In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] AND [redacted]

Appellants,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY,

Appellee.

ON APPEAL FROM THE 19th JUDICIAL
CIRCUIT IN AND FOR ST. LUCIE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

I. Introduction

The trial court denied an award of contractual attorneys' fees and costs to prevailing defendants [redacted] and [redacted] (the [redacted] even though the plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY (the BANK) stipulated to the [redacted] entitlement to fees under the terms of the mortgage contract and Florida statutory law.

II. Appellants' Statement of the Facts

This appeal arises from a post-judgment motion in a mortgage foreclosure case. The BANK filed the foreclosure in October 2007.[1] The trial court initially entered a judgment against the [redacted] less than six months after filing.[2] The [redacted] then retained counsel (the "Defense Firm") who, after a brief bankruptcy stay, successfully moved to vacate the judgment.[3] From that point, litigation between the parties ground on for over two and a half years and consuming over 35 docket entries[4] before the [redacted] prevailed in the case by way of a final

[1] Complaint docketed October 18, 2007 (App. 1).

[2] Summary Final Judgment of Foreclosure, dated April 1, 2008 (App. 33).

[3] Agreed Order on Defendants' Motion to Set Aside the Foreclosure Decree and Dismiss the Action, Or in the Alternative, Motion to Arrest Judgment and Withhold Execution, dated July 30, 2008 (App. 37).

[4] Docket for Case No. 562007CA004598AXXXHC (App. 127).

judgment of dismissal.[5] The BANK's motion for rehearing[6] was denied six months later.[7]

The [redacted] timely filed a Motion for Attorneys' Fees and Costs[8] which was set for hearing on July 31, 2012.[9] Before delving into the evidentiary hearing on the Motion, the parties stated on the record that the BANK did not contest the [redacted] entitlement to an award of attorneys' fees.[10] Indeed, correctly deferring to long-standing law, counsel for the BANK told the court that it was not contesting entitlement:

> THE COURT: Okay. But you're not contesting it [attorney's fees]?
>
> MS. EVERT [BANK's counsel]: No, Your Honor, because I believe the case law is pretty clear on a voluntarily [sic] dismissal.
>
> THE COURT: Okay. All right. So it's just the amount…[11]

The Court then conducted an hour and half evidentiary hearing.[12]

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[5] Final Judgment of Dismissal dated December 28, 2010 (App. 76).

[6] Plaintiff's Motion for Rehearing dated December 15, 2010; Plaintiff's Supplement to Motion for Rehearing dated March 7, 2011 (App. 66).

[7] Order on Motion for Rehearing dated June 13, 2011 (App. 85).

[8] Defendants, [redacted] and [redacted] Motion for Attorneys Fees and Costs, dated December 23, 2010 (App. 71).

[9] Transcript of Hearing, July 31, 2012 ("Tr.") (App. 88).

[10] Tr. at 5-6. (App. 89-90).

[11] Tr. at 5-6. (App. 89-90).

A. Testimony of Defense Firm Attorney

The [redacted] called as their first witness one of the attorneys at the Defense Firm—the attorney who had "handled the majority of the proceedings in the case" and who had argued the successful motion to dismiss.[13] That attorney testified to the following points—all without objection from opposing counsel:

- She had spent numerous hours reviewing the firm's business records which included the entire litigation file, the docket, and all notes and contemporaneous records.[14]
- The [redacted] had a fee agreement with the Defense Firm, the terms of which was a contingency fee plus a small monthly fee.[15]
- The Defense Firm did not keep contemporaneous billing records until November of 2011.[16]
- She had reconstructed the time prior to November of 2011 by cataloguing written documents, such as emails, motions, and orders from hearings. Undocumented tasks, such as phone calls, were not included.[17]

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[12] Tr. at 2 (App. 89).

[13] Tr. at 9, 12 (App. 90, 91).

[14] Tr. at 9, 12 (App. 90, 91).

[15] Tr. at 10 (App. 91).

[16] Tr. at 11, 12 (App. 91).

- She reconstructed time by comparing the documents in the file and what was listed in the docket and determining an amount of time for each task based on her experience with performing the same tasks in other cases.[18]
- She also verified the time spent by other personnel in the Defense Firm by arranging for them to review their entries and confirm the amount of time spent on each task.[19]
- The total amount of time spent was calculated by her review of the file as a business record, in her supervisory capacity as administrative attorney at the firm.[20]
- The total amount of time spent by the firm on the [redacted] case was 89.4 hours. Based on the hourly rates for the individuals working at the firm, the total for fees was $24,930.00, plus $930.00 for court reporter costs and $2,100.00 for expert witness fees.[21]

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[17] Tr. at 11-12 (App. 91).

