[33] Later, the Bank filed an affidavit of lost note which averred, under penalty of perjury, that the original note had been lost or destroyed.[34]

In her answer, Ms. [redacted] pled that she was without knowledge of each and every allegation of the Bank's complaint (which necessarily included the Bank's

[32] 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 to say that 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 an automatic transfer.

[33] Complaint, April 1, 2009 (R. 2-27).

[34] Affidavit of Lost Note, ¶2, October 13, 2009 (R. 64). While the Bank later absconded its request for re-establishment in an unverified "notice" asserting that it was "withdrawing" this count, (R. 244), this notice was silent regarding the affidavit. Indeed, nowhere in the record does it appear that the Bank took corrective action alerting the trial court that the affidavit it filed was false in fact.

allegation that it owned and held the note) and therefore denied the allegations.[35] Ms. [redacted] also raised the affirmative defense of lack of standing in her responsive pleading.[36]

Additionally, while the Bank filed an assignment of mortgage, the assignment was executed after it filed the Complaint.[37] Therefore, this document not only failed to establish the Bank's standing to sue at the inception, but served to disprove it. *Vidal v. Liquidation Properties, Inc.*, 104 So. 3d 1274, 1278 (Fla. 4th DCA 2013). *See also Progressive Exp. v. McGrath Chiropractic*, 913 So. 2d 1281 (Fla. 2d DCA 2004) (holding that assignment of PIP benefits after the date the PIP lawsuit was filed could not cure a provider's lack of standing at the onset

[35] Answer, ¶1, December 8, 2010 (R. 152).

[36] Affirmative Defense VI "Lack of Standing," December 8, 2010 (R. 158). Although the trial court initially—and erroneously—stuck this affirmative defense (Order granting the Bank's Motion to Strike [R. 300]), at trial, the court properly overruled the Bank's objection to Ms. [redacted] line of questioning regarding the Bank's standing (Supp. R. 37). The Bank has not taken a cross-appeal of this ruling and therefore cannot complain of it now. Fla. R. App. P. 9.110(g). In any event, because Ms. [redacted] denied the Bank's right to enforce the note in her answer, this was an issue it had to prove. *Carapezza v. Pate*, 143 So.2d 346, 347 (Fla. 3d DCA 1962); *Gee v. U.S. 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.").

[37] Assignment of Mortgage, October 12, 2010 (R. 117-118). The assignment clearly reveals that it was executed on April 13, 2009. R. 118. The complaint, on the other hand, was filed on April 1, 2009. R. 1.

of the lawsuit.) The Bank's witness claimed ignorance of the document[38] and Ms. proffered the assignment after cross-examining the Bank's witness.[39]

Thus, the Bank was required to prove at trial that it had the right to enforce the note on the day the lawsuit was filed. Since the exhibits it introduced at trial fell woefully short of this, and because the witness's testimony cannot be viewed as competent evidence of its standing, there is insufficient evidence to support the final judgment.

The Bank's first exhibit: the Note.

The first exhibit contained in the record on appeal is the note.[40] While the note bears a blank endorsement, the endorsement is not dated. [41] Therefore, the note does not provide competent, substantial evidence of the Bank's standing to sue on the day the lawsuit was filed. *Cromarty v. Wells Fargo Bank*, 110 So. 3d 988 (Fla. 4th DCA 2013).

[38] Supp. R. 41.

[39] Supp. R. 47.

[40] Adjustable Rate Note, February 3, 2014 (R. 1051-1059).

[41] Adjustable Rate Note, p. 7, February 3, 2014 (R. 1057).

The Bank's second exhibit: the Mortgage.

The second exhibit contained in the record on appeal is the mortgage.[42] This security instrument, however, identifies MERS as the mortgagee[43] and American Brokers as the lender.[44] Since the Bank is neither MERS nor American Brokers, the mortgage does not prove the Bank's standing at inception.

The Bank's third exhibit: the Demand Letter.

The third exhibit contained in the record on appeal is the demand letter dated February 17, 2009.[45] This letter, however, was addressed to Ms. [redacted] from an entity calling itself American Home Mortgage Servicing, Inc. ("AHMSI").[46] While not specifically mentioned at trial, judging from the Payment History (Exhibit 4), AHMSI appears to have been a prior servicer. Thus, if anything, this AHMSI letter tends to show that the Bank did not have standing at the inception of the lawsuit because the letter expressly states that if Ms. [redacted] fails to cure the default articulated in the letter, AHMSI would accelerate the debt and initiate a

[42] Mortgage, February 3, 2014 (R. 1060-1082).

