In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted] and [redacted]

Appellants,

v.

PNC BANK NATIONAL ASSOCIATION, et al.,

Appellees.

ON APPEAL FROM THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND FACTS

I. Introduction

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

- Whether there was competent evidence that the Bank complied with the condition precedent of sending an acceleration letter;
- Whether hearsay may be used to establish a hearsay exception.

II. Appellants' Statement of the Facts

A. The Pleadings

The Bank initiated this action when it filed its one-count mortgage foreclosure complaint.[1] According to Paragraph 22 of the mortgage attached to the complaint, the lender was required to send the Homeowners written notice of default which provided them thirty days to cure the default before the Bank could

[1] Complaint, October 30, 2012 (R. 1-25).

accelerate the loan and file this foreclosure action.[2] Paragraph 15 of the mortgage provided that any notices sent in connection with the mortgage would have been deemed given to the Homeowners when either mailed first-class mail or actually delivered to the Homeowners if sent by any other means.[3]

The Homeowners answered the complaint and denied, among other things, that the Bank had complied with all conditions precedent to foreclosure—namely that the Bank failed to comply with Paragraph 22's notice provisions.[4] And as an affirmative defense, the Homeowners specifically pled that they did not receive the required notice of default.[5]

On these pleadings, the matter was set for trial.[6]

B. The Trial

The Bank's First Witness

The Bank's first witness, Michael Bevins, testified that he was a default litigation coordinator with the Bank which required him to review loan documents

[2] Mortgage attached to the Complaint, October 30, 2012, ¶ 22 (R. 18).

[3] Mortgage attached to the Complaint, October 30, 2012, ¶ 15 (R. 15).

[4] Answer, July 29, 2013, ¶ 8 (R. 98).

[5] Second Affirmative Defense, Plaintiff Failed to Comply with Conditions Precedent, July 29, 2013 (R. 100-101).

[6] Order Setting Non-Jury Trial, May 7, 2014 (R. 435-441).

and records to assist lawyers at trial.[7] He had originally worked for National City Bank which was acquired by PNC (the Plaintiff Bank).[8] PNC had serviced the loan until October of 2009, after which time the servicing was turned over to Select Portfolio Services ("the Servicer").[9]

The Bank's Second Witness

The Bank called Loraine Baggs to the stand who testified that she was a Florida Case Manager for the Servicer.[10] Through Baggs, and over the Homeowners' hearsay objections, the trial court admitted the following exhibits that constitute the remainder of the Bank's case:

- The Servicer's Payoff History (Exhibit 6);[11]
- Screen prints of what Baggs identified as a Pay 3 and a Pay 4 (Exhibit 7);[12]
- A purported acceleration or "default" notice (Exhibit 8);[13]
- A screen print Baggs identified as a disbursement detail (Exhibit 10);[14]

[7] T. 12.
[8] T. 13.
[9] T. 14.
[10] T. 64.
[11] T. 70.
[12] T. 79.
[13] T. 86-87.
[14] T. 95.

- A screen print Baggs identified as an advance detail (Exhibit 11).[15]

On cross examination, Baggs admitted that she had only been employed with the Servicer for two months[16] and that she only reviewed loan documents for cases in which she was expected provide trial testimony.[17] And while she said that she had received "training" during the two months she was employed with the Servicer, she admitted that she only used that training to prepare for trial.[18] Indeed, she never input any records into the Servicer's system, nor was she responsible for boarding records from previous servicers.[19]

As for the acceleration notice (Exhibit 8), Baggs admitted that a third-party vendor known as Walz was responsible for creating and mailing the letters.[20] But Baggs never worked for Walz nor did she know the specific procedures that Walz used to create and mail acceleration notices.[21] In fact, the only way she "knew" that the acceleration notice was mailed was because it had a date and someone told

[15] T. 98.

[16] T. 101.

[17] T. 102.

[18] T. 104.

[19] T. 105-106.

[20] T. 108.