[18] Tr. at 11-13 (App. 91).

[19] Tr. at 13 (App. 91).

[20] Tr. at 14 (App. 92).

[21] Tr. at 14 (App. 92).

- Hourly rates ranged from $450 per hour for partner [redacted] Ice, to $325 or $300 per hour for associate attorneys, to $110 per hour for paralegals.[22]
- The Defense Firm sought a contingency risk multiplier in the amount of 2.5, based on the inability of the [redacted] to afford a similar type of legal representation at the level provided by the Defense Firm; the unlikelihood of success in taking on the case after entry of the final judgment against the [redacted] in 2008; the cutting edge nature of the work the Defense Firm provided during the relevant time frame of 2008; and the inability of the Defense Firm to mitigate against the risk of nonpayment by the clients.[23]
- With the contingency risk multiplier of 2.5, the requested attorneys' fee came to $62,325.00; with costs, the total requested was $64,855.00.[24]
- On cross-examination by the BANK's counsel, the Defense Firm's attorney testified that she had prepared the reconstruction of time in this case in one day, and confirmed that she had prepared reconstructions of

[22] Tr. at 17 (App. 92).

[23] Tr. at 17-19 (App. 92-93).

[24] Tr. at 20 (App. 93).

time in many cases ("I've prepared several reconstructions. I do them all of the time.").[25]

- She also confirmed that she was the business records custodian for the firm, and that she had reviewed the motions filed, notes, correspondence, and emails as business records.[26]

B. Testimony of Defense Firm Expert Witness

The Defense Firm next called its expert witness, a partner and commercial litigator associated with a West Palm Beach law firm.[27] The expert testified to the following points:

- He was familiar with the fees charged for commercial litigators who handle residential foreclosure actions in St. Lucie County.[28]
- He testified that it was much easier representing a lender in residential foreclosure actions in 2008 because homeowner defenses were almost nonexistent at that time.[29]

[25] Tr. at 22 (App. 94).
[26] Tr. at 36-37 (App. 97).
[27] Tr. at 38 (App. 98).
[28] Tr. at 39-40 (App. 98).
[29] Tr. at 42 (App. 99).

- He was familiar with the hourly rates being charged by attorneys practicing in foreclosure defense, and believed that the $450 per hour rate for [redacted] Ice was reasonable.[30] He also believed that the $300 and $325 per hour rates for associates, and $110 rate for paralegals, were also reasonable.[31]
- His determination of a reasonable amount of time and a reasonable hourly rate was not based simply on what the Defense Firm was claiming, but rather on his own independent review of the file before being advised of the amount being sought: "What I ask the [Firm] to do and what I've insisted that you do, is you send me your file first and I look at that and based upon my experience and my training and my history doing this kind of work … I examine and think what would be reasonable for the work …. But normally the last thing I look at and the last thing I would look at would be your fee reconstruction."[32]
- The expert's opinion was that the work in the file would have taken somewhere between 67 and 82 hours.[33]

[30] Tr. at 43-44 (App. 99).

[31] Tr. at 45-46 (App. 99-100).

[32] Tr. at 44-45 (App. 99).

[33] Tr. at 45 (App. 99).

- In determining the appropriate hourly rates, the expert reviewed the case docket, the pleadings, emails and PDFs provided by the Defense Firm, in light of his experience. He also spoke with the Defense Firm attorneys involved in the case.[34]
- He confirmed that the Defense Firm has a very good "representation" [sic: reputation] from a defense standpoint, and that securing a dismissal of the residential foreclosure action in 2008 was not nearly as common as it is today: "I think in 2008 that would be a daunting task."[35]
- He believed that the skill level necessary for the results obtained in this case was high for the timeframe, and that the Defense Firm was basically "inventing the wheel" of foreclosure defenses back in 2008 and 2009.[36]
- He testified that, in his opinion, a contingency risk multiplier between two and two and a half would be appropriate, based primarily on the low probability in 2008 of prevailing on the merits in this foreclosure action ("I wouldn't have taken a case anywhere like that in 2008."), the amount

[34] Tr. at 46 (App. 100).

[35] Tr. at 47 (App. 100).

[36] Tr. at 47-48 (App. 100).

of research that had to be done at the time, and the difficulty in mitigating against the risk of nonpayment from the clients.[37]

- The expert testified that his hourly rate was $350 per hour, that he had previously billed $2,100.00 for preparation and attendance at a prior hearing, and that he billed an additional three hours (or $1,050.00) for the hearing that day.[38]
- On cross-examination, the expert confirmed that he was familiar with the reasonable rates charged in St. Lucie County, and that they would be similar to reasonable rates in Palm Beach County, especially in the area of foreclosure defense in 2008.[39]
- He also affirmed that in 2008, the standing defense raised by the Defense Firm was not common at all, and that reviewing and analyzing a chain of title (as the Defense Firm did here) was "almost unheard of" at that time.[40]
- The expert also explained again that he did not base his determination of reasonable hours (between 67 and 82 hours) on the reconstruction of time

[37] Tr. at 48-51 (App. 100-101).