[43] Mortgage, Subsection (C) of the Definitions section, February 3, 2014 (R. 1060).

[44] Mortgage, Subsection (D) of the Definitions section, February 3, 2014 (R. 1060).

[45] Demand Letter, February 3, 2014 (R. 1083-1085).

[46] Demand Letter, p. 2 valediction, February 3, 2014 (R. 1084).

foreclosure proceeding.[47] Therefore, the demand letter cannot establish the Bank's standing.

The Bank's fourth exhibit: the Payment History.

The final exhibit contained in the record on appeal is the payment history.[48] The first seven pages of this exhibit is a meaningless list of numbers arranged in columns without headings.[49] The following page, a "Detail Transaction History" apparently created by Ocwen, contains four entries between February and April of 2013.[50] Following that are two pages listing a "Homeward" loan number and an Ocwen loan number purporting to show escrow transactions between July of 2008, through November of 2012. Finally, there are ten pages of what appear to be AHMSI servicing records (beginning in July of 2008 and ending in December 2011). This too fails to prove the Bank's standing.

The Bank's unmarked fifth exhibit: the purported Loan Schedule.

Following the payment history are 448 incoherent pages of numbers, names, and addresses[51] which appear to be at least some of the pages of the print-out of

[47] Demand Letter, p. 1, Paragraph (d), February 3, 2014 (R. 1083).

[48] Payment history, February 3, 2014 (R. 1086-1554).

[49] Payment history, February 3, 2014 (R. 1086-1092).

[50] Detail Transaction History, February 3, 2014 (R. 1093-1095).

[51] R. 1086-1554,

the "loan inventory schedule" the Bank's witness attempted to authenticate at the trial.[52] Ostensibly, these pages were admitted as the fifth exhibit, although they were never marked as such by the clerk. Notably, the entire document that was discussed at trial contained 1,256 pages.[53]

Tellingly, whether these 448 pages are part of Exhibit 4, or actually an unmarked Exhibit 5, nowhere in any of these pages is there any mention of when the note was transferred from American Brokers to the Bank. In fact, the Bank's name does not appear on a single page. Therefore, this hodgepodge exhibit (or exhibits) cannot be competent, substantial evidence of the Bank's standing on the day the lawsuit was filed.

Worse, Whittaker admitted he did not know whether the document being presented to the court was a copy of that which was submitted to the Securities and Exchange Commission ("SEC") as part of a Pooling and Servicing Agreement ("PSA") for establishing a securitized trust.[54] In fact, he testified that he had never even seen the document which was submitted to the SEC.[55] This document, therefore, does not establish that Ms. [redacted] loan was ever a part of the trust for which the Bank purports to act as trustee, much less <u>when</u> the trust would have

[52] Supp R. 33-34.

[53] Supp R. 33.

[54] Supp. R. 38.

[55] Supp. R. 39.

acquired the loan. *Focht*, 124 So. 3d at 312 (Fla. 2d DCA 2013) ("Wells Fargo noted that the trust in which Focht's mortgage loan was held was created years before Wells Fargo filed the foreclosure action. But the record does not reflect that, at the time the trust was created, Focht's mortgage loan was an asset of the trust. Thus, a genuine issue of material fact remains regarding standing that precludes the entry of summary judgment.").[56]

Therefore, even if the final 448 pages of the payment history were to be construed as the "loan inventory history," this document still fails to establish the Bank's standing.

The Witness's Testimony.

The Bank's witness provided self-serving, conclusory testimony that the Bank owned the loan as of the day the Complaint was filed.[57] This testimony is likewise insufficient to establish the Bank's standing for several reasons.

First, the question and answer made clear that the witness had no personal knowledge of when the Bank acquired the loan—his "knowledge" was limited to what was allegedly stated in business records that never came into evidence. When the Bank's attorney requested that the trial court take judicial notice of the

[56] Notably, the PSA would be needed to establish: 1) the closing date of the trust; and 2) whether loans could be added or subtracted from the trust's loan schedule after the closing date (which is usually the case).

[57] Supp. R. 26-27.

business record upon which the witness claimed to have relied (identified by the attorney as a bailee letter), the trial court sustained Ms. [redacted] objection.[58]

Since the alleged business record which made up the basis of the witness's statement was excluded from evidence, the witness's testimony did not provide competent, substantial evidence of the Bank's standing. *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.)