[21] *Id.*

her during her training that Walz mails acceleration notices on the day they are written (i.e. on the date printed on the letter itself).[22]

Baggs also admitted that while Exhibit 7 was created by the cashier and payoff departments,[23] she did not work for either department.[24] She had no role in boarding the figures and was simply relying on the face of the document for its accuracy.[25]

Nor did she, or anyone she worked with, input the entries found on the payment history (Exhibit 6).[26] Rather, she was only familiar with these departments through the training she received.[27]

After completion of cross examination, the Homeowners reiterated their hearsay objections to the Bank's exhibits in general, which the court overruled, finding that Baggs was well-qualified to lay a foundation for a hearsay objection. The court also expressed a belief that computer generated records are "probably not hearsay" and should be distinguished from ordinary business records which must meet the business records exception:

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[22] T. 109-110.

[23] T. 111.

[24] T. 112-113.

[25] T. 114-115.

[26] T. 125.

[27] T. 126.

> THE COURT: ….She has 25 years' experience in similar types of work and, again [Ehrhardt's] talks about distinguishing between computer-generated records, *e.g.* billing records that are generated by a computer itself, which are probably not hearsay records and business stored records, which may be hearsay and admissible under the business records exception….[28]

Additionally, the Homeowners made a specific objection to the alleged acceleration notice (Exhibit 8), contending that because the document was not even prepared by Baggs or her company, it was hearsay.[29] The court overruled that objection asserting that the hearsay was of no consequence because mailing was merely a perfunctory task.[30]

After the close of the Bank's case, the Homeowners moved for an involuntary dismissal asserting that there was insufficient evidence of the Bank's failure to prove compliance with the notice provisions of the mortgage. The court denied the motion.[31]

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[28] T. 127.

[29] T. 128.

[30] T. 128-129.

[31] T. 138-139.

The Homeowners' case consisted of testimony from Mr. [redacted] that he never received the acceleration notice[32] and testimony from Ms. [redacted] that she also did not recall receiving the notice in the mail.[33]

After hearing closing argument the court entered judgment in the Bank's favor.[34] This appeal follows.

[32] T. 147.

[33] T. 157.

[34] T. 174.

SUMMARY OF THE ARGUMENT

The trial court should have granted the Homeowners' motion for involuntary dismissal for two separate reasons. First, the Bank failed to prove that it complied with Paragraph 22 of the mortgage, which is a condition precedent to both acceleration and foreclosure. There was no competent evidence that the third-party vendor mailed the notice or, even if it did, there was no competent evidence of when it mailed the notice. Additionally, there was absolutely no evidence—competent or otherwise—that the third-party vendor sent the notice by first class mail. Without such evidence, the Bank could not rely on the presumption of Paragraph 15 that the Homeowners received notice or that they received it timely—i.e. in sufficient time to have a full thirty days to cure as required by Paragraph 22.

Second, Baggs was wholly incompetent to lay the business records hearsay exception for the Servicer's documents admitted through her testimony. These exhibits—particularly the alleged acceleration notice—should have been excluded from evidence.

Consequently, this Court should reverse the judgment with instructions that the trial court enter an order of involuntary dismissal on remand.

STANDARD OF REVIEW

In a non-jury case, sufficiency of the evidence may be raised for the first time on appeal. Fla. R. Civ. P. 1.530(e). 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).

The *de novo* standard also applies when the issue is whether the trial court erred in applying a provision of the Florida Evidence Code. *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 erred in denying the Homeowners' motion for involuntary dismissal because there was no evidence that the acceleration notice was sent in accordance with the terms of the mortgage.

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. *Crowe v. Crowe*, 763 So. 2d 1183, 1183-84 (Fla. 4th DCA 2000). Because no view of the evidence or testimony presented at trial establishes this, the trial court erred in denying the motion.

There was no evidence that the acceleration notice was mailed.