[38] Tr. at 51 (App. 101).

[39] Tr. at 51-53 (App. 101).

[40] Tr. at 53-54 (App. 101-102).

prepared by the Defense Firm. Instead, he reviewed the file and independently came up with an amount that he believed was reasonable and correct.[41]

- He confirmed that his estimation of reasonable hours included the Defense Firm's time for seeking fees.[42]
- He did not have an opinion as to whether the suggested contingency risk multiplier was applicable to the period of time spent in obtaining fees, other than to reference a recent case from the Fourth District Court of Appeal which appeared to clarify the law on the issue of "fees for fees."[43]
- In response to the expert's reference to the recent Fourth District case concerning "fees for fees," counsel for the Defense Firm later proffered a copy of the "*Waverly*"[44] case to the trial court, but the court instead instructed counsel to prepare findings in a proposed order.[45]

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[41] Tr. at 57 (App. 102).

[42] Tr. at 57; 60 (App. 102-103).

[43] Tr. at 62-63 (App. 104).

[44] *Waverly at Las Olas Condominium Association Inc. v. Waverly Las Olas LLC*, 88 So. 3d 386 (Fla. 4th DCA 2012) (where contractual provision is broad enough to encompass fees incurred in litigating the amount of fees, trial court may award such fees, distinguishing *State Farm Fire & Casualty Co. v. Palma*, 629 So. 2d 830 (Fla. 1993)).

[45] Tr. at 65-66 (App. 104-105).

After the Defense Firm rested its case, counsel for the Plaintiff confirmed that she had no evidence to present.[46]

During closing argument, in response to a question from the trial court as to the propriety of awarding fees for determining the amount of fees, counsel for the Defense Firm elaborated on the holding in the *Waverly* case and specifically pointed out the broad attorneys' fees provisions contained in the Note and Mortgage documents in this case.[47]

By Order dated December 26, 2012, the trial court "denied" the Motion for Attorneys' Fees and Costs[48] in its entirety—awarding nothing for attorneys' fees (even though entitlement was stipulated) and nothing for the undisputed costs.

This appeal follows.

[46] Tr. at 67 (App. 105).

[47] Tr. at 70-72. The fee provisions are also quoted in the Motion for Attorneys' Fees and Costs, dated December 23, 2010 (App. 106).

[48] Order Upon Defendant's Motion for Attorneys' Fees dated December 26, 2012 ("Fee Order") (App. 122).

SUMMARY OF THE ARGUMENT

It is undisputed that the [redacted] were the prevailing parties below upon the trial court's dismissal of the BANK's foreclosure action. The court's denial of *any* attorney's fees and costs to the [redacted] is without support in the record, as it was based on incorrect findings of fact that are clearly contrary to the uncontradicted testimony of the Defense Firm's fact and expert witnesses. Indeed, there were no other witnesses at trial, and absolutely no contrary evidence or testimony presented by the BANK.

The trial court's stated rationale for the denial of fees and costs is contrary to relevant case law. Florida law does not impose an absolute requirement that contemporaneous time records be maintained. The trial court further erred when it denied any fees to the [redacted] because the hours spent determining the amount of the fees were not separated from the overall fee claim. No such breakdown of "fees for fees" was required because the language in the fee provisions in the Note and Mortgage are broad enough to include recovery of such fees.

The trial court's Order denying fees and costs to the [redacted] must be reversed.

STANDARD OF REVIEW

Appellate review of a trial court's denial of attorneys' fees and costs in a foreclosure action, when entitlement is based on §57.105(7), Fla. Stat., and the provisions of the note and mortgage, is initially subject to de novo standard of review. *See e.g., Raza v. Deutsche Bank National Trust Co.*, 100 So. 3d 121, 122 (Fla. 2d DCA 2012). The amount of fees and costs actually awarded is in the trial court's discretion, subject to an abuse of discretion standard. *Id*. at 126.

ARGUMENT

I. It is a *Per Se* Abuse of Discretion to Decline to Award a Single Dollar in Attorneys' Fees and Costs in the Face of Uncontradicted Evidence and Expert Testimony Regarding Reasonable Fees and Expenses.