Second, subsequent testimony that the Bank became both the "owner and holder" of the note nearly three years before the Complaint was filed is similarly defective.[59] As with the purported "bailee letter," the witness had no personal knowledge of the subject, but was, at best, parroting hearsay information he claimed to have seen in documents provided him by the Bank.[60] And again, the alleged business record upon which he claimed to rely was excluded from evidence. No records admitted into evidence establish that the witness's self-serving hearsay assertion was actual fact. Indeed, no exhibit in this case establishes a date that the Bank came into possession of an endorsed Note.

[58] Supp. R. 29 (sustaining objection to judicial notice of alleged business record.)

[59] Supp. R. 39-40.

[60] Supp. R. 40.

Therefore, the evidence presented at the bench trial was insufficient to support the final judgment because the Bank's exhibits and its witness did not prove the Bank's standing at inception.

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*, 39 Fla. L. Weekly at D2158; *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 presented insufficient evidence to support its measure of damages.

1. The principal award is not supported by competent, substantial evidence

The judgment awarded $191,049.55 in principal to the Bank. However, the note[61] and mortgage[62] both expressly provide that the original principal balance of

[61] Adjustable Rate Note, p. 1, ¶1, February 3, 2014 (R. 1051).

the loan was $176,000.00. No evidence was presented or testimony given which explains this difference.

In fact, the first page of the AHMSI payment history—starting over two years after the Note was executed—shows a principal balance having been brought forward of $185,225.21.[63] While this increase was undoubtedly attributable to the "negative amortization" of deferred interest,[64] without a complete payment history from the inception of the loan until the first entry of the AHMSI payment history, there is no evidence before this Court supporting the amount of additional principal. More to the point, the negatively amortized amount is a function of the payments made, the portion that was attributed to interest and, most importantly, the interest due at the time of that payment. The difference between the interest paid and the interest due would become additional interest. But because there was no information about the first two years of payments and because, as shown in the next section, the interest due in any given month cannot be computed, the additional principal cannot be determined from the exhibits.

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[62] Mortgage, p. 2, February 3, 2014 (R. 1061).

[63] AHMSI Loan History Y-T-D ending 12/31/08, February 3, 2014 (R. 1103).

[64] Adjustable Rate Note, p. 3, ¶G, February 3, 2014 (R. 1053).

2. The interest award is not supported by competent, substantial evidence.

The judgment awarded $38,716.03 in interest for the period between December 1, 2008 and January 31, 2014. It mentions no annual or per diem interest figures.

By its own terms, the Note's interest rate was indisputably adjustable both before and after default.[65] Specifically, starting July 1, 2006, the interest could change each month.[66] The interest rate would be based on an "Index" identified as the twelve-month average of the annual yields of actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board.[67] The interest rate then for each month was to be the "Current Index"[68] plus 3.450%[69] with an interest rate cap of 9.950%.[70]

The payment history, however, provides no information as to the interest rate that was applicable (or that was used to compute the judgment) for 2012, 2013, and 2014. While it purports to provide rates for some point in each of the

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[65] Adjustable Rate Note, p. 1, providing that "THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT," February 3, 2014 (R. 1051).

[66] Adjustable Rate Note, p. 2, ¶4(A), February 3, 2014 (R. 1053).

[67] Adjustable Rate Note, p. 2, ¶4(B), February 3, 2014 (R. 1053).

[68] Defined as "The most recent Index figure available as [of] 15 days before each interest rate Change Date." *Id.*

[69] Adjustable Rate Note, p. 2, ¶4(C), February 3, 2014 (R. 1053).

[70] Adjustable Rate Note, p. 2, ¶4(D), February 3, 2014 (R. 1053).

years 2008,[71] 2009,[72] 2010,[73] and 2011,[74] this only serves to prove that the rate was, in fact, changing. It does not establish the rate that was applicable for each month. And because it does not provide the Current Index, there is no way of determining whether the mentioned interest rate was correct.

It is apparent that, whatever interest rate was used by the Bank, it was not the 5.706% mentioned in three of the years and in the Detail Transaction History because using this rate on a per diem basis from December 1, 2008 until January 31, 2014 would have awarded the Bank more interest than what was awarded in the judgment.[75]

Without evidence or testimony regarding the interest rates for the three years preceding the final judgment, and no information (such as the Current Index) from which the applicable rate can be determined, there is no competent, substantial

[71] AHMSI Loan History Y-T-D ending 12/31/08 indicating interest rate of 5.929%, February 3, 2014 (R. 1103).