Prior to filing the foreclosure action, the Bank was required to send the Homeowners a notice of acceleration and opportunity to cure which complied with Paragraph 22 of the mortgage. The Bank, however, failed to present any competent substantial evidence that it actual mailed this notice, or if it did mail the notice, when it actually placed it in an envelope, stamped it, and brought it to the post office or mailbox for delivery. The trial court, therefore, should have granted the Homeowners' motion for involuntary dismissal.

The Bank adduced a single document—purportedly a copy of the letter itself—to prove that it sent a notice of acceleration. Baggs initially testified (over

the Homeowners' hearsay and foundation objection) that a "review" of her business records "confirmed" that the notice had been mailed.[35] But on cross-examination, the only "business record" she claims to have relied on was a purported image of the letter in the computer system, "that says when that image was uploaded."[36] Setting aside that an upload date does not establish whether the notice was mailed, she did not bring the purported computer record with her and it was never admitted into evidence.[37] The witness's testimony did not provide competent, substantial evidence that the Bank ever mailed the notice to the Homeowners. *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.)

There was no evidence of when the notice of acceleration was mailed.

Not only was it critical to establish that the notice was actually mailed, it was also critical to establish the exact date that it was mailed. This is because

[35] T. 88-89.

[36] T. 109.

[37] T. 109.

Paragraph 22 requires that the Bank give the Homeowners thirty days to cure any default identified in the notice:

> 22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property.[38]

The alleged notice identifies this cure date as thirty days from the date the letter was written (the date on the letter):[39]

> Dear Customer(s):
>
> This letter constitutes notice that the mortgage on your home is in default and that if you take no action, the lender intends to refer this matter to an attorney for foreclosure. This letter provides information about the notice of default and what rights you have to cure such default. As of the date of this letter, the total amount due and required to cure these defaults on your loan is $4,551.40. This letter is a formal demand to pay. You can cure the default if, on or before thirty (30) days from the date of this letter (Cure Date), you pay the amount required to cure the default.

Thus, for the Homeowners to have the benefit of the agreed thirty-day cure period, they must be given the notice on the same day the letter is written. The Bank would normally rely on the legal fiction in Paragraph 15 which allows the court to "deem" that the Homeowners receive notice on the day it is mailed:

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[38] Mortgage, ¶ 22, Plaintiff's Exhibit 2 (emphasis added) (R. Exh. 7).

[39] Letter dated January 17, 2012, Plaintiff's Exhibit 8, (R. Exh. 142).

> 15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means.[40]

Accordingly, in the instant case, to prove that the Homeowners were given a full thirty days to cure, the Bank needed to prove, not just that the notice was mailed, but <u>when</u> the notice was mailed—and more specifically, that it was mailed the same day it was written.

Here, again, Baggs could only testify to what she was trained in preparation to testify—that Walz would create, image, upload and mail the letter all on the same day.[41] Because this was rank hearsay, it did not establish the date the notice was mailed and, as a result, it did not prove compliance with the thirty-day notice provision of Paragraph 22 or that the Bank was entitled to the legal fiction in Paragraph 15. *Webster v. Chase Home Finance, LLC,* 40 Fla. L. Weekly D213 (Fla. 5th DCA January 16, 2015) (reversing final judgment of foreclosure after bench trial because trial court permitted impermissible hearsay testimony regarding lender's compliance with notice provisions of the mortgage).

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[40]Mortgage, ¶ 15, Plaintiff's Exhibit 2.

[41] T. 109-110.

There was no evidence that the notice of acceleration was sent by first class mail.

An additional requirement for the Bank to avail itself of the same-day delivery presumption of Paragraph 15 is that the notice be mailed by first class mail. There is no evidence in this case as to the manner in which the notice was mailed. The letter itself mentions nothing and the Bank did not offer an envelope as an exhibit. Except where the witness reads the Paragraph 15 requirement, the words "first class mail" do not appear in the transcript of the trial.

The Bank could have tried to offer proof that the notice sent by first class mail by way of testimony that it was the normal routine practice of Walz, the third party vendor, 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 even if she had tried, the witness was not qualified to provide such testimony because she never worked for Walz.[42] *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 routine practice of that company).