Despite the stipulation of the parties that the [redacted] were entitled to attorneys' fees as prevailing party, the trial court here refused to award any attorneys' fees or costs at all. "It is well settled in this state that '[a] stipulation properly entered into and relating to a matter upon which it is appropriate to stipulate is binding upon the parties and upon the Court.'" *See Hufcor/Gulfstream, Inc. v. Homestead Concrete & Drainage, Inc.*, 831 So. 2d 767, 769 (Fla. 4th DCA 2002). Indeed, applying this principle, Florida appellate courts have consistently reversed trial courts when they have denied damages despite the parties' stipulation as to liability. *See, e.g., Turner v. Miami-Dade County Sch. Bd.*, 941 So. 2d 508, 509 (Fla. 1st DCA 2006) (reversing and remanding where trial court failed to acknowledge stipulation of liability and award damages).

Even without a stipulation, the trial court had no discretion to deny an award of costs to the [redacted] in this action. *See* §57.041, Fla. Stat. (party recovering judgment *shall* recover all his or her legal costs and charges) (emphasis added).

Moreover, with specific regard to attorney fee awards, where a party clearly prevails in litigation, as the [redacted] did here, and where there is a prevailing

party contract, as there exists in this case, reasonable attorneys' fees must be awarded to the prevailing party. *Sorrentino v. River Run Condominium Ass.*, 925 So. 2d 1060, 1066 (Fla. 5th DCA 2006). The Florida Supreme Court made clear in *Florida Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985), that the lodestar process "*requires* the court to determine a reasonable hourly rate for the services of the prevailing party's attorney." (emphasis added).

While the trial court never explained its justification to deny costs to the [redacted] the trial court's refusal to award any attorneys' fees was based on a perceived lack of competent and substantial evidence, in that contemporaneous time records were not available and a reconstruction of time prepared by the Defense Firm was deemed "not trustworthy."

The trial court's denial of any reasonable attorneys' fees to the [redacted] constitutes an abuse of discretion because the trial court's key findings are not supported by the record or the testimony, and its conclusions are contrary to established case law.

A. The trial court's factual errors.

In its Order denying fees, the trial court stated that in August 2008, "an agreed order vacating the Final Judgment and dismissing the action without

prejudice was entered by the court."[49] This finding is contrary to the record, in that the Agreed Order (which is actually dated July 30, 2008), merely set aside the previously entered foreclosure decree and granted the BANK leave to amend within ten days.[50] The BANK filed an amended complaint,[51] and the foreclosure action was not dismissed for another two and a half years, during which time the parties fully litigated the case.

The dismissal of the action did not occur until December, 2010, and the BANK certainly did not agree to the dismissal.[52] In fact, the BANK moved for rehearing to challenge the dismissal.[53]

The trial court's error in this particular finding also compromised a key conclusion made later in the Order denying fees. Based in part on its incorrect finding that the parties had agreed to a dismissal of the action, the trial court concluded that "there are no extraordinary circumstances in this case to justify a

[49] Fee Order, p. 2, ¶ 4 (App. 123).

[50] Agreed Order, dated July 30, 2008 (App. 37).

[51] Amended Mortgage Foreclosure Complaint, docketed August 28, 2008 (App. 39).

[52] Final Judgment of Dismissal, dated December 28, 2010 (App. 76).

[53] Motion for Rehearing, dated December 15, 2010; Supplement to Motion for Rehearing dated March 7, 2011 (App. 66).

contingency fee multiplier."[54] The trial court rationalized the denial of a multiplier because "the defendants did not testify at the hearing that it was difficult to obtain counsel," and "the issue of standing at the time a complaint was filed was addressed by the 4th District Court of Appeal in the previously cited Jeff-Ray case in 1990, *which is why an agreed order of dismissal was entered by the court*."[55] Again, the record confirms that the parties did not agree to a dismissal of the action. The trial court's finding is also contrary to the testimony of the Defense Firm attorney who obtained the dismissal of the action. The witness testified that she handled the hearing on the motion to dismiss, and recalled attending court three times on the BANK's Motion for Rehearing.[56]

In denying the requested multiplier, the trial court simply ignored the unrebutted testimony of the Defense Firm's attorney witness and expert witness on this particular issue. The attorney fact witness for the Firm specifically testified about the justification for the multiplier, in part based on the [redacted] inability to obtain other counsel in light of the difficulty of the case and the [redacted] dire financial circumstances:

[54] Fee Order, p. 3 (App. 124).

[55] Fee Order, p. 3 (emphasis added) (App. 124).

[56] Tr. at 9, 28 (App. 90, 95).