[72] AHMSI Loan History Y-T-D ending 12/31/09 indicating interest rate of 5.706%, February 3, 2014 (R. 1101).

[73] AHMSI Loan History Y-T-D ending 12/31/10 indicating interest rate of 5.706%, February 3, 2014 (R. 1099).

[74] AHMSI Loan History Y-T-D ending 12/31/11 indicating interest rate of 5.706%, February 3, 2014 (R. 1096).

[75] Using the $191,049.55 principal amount awarded in the judgment, per diem interest would be $29.87 since the formula to derive this number is the outstanding principal times the interest rate divided by the number of days in the year or ($191,049.55 x 5.706%)/365. Further, between December 1, 2008 and January 31, 2014 there was a total of 1,858 days. The resulting interest award would $55,498.46, almost $20,000.00 more than what is awarded in the final judgment.

evidence supporting the interest award. *Salauddin v. Bank of Am., N.A.*, ___ So. 3d ___, 39 Fla. L. Weekly D2356 (Fla. 4th DCA Nov. 12, 2014) (reversing and remanding where bank did not produce evidence of a change in the interest rate, and holding that "the trial court erred in adopting the interest amount set forth in the bank's proposed final judgment").

3. The attorney's fee award is not supported by competent, substantial evidence.

The final judgment found Ms. [redacted] liable for $8,303.75 in attorney's fees.[76] However, the Bank's attorney did not testify or present evidence 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 Bank's witness merely testified that the final judgment included an amount of attorney's fees and that this amount was recoverable under the note and mortgage.[77] Further, the payment history admitted at trial does not contain the identity of the timekeeper, the hours worked, or the work performed.

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 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

[76] Final Judgment, p. 2 January 31, 2014 (R. 1916).

[77] Supp. R. 34-35.

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.")

This issue may be raised for the first time on appeal since it tests the sufficiency of the evidence of the fee award made after a nonjury trial. *Diwakar v. Montecito Palm Beach Condo. Ass'n, Inc.*, 143 So. 3d 958, 961 (Fla. 4th DCA 2014) (holding that the sufficiency of evidence supporting an attorney's fee award after a nonjury bench trial in a foreclosure case can be raised for the first time on appeal); *see also Markham v. Markham*, 485 So. 2d 1299, 1301 (Fla. 5th DCA 1986) (holding that former husband did not waive his right to contest attorney's fee award on appeal where award was established solely through testimony of former wife without testimony from either the attorney rendering services or an expert witness.)

Nor does the Bank's "amended verified" statement as to the amount of hours its attorney purportedly worked on the case[78] and an "amended verified" statement regarding the reasonableness of the fees[79] change the result. These were not presented to the court for its consideration during the trial and therefore cannot be considered by this Court when reviewing the post-trial judgment. *Diwakar*, 143 So. 3d at 961 ("On appeal, the Association relies on "updated" affidavits filed after the trial concluded and the court had announced its ruling. However, no affidavits were introduced at trial. With regard to the affidavits filed in the case during the course of litigation, there was no mention of these affidavits by [the witness.]"); *see also Coca Cola Bottling Company v. Clark*, 299 So. 2d 78, 82 (Fla. 1st DCA 1974), *cert. denied* 301 So.2d 100 (Fla. 1974) ("An appellate court, reviewing a post-trial judgment (as distinguished from a pretrial judgment, such as a summary judgment, judgment on the pleadings or judgment of dismissal) may only consider that which was properly made a part of the trial record.")

4. The proper remedy is involuntary dismissal.

Since the Bank failed to establish an evidentiary basis for the damages it sought, the proper remedy on remand is involuntary dismissal. *Wolkoff v. Am.*

[78] Amended Verified Statement as to Attorney's Time and Effort, January 31, 2014 (R. 1042-1047).

[79] Amended Verified Statement as to Reasonable Attorney's Fee, January 31, 2014 (R. 1041-1042).