[42] T. 108.

Again, because the Bank's notice specifies the cure date as thirty days from the date of the letter, without the same-day delivery presumption of Paragraph 15 (because there is no evidence that notice was sent by first class mail), then the Bank failed to comply with the thirty-day cure period requirement of Paragraph 22.

Furthermore, the Bank did not pursue the alternate method of proof available to it under the mortgage by presenting evidence of when the Homeowners actually received the notice. For example, the Bank could still comply with the thirty-day cure period requirement if it proved that the notice was emailed or hand-delivered to the Homeowners on the same date the letter was written. Instead, the only evidence on this subject was that of the Homeowners themselves—their own unrebutted testimony that established that they never received the notice.[43]

* * *

In summary, 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, and sent by first class mail, as required by Paragraph 15 of the mortgage. Since the Bank failed to present any testimony or evidence indicating whether the notice was sent or how it was sent, the Bank was not entitled to the Paragraph 15 presumption that the Homeowners

[43] T. 146-147, 157.

received the notice or the legal fiction that they received it as of the moment of mailing. Because there was 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.

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 the Homeowners a sufficient Paragraph 22 notice. Short of this, involuntary dismissal must be entered on remand.

II. The Bank's witness was not qualified to lay the foundation for a business records exception for the exhibits she introduced because hearsay cannot be used to establish a hearsay exception.

Personal knowledge of how, when and why the records were created and kept is an essential requirement of due process.

The question at the core of this issue is what may constitute the "personal knowledge" required for a witness to authenticate documents and to lay the foundation for a business records exception to hearsay for those documents. Specifically, it presents the question whether the party offering those documents as evidence may convey information to its otherwise unknowledgeable witness to create a veneer of "personal knowledge" with two simple preparatory steps:

- having its witness read the documents before trial; and
- telling its witness what to say in court about its record-keeping practices.

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. To hold that the personal knowledge requirement for authenticity and the business records hearsay exception can be satisfied by reading the records themselves, is to make all records admissible and the hearsay rule superfluous. And to hold that a witness may be trained what magic words to say about the company's alleged recordkeeping practices so as to appear to meet

the business records exception—even if the witness has no personal knowledge whether such practices actually exist—is to admit hearsay based on hearsay.

To properly authenticate the documents before admitting them into evidence, Baggs would have had to be sufficiently familiar with them to testify that they are what the Bank claims them to be. § 90.901, Fla. Stat. Moreover, to overcome the hearsay objections made to each and every exhibit, the Bank would have had to first lay the predicate for the "business records" exception. There are five requirements for such an exception:

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).

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 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*, __ So. 3d __, 2015 WL 340554, at *6 (Fla. 4th DCA 2015) (witness was not qualified to introduce bank's payment records over hearsay objection).

See also 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); *Mazine v. M & I Bank*, 67 So. 3d 1129, 1131 (Fla. 1st DCA 2011) (holding that a witness was not qualified 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.)

In this case, Baggs testified that she was employed with the Servicer for two months prior to trial[44] and that she only worked on a loan if she was going to testify about it at a trial.[45] While she testified she had received "training" from the

[44] T. 101.

[45] T. 102.

Servicer, she admitted that this training was only used to help her testify at trials.[46] And she admitted that she was not responsible for either inputting records or boarding documents received from prior servicers.[47]

And for nearly every document she sought to introduce, she had absolutely no experiential familiarity with the department responsible for creating them. For instance, she testified that the Pay 3 and Pay 4 screenshots (Exhibit 7) were created by the payoff and cashiering department.[48] But she admitted that she only saw the documents two weeks before trial[49] and that she never worked for either the payoff[50] or the cashiering department.[51] Indeed, she admitted that she did not participate in any boarding of these numbers and was simply relying on the face of the documents for their accuracy.[52]

But even more troubling was her testimony regarding the acceleration notice (Exhibit 8). She explicitly admitted that that document was created and mailed by

[46] T. 104.