> Well, there are several factors that go to that. One is the ability of the client to afford a similar type of representation. In 2008 there really was no attorneys doing the level of work that we were doing. The [redacted] had severe financial hardship. In fact, if you look at our contract, you'll see we didn't even charge them an initial fee. But these clients weren't able to afford that, so we only charged them a flat monthly fee.[57]

The Defense Firm's expert witness also testified without objection as to the difficulty in obtaining counsel under the circumstances. This witness testified that he "wouldn't have taken a case anywhere like that in 2008," because "at the time I think it was much more difficult and much more onerous and took much more time than it would today."[58] This testimony certainly responds to the trial court's suggestion that there would have been no difficulty for the [redacted] to find counsel to defend them in the foreclosure action.

In another key conclusion, i.e., that the Defense Firm "failed to present competent and substantial evidence to support an award of attorney fees," the trial

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[57] Tr. at 17-18 (App. 92, 93).

[58] Tr. at 48-49. *Compare J.P. Morgan Mortgage Acquisition Corp. v. Golden*, 98 So. 3d 220 (Fla. 2d DCA 2012) (contingency multiplier of 2.5 for foreclosure defense counsel affirmed where defendant was financially unable to pay counsel, a default had already been entered against defendant, and an expert testified that he knew of no other attorneys in the area who would undertake a mortgage foreclosure defense on such a contingency contract) (App. 100).

relied upon another mistake of fact, which again was contrary to the record and the evidence. The trial court found as follows:

> Ice Legal, P.A. failed to call any of the attorneys or paralegals to testify regarding the amount of hours and hourly fee to establish a lodestar amount for the work done by them in obtaining a dismissal. The only attorney presently associated with that firm, Ms. Amanda Lundergan, who testified at the hearing, *was hired in 2010 and did not perform any of the work done in obtaining the dismissal*.

(emphasis added).[59]

As stated above, this witness—the only fact witness—testified to the contrary. She handled the hearing on the Motion to Dismiss, and all of the hearings since then, including the hearings related to the BANK'S Motion for Rehearing.[60] Thus, to the extent testimony must come from someone who performed the legal services—an evidentiary point which is not conceded here[61]—this witness certainly would have met the trial court's competency standard had the court not made the factual error.

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[59] Fee Order, p. 3 (App. 124).

[60] Tr. at 9 (App. 90).

[61] *See e.g.*, *Cohen & Cohen P.A. v. Angrand*, 710 So. 2d 166, 167 (Fla. 3d DCA 1998) ("The general master ruled that the reconstructed time records must be disregarded because the attorney who prepared the reconstruction was not offered as a witness at the hearing, and had not personally worked on the case. We disagree.")

B. The trial court's legal errors.

Contrary to the trial court's flawed findings and conclusions, the Defense Firm did indeed present substantial and competent evidence supporting its request for attorneys' fees and costs.

The trial court relied on *Braswell v. Braswell*, 4 So. 3d 4 (Fla. 2d DCA 2009), and concluded that there was no competent and substantial evidence to support an award of attorneys' fees to the [redacted] The cited case is distinguishable, in that it repeatedly notes that the attorney in that case "introduced no evidence" to support his claim for fees and costs. *Id*. at 5. Here, by contrast, there was testimony from one of the attorneys involved in the foreclosure litigation, who thoroughly reviewed the docket and the Defense Firm file and prepared a reconstruction of time in her capacity as administrative attorney for the Firm. The Defense Firm also elicited testimony from an expert witness who independently determined a reasonable fee for the Defense Firm's work on behalf of the [redacted]

1. Florida law permits attorney fee reconstruction.

The trial court's refusal to grant <u>any</u> fees on the grounds that the Defense Firm had not maintained contemporaneous time records was an abuse of discretion. As this Court recognized, *Florida Patient's Compensation Fund v.*

Rowe, 472 So. 2d 1145 (Fla. 1985), "does not require that the number of hours expended by counsel must be documented by written time records." *Executive Square Ltd. v. Delray Executive Square, Ltd.*, 553 So. 2d 803, 804 (Fla. 4th DCA 1989). *See also Badillo v. Playboy Enterprises Group Inc.*, 302 Fed. Appx. 901 (11th Cir. 2008) ("Florida imposes no absolute requirement that contemporaneous records be maintained.").

The Second District has reached the same conclusion concerning the sufficiency of counsel's testimony even in the absence of contemporaneous records. In *Glades Inc. v. Glades Country Club Apartments Association Inc.*, 534 So. 2d 723 (Fla. 2d DCA 1988), the appellate court held that counsel's testimony regarding hours expended, even though he produced no contemporaneous time records, was sufficient to support the award of fees. As the court stated, "we do not agree with the contention on plaintiff's appeal that *Rowe* requires that those hours must necessarily have been specifically reflected in time records." *Id*. at 724.