Home Mortg. Servicing, Inc., ___So. 3d. ___, 39 Fla. L. Weekly D1159, at *3 (Fla. 2d DCA May 30, 2014) ("When a party seeking monetary damages fails to establish an evidentiary basis for the damages ultimately awarded at trial, reversal for entry of an order of dismissal is warranted.*"). See also Spencer v. EMC Mortg. Corp.*, 97 So. 3d 257 (Fla. 3d DCA 2012) (reversing summary judgment of foreclosure on lack of prosecution grounds and noting that, had this ground not existed, the court would have nevertheless reversed because the judgment contained mathematically impossible interest figures); *cf. Salauddin*, at *2 (suggesting that trial court should compute interest at minimum rate allowed by the note, where—unlike this case—the note stated a minimum interest rate).

C. The Bank presented insufficient evidence to support compliance with the notice provisions of the mortgage.

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

Paragraph 22 of the mortgage required that the Bank send Ms. [redacted] a notice of default and opportunity to cure prior to instituting a foreclosure action against her. The Bank, however, failed to present any competent substantial evidence that this notice was sent.

The only document offered by the witness as evidence the Bank sent a notice was an alleged copy of an AHMSI letter. As with the other exhibits, Whittaker did

not testify that he had personal knowledge of when or how it was sent. He did not profess to have worked at AHMSI or to know their routine mailing procedures.

How the letter was sent is critical information because Paragraph 15 of the mortgage provides that all notices sent pursuant to the mortgage are deemed to have been given either when mailed by first class mail or actually delivered to Ms. [redacted][80] 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 or that it was actually delivered to Mr. [redacted] Tellingly, the notice itself does not even say that it was sent first class mail or that a return receipt was requested.

The Bank could have tried to offer such proof on this issue by way of testimony that it was AHMSI's normal routine practice to send such letters by first class mail. *See Brown v. Giffen Indus., Inc.*, 281 So. 2d 897, 900 (Fla. 1973) (the requirement of showing proper mailing satisfied by proof of general office practice); *Berwick v. Prudential Prop. & Cas. Ins. Co.*, 436 So. 2d 239, 240 (Fla. 3d DCA 1983) (same). But the witness was not qualified to provide such testimony since he was not an employee of AHMSI. *See Eig v. Ins. Co. of N. Am.*, 447 So. 2d 377, 379 (Fla. 3d DCA 1984) (testimony from witness who was not an employee of the company at the relevant time was incompetent to establish the

[80] Mortgage, p. 11, ¶15, February 3, 2014 (R. 1070).

routine practice of that company). In any event, the Bank did not even attempt to adduce such testimony from Whittaker or from anyone else.

Alternatively, the Bank could have offered evidence or testimony that Ms. [redacted] actually received the notice. It failed to do this as well. Accordingly, there was no evidence that would entitle the Bank to a finding that AHMSI actually sent the notice.

Finding that the Bank actually sent a notice in accordance with the mortgage requires more than the mere existence of some piece of paper. There must be proof that the notice was actually sent as required by Paragraph 15 of the mortgage. Similarly, there must be proof that it was actually mailed on the date that is stated at the top of the letter.[81] Since the Bank failed to present any testimony or evidence indicating that the notice was sent as required (and when required), there is no competent, substantial evidence that the Bank complied with the mortgage's notice provisions.

2. Even assuming it was sent, the notice did not comply with the mortgage's notice requirements.

The plain language of Paragraph 22 of the mortgage required that the Bank send Ms. [redacted] a notice <u>following</u> her alleged breach—a letter which specified:

[81] Paragraph 22 requires that the notice provide the borrower thirty days to cure the default. Because the AHMSI letter provides exactly thirty days from "the date of this notice," it was incumbent upon the Bank to establish that the letter was placed into the hands of the United States Postal Service on that exact date—not one or two days later.

1) the nature of breach; and 2) a date not less than thirty days from the notice by which Ms. [redacted] could cure the breach.[82] Where, as here, a mortgage contains specific requirements for the contents of the pre-acceleration notice that must be given, a plaintiff is not entitled to foreclosure unless the evidence shows that it provided notice in a form that included all of the required contents. *Kurian v. Wells Fargo Bank, N.A.*, 114 So. 3d 1052, 1055 (Fla. 4th DCA 2013) (finding notice insufficient for failing to "advise of the default, provide an opportunity to cure, or provide thirty days in which to do so"); *Haberl v. 21st Mortg. Corp.*, 138 So. 3d 1192, n.1 (Fla. 5th DCA 2014) (finding notice insufficient for failing to meet mortgage's requirements of informing the borrower of "the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or other defense of borrower to acceleration and foreclosure"); *Samaroo v. Wells Fargo Bank*, 137 So. 3d 1127, 1129 (Fla. 5th DCA 2014) (finding notice insufficient for failing to inform borrowers "of their right to reinstate after acceleration"); *Judy v. MSMC Venture, LLC*, 100 So. 3d 1287, 1288-89 (Fla. 2d DCA 2012) (finding notice insufficient because it only generally stated that a breach had occurred but "failed to specify the breach").