[47] T. 105-106.

[48] T. 73.

[49] T. 111.

[50] T. 112.

[51] T. 113.

[52] T. 114-115.

a third-party vendor for which she did not work.[53] She also admitted she had no personal experience with the third-party vendor's procedures.[54]

In short, Baggs was a "robo witness"—one of the hearsay-toting automatons, the use of which this Court explicitly forbade in *Bank of New York v. Calloway*, __ So. 3d __, 40 Fla. L. Weekly D173 (Fla. 4th DCA January 7, 2015). While certainly well trained in the art of giving hearsay testimony, she was not a records custodian or other qualified witness since she was neither in charge of, nor (other than through hearsay) acquainted with, any of the activity constituting usual business practices for creating and maintaining the payment history, the acceleration notice, the payoff quote, and the escrow breakdown. Her only connection to the documents was that she had read them and that her training taught her how to parrot the business records exception.

In sustaining the Bank's objection to the Homeowners' line of questioning on cross-examination, the trial court revealed its belief that Baggs' personal knowledge and experience with the recordkeeping procedures was irrelevant as long as she had parroted the magic words:

> MR. BROTMAN: I want to see if the witness is able to recite anything besides the magic words. She said that's

[53] T. 108.

[54] T. 110.

made at or near the time, I need to know what at or near the time means. If she's saying it's kept in the course of business, I need to know what that means as far as this actual department and this actual record. I don't want her to parrot the business records foundation.

THE COURT: What's the relevance?

MR. BROTMAN: If the witness cannot lay the proper foundation, the document is hearsay and cannot be admitted into evidence.

THE COURT: I disagree with you. So the objection is sustained. I find it irrelevant to the issues that are before this Court for decision-making.[55]

This reasoning is clearly erroneous as a matter of law. Worse, by foreclosing further questioning into Baggs' lack of personal knowledge, the trial court limited this court's review of the issue. Thus, the Bank's objection to this testimony should have been overruled and the Homeowners' objections to these exhibits should have been sustained.

"Training" to testify is another word for "hearsay" or worse, "witness coaching."

The Bank will argue that Baggs was "familiar" with the records—citing to her witness "training" as though it were something laudable. First, "training" which consists of feeding the witness information for purposes of regurgitating it

[55] T. 116-117.

to the factfinder is nothing more than a synonym for "hearsay." In essence, the witness is saying, "My employer told me to testify that the recordkeeping policy of our company—or some other company—was that it met all the criteria required for a business record hearsay exception." The self-serving statement which the Bank thereby smuggles to the factfinder is not only rank hearsay, but hearsay designed to coax the court to admit other hearsay (the purported records). And it is hearsay of the worst kind because it is deliberately communicated to the witness for the specific purpose of testifying in court. It is witness coaching to create a façade of "familiarity" with recordkeeping procedures.

But the law has always required that the familiarity of the otherwise qualified witness be experiential—i.e., that it be gained through an actual job-responsibility tied to the business activity. *See e.g., Lassonde v. State*, 112 So. 3d at 662. Acceptable training would be instruction on how to perform a business-related job, not a litigation-related job. To hold otherwise would have the business record exception swallow the rule because <u>there is no record that a witness cannot be told (or "trained") to say meets the exception</u>.

The myth that bank records are inherently trustworthy.

A typical bank argument (and one apparently espoused by the trial court) is that bank records are commonly viewed as particularly trustworthy, and therefore, the hearsay rules should be loosened as to them.

There can be no doubt that the business records hearsay exception is conditioned upon the records being considered "trustworthy." The Florida rule itself provides that records of regularly conducted business activity are admissible "unless the sources of information or other circumstances show lack of trustworthiness." § 90.803(6)(a), Fla. Stat. Trustworthiness, therefore, is an additional requirement for admissibility, not a shortcut that bypasses the other criteria.