Under this analysis, the testimony of the Defense Firm's witness was sufficient by itself. She testified that even though the Firm had not kept contemporaneous records during part of the [redacted] case, she had reviewed the entire docket and the Defense Firm's file to prepare a reconstruction of time. She then testified as to the amount of time spent on the case.

The trial court found that the reconstruction was "not trustworthy"[62] because it "was prepared solely for litigation." Since all reconstructions of attorney time would necessarily be prepared "in contemplation of litigation," the rule established by the trial court in this case would render reconstructions always inadmissible as "untrustworthy." Such a rule is clearly contrary to law, in light of the case law cited above authorizing the use of such reconstructions.

The trial court nevertheless sought support for this rule in a citation to *Stambor v. One Hundred Seventy-Second Collins Corp.*, 465 So. 2d 1296 (Fla. 3d DCA 1985). *Stambor*, however, is a straightforward slip and fall case involving the trial court's admission of an accident report into evidence. The accident report was indeed prepared solely in anticipation of litigation ("to defend against a claim which might arise from the accident"), and thus was inadmissible under the business records exception to the hearsay rule. *Id*. at 1297.

The *Stambor* case has no applicability to attorney fee reconstructions. Florida law clearly contemplates the use and admissibility of reconstructions of attorney time during fee hearings, even though they are intrinsically and necessarily prepared for litigation. *See Cohen & Cohen P.A. v. Angrand*, 710 So. 2d at 167; *Trumball Insurance Co.*, 2 So. 3d at 1056; *see also Stokus v. Phillips*,

[62] Fee Order, p. 3 (App. 124).

651 So. 2d 1244 (Fla. 2d DCA 1995) (competent proof of an attorney's time and services is not restricted to the original time records; substantial competent evidence of reasonable fee may include "reconstructed" records); *Brake v. Murphy*, 736 So. 2d 745, 747 (Fla. 3d DCA 1999) ("Where attorneys have not kept contemporaneous records, it is permissible for a reconstruction of time to be prepared."); *Grapski v. City of Alachua*, 37 Fla. L. Weekly D1034, 2012 WL 1448503, No. 1D11–2719 (Fla. 1st DCA 2012) (upholding award of attorneys' fees, despite the absence of contemporaneous time records, based upon the expert's testimony).[63] In an ironic twist, the BANK has also relied on reconstructions of its counsel's time in at least one other foreclosure case. *Deutsche Bank Nat. Trust Co. v. Fine,* 2007 WL 1952681 (M.D. Fla. 2007) ("Plaintiff's attorney has submitted a reconstruction of the approximate time and activities that were performed for the case during the uncontested period.").

The trial court also cited to *Trumball Insurance Co. v. Wolentarski*, 2 So. 3d 1050 (Fla. 3d DCA 2009), where the appellate court reversed a fee award after finding no support for the award in the record. But in stark contrast to this case, the attorney seeking fees in *Trumball* did not prepare any worksheet reconstructing

[63] Indeed, the dissent in *Grapski* dissented only because Judge [redacted] felt the award of attorneys' fees was woefully insufficient. *Grapski v. City of Alachua*, 37 Fla. L. Weekly D1034, 2012 WL 1448503 at *2, No. 1D11–2719 (Fla. 1st DCA 2012) ([redacted] J., dissenting).

the "astounding number of hours requested," and testified at the hearing that he simply added up the time "in my mind." *Id*. at 1053-54. The Third District recognized the prevailing rule that permitted a fee award based on a reconstruction of time expended, but pointed out that the reconstruction must consist of something "more than wild guesses." *Id*. at 1056.

Here, the testimony of the Defense Firm's attorney was based specifically on her detailed reconstruction of time after thoroughly reviewing the docket and the file itself:

> Since I was the attorney who handled the majority of the proceedings in this case, I did reconstruct. What I did was take the docket and compare it to our very detailed filing system. We have a system where we take every document that we file, every document we received and we save in an electronic file. All of our documents that go out are turned into a PDF, so it locks in the motion or the document that has gone out, the date that it has gone out, the name of the person who filed the document. We also keep notes when – in the file that were notes of research that was done, anything that was looked at, reviewed. So I compared everything we have in our file, everything that was in the docket, everything in the file that I have reviewed, I documented how much time I had spent on that, and these motions that I have filed hundreds of hundreds of motions to dismiss; hundreds of motions for attorney's fees and costs. After I had reconstructed the time that I believe was spent on those, I then had for the few entries that were not my entries, for instance, if Tom Ice had done something, I had him take a look at it and if he agreed that was, in fact, that was the amount of time he had spent and we finalized the reconstruction.[64]

[64] Tr. at 12-13 (App. 91).