The notice the Bank submitted at trial, however, does not comply with the mortgage's notice requirements because it warns of a future breach—one that had

[82] Mortgage, p. 14, ¶22, February 3, 2014 (R. 1073).

not yet occurred—if AHMSI did not receive the next payment.[83] AHMSI therefore attempted to provide notice that was not only prior to the breach, but which provided Ms. [redacted] less than thirty days to cure that breach, one which had not yet occurred. This is because the alleged future breach could not have occurred until March 1, 2009, leaving Ms. [redacted] only sixteen days from the date of the notice to cure this additional breach. In other words, AHMSI impermissibly tried to start the thirty-day clock to cure a anticipated default on the March 1, 2009 payment eighteen days before the payment was even due.

To make matters worse, by including unnecessary (and not-yet-true) information—the reference to a potential future breach—AHMSI rendered the alleged notice defectively ambiguous. The notice was designed, according to the parties' express agreement in the mortgage, to "specify" the default and to precisely identify the action to cure. And specify means to mention specifically in full and explicit terms so that misunderstanding is impossible. *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992) (explaining that "'Specify' means [t]o mention specifically; to state in full and explicit terms; to point out; to tell or state precisely or in detail; to particularize, or to distinguish by words one thing from another…"Specify" means a statement explicit, detailed, and specific so that misunderstanding is impossible.") (Citations omitted). The alleged notice does not

[83] Demand letter, p. 1, ¶(b), February 3, 2014 (R.1084).

specify "the default," but refers to two that it claims must both be cured by the deadline.

Nor does the notice specify a definite course of action to cure because it does not unambiguously state an amount that must be paid to avoid foreclosure. Instead, it alludes to "other expenses" that are not identified in the notice. This, of course, leaves the unwary borrower subject to foreclosure if he or she makes all the payments before the thirty-day clock expired but is unaware of—or simply miscalculates—the "other expenses."

It is black letter law that the thirty day notice must be strictly observed. *See Kurian v. Wells Fargo Bank, N.A.*, 114 So. 3d at 1055 (Fla. 4th DCA 2013) (summary judgment reversed where notice stated that acceleration had already occurred and was dated only six days before the complaint was filed); *Konsulian v. Busey Bank, N.A.*, 61 So. 3d 1283, 1285 (Fla. 2d DCA 2011) (reversing summary judgment where suit was filed three days after the bank sent an acceleration letter); *Laurencio v. Deutsche Bank Nat. Trust Co.*, 65 So. 3d 1190, 1191 (Fla. 2d DCA 2011) (summary judgment reversed where suit filed two days after default letter).

Therefore the notice does not comply with Paragraph 22 of the mortgage.

3. 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 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 Ms. [redacted] a sufficient Paragraph 22 notice. Short of this, involuntary dismissal must be entered on remand.

Further, this Court has explicitly recognized that where a mortgage contains a notice provision and this provision is not complied with, dismissal is the appropriate remedy. *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.)

Finally, the Fourth District's *sua sponte* holding in *Holt v. Calchas, LLC*, ___ So. 3d ___, 39 Fla. L. Weekly D2305 (Fla. 4th DCA Nov. 5, 2014) concluding that failure to comply with the demand letter requirements of a mortgage does not require dismissal of the foreclosure action is simply incorrect. Indeed, this holding not only overlooks *Rashid*, but is contradicted—at least in this case—by Paragraph 20 of the mortgage which explicitly prohibits either the borrower or the lender from commencing, joining, or being joined to any judicial

action that alleges the other party breached any term of the mortgage until notice has been given to the other party.[84]

Therefore, prior precedent from this Court demands that, upon remand, the case be dismissed because the notice fails to satisfy the mortgage's notice requirements.

CONCLUSION

The Court should reverse the judgment and remand for entry of dismissal of the case with prejudice.

Dated: December 16, 2014

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[84] Mortgage, p. 13, ¶20, February 3, 2014 (R. 1072). In fact, Paragraph 20 of the mortgage explicitly recognizes that the Paragraph 22 notice satisfies the requirements of Paragraph 20. *Id.*

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 December 16, 2014 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 December 16, 2014.

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