Moreover, the era when banking records were considered trustworthy, at least in the context of foreclosure litigation, is long gone. Now, the banking industry's flagrant abuse of the judicial system with perjured affidavits in which the affiants falsely claimed personal knowledge (robo-signing) has become common knowledge—so much so that a definite absence of trustworthiness may well be judicially noticed. *See Pino v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011) ("…many, many mortgage foreclosures appear tainted with suspect documents."); Memorandum No. 2012-AT-1803 of the Office of the

Inspector General of the Department of Housing and Urban Development, September 28, 2012 (concluding that the five largest servicers had "flawed control environments" which permitted robo-signing, the filing of improper legal documents, and, in some cases, mathematical inaccuracies in the amounts of the borrowers' indebtedness);[56] Press Release of the Department of Justice Financial Fraud Enforcement Task Force, March 12, 2012 and related court filings.[57]

Arguably, this well-known lack of trustworthiness is enough to hold that banks can never qualify for the business records hearsay exception in a foreclosure case. But at a minimum, the banks cannot be told that they may skip bringing a qualified witness to establish authenticity or to lay the foundation for the business-record hearsay exception because banks are somehow more worthy of the court's trust than the average litigant.

The question remains why experience has proven the unreliability of bank foreclosure records—a finding that runs counter to the experience with records from other businesses, as well as traditional dogma. As this Court noted in *Calloway*, "[t]he rationale behind the business records exception is that such documents have a high degree of reliability because businesses have incentives to

[56] Available at: http://www.hudoig.gov/sites/default/files/Audit_Reports/2012-CH-1803.pdf

[57] Available at: http://www.nationalmortgagesettlement.com/.

keep accurate records." But that incentive is driven by a profit motive—the desire to keep customers. *See generally US v. McIntyre*, 997 F. 2d 687, 689 (10th Cir. 1993) (providing that the underlying theory of the business records exception is "a practice and environment encouraging the making of accurate records.") (Citations omitted). For example, a dry cleaner is motivated to keep careful records of the clothes he receives for cleaning, because a pattern of losing the clothes will result in a loss of customers.

A servicer, on the other hand, has no motivation to keep accurate records for its "customers"—the borrowers—because these customers have no option to go to a different servicer if they find its recordkeeping unreliable. Servicers are motivated only to serve their principals, the owners of the loan[58] and themselves (to the extent that they profit from the generation of additional fees, such as late fees or inflated insurance payments[59]). And their principals are motivated only to maximize their return on their investment in the note which means that a servicer's

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[58] Paul Fitzgerald Bone, *Toward a Model of Consumer Empowerment and Welfare in Financial Markets with an Application to Mortgage Servicers*, Journal of Consumer Affairs, Vol. 42, Issue. 2, pg. 165 (2008) ("Mortgage servicers act on behalf of the investors holding the mortgage-backed security. Keeping customers satisfied generally means keeping investors, rather than homeowners, satisfied.") *Id*. at 178.

[59] *See for example, JPMorgan $300M Settlement Over Force-Placed Insurance Approved*, Insurance Journal, March 3, 2014, available at, http://www.insurancejournal.com /news/national/2014/03/03/321966.htm.

unreliability is acceptable so long as it is in their favor. When a note is not performing, the only check against absolute fabrication is the courts themselves.

Stated plainly, the appellate record is devoid of any suggestion that the Servicer proffering this evidence suffers any financial penalty if the records it inherits or creates are inaccurate. And court rulings that give banks an evidentiary pass only increase the likelihood that their records will be even more untrustworthy in the future.

The myth that providing admissible evidence from qualified witnesses is "impractical."

Strict compliance with the hearsay exception rules is required. *Johnson v. Dep't of Health & Rehabilitative Services*, 546 So. 2d 741, 743 (Fla. 1st DCA 1989). The foreclosing banks often argue, however, that the court should excuse them from the rules because it would be impractical for the banks to comply with the Florida hearsay exception rule when the paperwork has been prepared by different entities and departments located far from the courthouse. Ignoring for the moment the impropriety of making evidentiary rulings based on the unproven impact it would have on nonparties, Florida law has already provided a practical, efficient means for foreclosing banks to introduce records from far-flung departments or corporate affiliates.