Thus, the testimony of the Defense Firm's witness constituted much more than the "wild guesses" proffered by counsel in *Trumball*.

Here, as demonstrated above, the record contains ample, undisputed, and unobjected-to evidence of (a) the terms of the contingency fee agreement between the [redacted] and their attorneys, (b) the amount of the contingency requested as calculated based upon the contract terms and the judgment overturned, (c) the reasonable hourly rates charged by each of the attorneys who worked on the [redacted] case, (d) an independent expert assessment of the reasonableness of each attorney's hourly rate (e) an estimation of the number of hours spent litigating the [redacted] case, and (f) an independent expert assessment of the approximate number of hours that would reasonably be spent on the work done on behalf of the [redacted] and (g) extensive testimony by both a fact witness and an expert witness regarding each of the factors set forth in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla.1985).

2. Testimony is sufficient to establish the terms of the fee contract.

Perhaps the trial court's most blatant departure from the law was its decision to ignore testimony concerning the fee contract:

> During the hearing, Ms. Lundergan testified that a contract existed between Ice Legal and the defendants, which included a contingency

> fee. No contract, however, was ever offered in evidence for the court to examine; therefore, the court is not going to consider it.[65]

This express decision "not to consider" competent evidence flies in the face of the well-established, unambiguous law in this District. In *Executive Square, Ltd. v. Delray Executive Square, Ltd*, 553 So. 2d 803, 804 (Fla. 4th DCA 1989), this Court found "no error in the trial court's admission of testimony concerning the fee contract" because—as in this case—opposing counsel "failed to make an appropriate objection based upon the best evidence rule." Indeed, here, the BANK's counsel not only failed to object, but thoroughly cross-examined the Defense Firm's witness about its terms using the written fee agreement that she had been given over a year before the hearing.[66]

It is a *per se* abuse of discretion to ignore valid, undisputed evidence. *Zinovoy v. Zinovoy*, 50 So. 3d 763, 768 (Fla. 2d DCA 2010). And if the trial court had some concern or confusion about the testimony, it had every right to further interrogate the witness. §90.615 (2) Fla. Stat.; *see also*, Fla. R. Civ. P. 1.452 (to the extent that the judge is also a factfinder at the hearing).

This post-hearing insistence on documentary evidence is also a disallowed "gotcha" maneuver. When the BANK waived any "best evidence" objection, it

[65] Fee Order, p. 3 (App. 124).

[66] Tr. at 19-20 (App. 93).

meant that the Defense Firm did not need to avail itself of the opportunity to move the document (which was already marked for identification[67]) into evidence. Thus, the BANK cannot now be heard to argue that the trial judge was entitled to insist upon documentary evidence rather than the unimpeached testimony of the Defense Firm's witness.

3. The Trial Court Abused Its Discretion in Rejecting the Undisputed Expert Testimony.

In addition to the competent and substantial testimony of the Defense Firm's attorney, the Defense Firm offered the testimony of an expert witness concerning its reasonable hours and reasonable hourly rates. The trial court's Order acknowledged that the expert witness testified as to the total amount of time spent in obtaining the dismissal and litigating the amount of the attorney fee, but "without a breakdown thereof."[68] Rather than "speculate" as to a breakdown, the trial court simply disregarded the expert's testimony and awarded no fees.

In assessing expert testimony, "the court's discretion in rejecting expert testimony cannot be exercised arbitrarily and requires some reasonable basis in the evidence." *Beach Cmty. Bank v. First Brownsville Co.*, 85 So. 3d 1119, 1121 (Fla. 1st DCA 2012). And while the [redacted] were entitled to "fees for fees," there

[67] Tr. at 19 (App. 93).

[68] Fee Order, p. 3 (App. 124).

existed a reasonable basis for determining the amount of fees to be carved out if they were not entitled. As noted earlier, the court could ask its own questions at the hearing or could take judicial notice of its own file and reasonably estimate the percentage of litigation devoted to the fee issue. Although that estimation would be discretionary, a default assumption that all the time was spent litigating fees—so as to somehow justify a zero fee award—cannot be countenanced.

II. The Trial Court Erred in Concluding that the [redacted] Were Not Entitled to Fees for Determining the Amount of its Fees.

The trial court refused to award a fee, in part, because it determined that it should not have to speculate as to the breakdown between the fees associated with obtaining the dismissal of the action and the fees associated with determining the amount of the fees as prevailing party. Under the circumstances of this case, the trial court clearly erred in its conclusions about "fees for fees." No breakdown of the fees was required. And the trial court's rejection of "fees for fees" is reviewed by this Court *de novo*. *Waverly at Las Olas Condo. Ass'n, Inc. v. Waverly Las Olas, LLC,* 88 So. 3d 386, 389 (Fla. 4th DCA 2012).