Section § 90.902(11), Fla. Stat. provides that the records custodian or qualified person need not be present in court to lay the business record foundation for documentary evidence. Instead, their testimony may be admitted through an affidavit (a "certification or declaration"):

> (11) An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another qualified person certifying or declaring that the record:
>
> (a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;
>
> (b) Was kept in the course of the regularly conducted activity; and
>
> (c) Was made as a regular practice in the course of the regularly conducted activity,
>
> provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed.
>
> § 90.902, Fla. Stat.

See also § 90.803(6)(c), Fla. Stat. (providing the procedure for using such an affidavit, which includes reasonable notice before trial and, if opposed, a pre-trial motion); *Yisrael v. State*, 993 So. 2d at 957. Indeed, Florida courts, including this Court, have already suggested that foreclosing banks can meet the hearsay

exception requirements in exactly this manner. *Holt v. Calchas,* at *5; *Mazine v. M & I Bank,* 67 So. 3d at 1132.

In this case, however, the Bank chose not to avail itself of this rule which seems specifically designed to simplify the procedure by which the records of modern, highly departmentalized and geographically dispersed corporations may be admitted into evidence. It is telling that the Bank chose to conduct this litigation without any certifications or declarations, despite the relative ease of doing so. Presumably, it would have been as easy—if not easier—to provide these certifications from legitimately qualified witnesses—ones who work in the relevant departments—than to attempt to train one person on all aspects of the business.

Thus, even if it were proper for the Court to concern itself with the ramifications of evidentiary rulings on the economic well-being of the litigants or non-parties, it is unnecessary to ignore binding precedent or to rewrite the rules of evidence to allay that concern.

* * *

In summary, the court erred in admitting the Bank's exhibits, the predicate for which Baggs attempted to lay. The most egregious of these was the alleged acceleration notice which she claimed was sent by an entirely different company where she had never been employed and whose policies she did not know

firsthand. Because the acceleration letter was not admissible through this witness, the case must be remanded for dismissal. *Holt v. Calchas, LLC*, __ So. 3d. __, 2015 WL 340554, at *7 (Fla. 4th DCA January 28, 2015) ("[I]nsufficient evidence of compliance with paragraph twenty-two justifies dismissal of the entire case.").[60]

[60] While this argument focuses primarily on Baggs, it should not be construed as an admission that Bevins was a records custodian or other qualified witness for the documents the Bank introduced through him. If anything, the record reflects that he was not qualified to introduce his exhibits. For instance, he testified that he worked for PNC and National City Bank but admitted that he did not work for Fidelity Federal, the company that had originated the loan (T. 13, 36). But the trial court admitted PNC's "payment history" (Plaintiff's Exhibit 4) over the Homeowners' hearsay objection even though the document included records from Fidelity Federal (T. 51-52). In fact, the trial court specifically overruled an objection that Bevins could not testify to the accuracy of the Fidelity account balance when it first came to his company, National City Bank. The trial court explained its reasoning with the revealing comment: "I'm not worried about accuracy" (T. 59). And this provides an independent basis for reversal and dismissal because if the Bank's payment history had been properly excluded it could not have established the amount due and owing to it. *See Wolkoff v. American Home Mortg. Servicing, Inc.*, 153 So.3d 280 (Fla.App. 2 Dist., 2014). But because Baggs was clearly the sort of robo-testifier this Court ruled cannot authenticate documents in *Calloway*, and since exclusion of the acceleration letter requires dismissal under *Holt*, there really is no reason for an in-depth analysis of Bevins' qualifications.

CONCLUSION

The Court should reverse the judgment with instructions that the trial court enter an order of involuntary dismissal on remand.

Dated: March 1, 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 March 1, 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 March 1, 2015.

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