A. The language of the fee provision is sufficiently broad to include "fees for fees."

This Court has recently clarified that a party entitled to attorneys' fees under a contractual prevailing party provision may recover fees spent in litigating the

amount of fees so long as the contract language is broad enough to encompass such fees. *Id.* In that case, this Court found the following language broad enough to permit these additional fees:

> In the event of any litigation between the parties under this Agreement, the prevailing party shall be entitled to reasonable attorneys', paralegals' and para-professionals' fees and court costs at all trial and appellate levels.

Waverly at Las Olas Condo. Ass'n, Inc. v. Waverly Las Olas, LLC, 88 So. 3d at 387.

As specifically detailed in the Motion for Attorneys' Fees and Costs presented to the trial court, the prevailing party attorney fees provisions contained within the Note and Mortgage in this case were similarly very broad:

> Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

Mortgage, ¶ 22. Because the collection of "reasonable attorneys' fees is one of the specified remedies in Section 22, then the expense of collecting such fees is part of "all expenses" to which the Lender is entitled.

Paragraph 14 of the Mortgage is equally broad, allowing the Lender to collect fees for any legal services connected to Borrower's default:

> 14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for

> the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees.

Mortgage, ¶ 14. (emphasis added). This is the equivalent of the *Waverly* language which allowed recovery for "any litigation…under the agreement."

The Note in this case is also written in all-inclusive terms, allowing the Note Holder to be repaid "all of its costs and expenses" under the Note:

> (E) Payment of Note Holder's Costs and Expenses
>
> If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

Note, ¶ 7(E).[69]

Section 57.105(7), Fla. Stat., provides that if a contract upon which an action is brought provides for fees to one party, the court may award fees to the other party when that party prevails. This statutory "mirroring" of attorney fee provisions helps level the playing field for consumers who are powerless to negotiate for such equal treatment in what are essentially adhesion contracts. Thus, consistent with this statute and *Waverly*, the very broad prevailing party fee

[69] Motion for Attorneys' Fees and Costs, dated December 23, 2010, p. 3 (App. 71).

provisions in the Note and Mortgage must be mirrored back against the BANK. In short, if the BANK can collect "fees for fees" against the borrower, then the reverse must also be true.

B. The fee provisions of the Note and Mortgage were "in evidence" and available for examination.

The trial court, in rejecting the application of *Waverly* to the present case, declared that the Defense Firm had "failed to offer any contract between the parties in evidence for the court to examine." The trial court apparently did not review the court file given that the operative contract between the parties—the Note and the Mortgage—were attached to both the Complaint and the Amended Complaint.[70] Attachments become part of the pleadings (*see Nicholas v. Ross*, 721 So. 2d 1241, 1243 (Fla. 4th DCA 1998)) and the BANK is bound by that pleading. No further evidence of the Note and Mortgage is necessary. *Carvell v. Kinsey*, 87 So. 2d 577, 579 (Fla. 1956) ("…parties-litigant are bound by the allegations of their pleadings and … admissions contained in the pleadings … are accepted as facts without the necessity of supporting evidence").

Moreover, the Motion for Attorneys' Fees and Costs specifically outlined the contractual prevailing party fee provisions relied upon by the

[70] Complaint docketed October 19, 2007; Amended Complaint docketed August 28, 2008 (App. 1; 39).

provisions that were never disputed. The trial court need not have looked any further than its own file, and the very motion it was ruling upon, to have access to the contract language at issue. "Every court will take judicial notice of its own records appearing in the case before it for consideration." *Elmore v. Florida Power & Light Co.*, 895 So. 2d 475 (Fla. 4th DCA 2005), *citing Tower Credit Corp. v. State of Florida*, 183 So. 2d 255 (Fla. 4th DCA 1966).

CONCLUSION

The trial court's denial of any fees at all lacks any factual basis in the record or rationale under the law. The trial court's denial of attorneys' fees to the [redacted] should be reversed, and remanded with instructions to award fees and costs in an amount consistent with the unrebutted testimony of the witnesses, as follows:

Attorneys' Fees: **$24,930.00**

Costs:

Court Reporting: $ 430.00 court reporting fees

Expert Fees: $ 2,100.00 prior to hearing

$ 1,050.00 at the hearing.

Total Costs: **$ 3,580.00**

Additionally, the Court should reverse and remand for the determination of the appropriate contingency fee multiplier.

Dated: July 8, 2013.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief complies with Fla. R. App. P. 9.210(a)(2) and has been typed in Times New Roman, 14 Point.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this July 8, 2013 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties.

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