In the District Court of Appeal
Fifth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] ,

Appellant,

v.

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB, AS TRUSTEE FOR STANWICH MORTGAGE LOAN TRUST, SERIES 2012-19,

Appellee.

ON APPEAL FROM THE NINTH JUDICIAL
CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Statutes

STATEMENT OF THE CASE AND FACTS

I. The Pleadings

This appeal arises from a foreclosure action filed to collect a loan made by BankUnited, FSB to [redacted] Parada a/k/a [redacted] [redacted] [redacted] ("the Homeowner"). An entity calling itself BankUnited (without the FSB), brought this action[1] claiming that "[a]ll conditions precedent to the acceleration of the Mortgage Note and foreclosure of the Mortgage have been performed or have occurred."[2] The Homeowner denied the allegation as being outside of the knowledge and information available to her.[3] She also raised an affirmative defense alleging that the Bank failed to comply with conditions precedent.[4] She specifically alleged that paragraph 22 of the Mortgage required that the Bank send a notice prior to acceleration of the debt and that the notice specify a date "not less than 30 days" after the notice by which she could cure the default. The

[1] The Plaintiff/Appellee (including the original Plaintiff, BankUnited) will be referred to as "the Bank."

[2] Verified Mortgage Foreclosure Complaint, September 13, 2010, ¶ 8 (R. 13).

[3] Defendant, [redacted] Answer to Complaint and Affirmative Defenses, March 27, 2012, ¶ 8 (R. 280).

[4] Defendant, [redacted] Answer to Complaint and Affirmative Defenses, March 27, 2012, Second Affirmative Defense (R. 281).

Homeowner alleged that the Bank failed to send a notice that complied with this provision of the Mortgage—or any notice at all:

> Defendant did not receive the notice of default required by the Note and Mortgage. Defendant, therefore, alleges Plaintiff failed to comply with these requirements in one or more respects which include but are not limited to: 1) Plaintiff failed to mail the notice; 2) the notice was untimely; and 3) the notice does not contain the required language.[5]

Two months after the court issued an order setting a pretrial conference and trial,[6] the Bank obtained an *ex parte* order substituting the party plaintiff (and counsel and to amend the case style) such that an entity calling itself Christiana Trust, a Division of Wilmington Savings Fund Society, FSB, as Trustee for Stanwich Mortgage Loan Trust, Series 2012-19 became the new Plaintiff.[7]

II. **The Trial.**

At trial, the Bank rested its entire case on one witness who had never been an employee of BankUnited or Christiana Trust.[8] The witness, Clayton Gordon, worked for the Bank's servicer, Carrington Mortgage Services, LLC, as a "Default

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[5] Defendant, [redacted] Answer to Complaint and Affirmative Defenses, March 27, 2012, Second Affirmative Defense (R. 282-83).

[6] Order Setting Pretrial and Trial, August 13, 2013 (R. 425).

[7] Order Granting Motion to Substitute Counsel, Substitute Party Plaintiff, and Amend Case Style, October 18, 2013 (R. 446).

[8] Transcript of Hearing [Trial], February 14, 2014 ("T. __"), p. 16. Volume I of the trial transcript is at R. 738; Volume II of the trial transcript is at Supp. R. 1.

Mediation Supervisor."[9] His job duties are to review the records of loans that are in default "all…in anticipation of trial."[10] And although most of the records he shuttled into evidence came from BankUnited (Carrington had only become the servicing agent just over a year before trial), he had never spoken to anyone at BankUnited about their records retention policy.[11] Even his belief that BankUnited was the source of the records came from reading the records themselves.[12]

Based on this foundation, Mr. Gordon was allowed to give a lengthy description of a boarding process at Carrington in which documents received from the previous servicer are allegedly audited to verify they are accurate and correct.[13] He gave no specifics as to how this alleged verification was actually done—such as, what records they would have been verified against. He was also permitted to talk about compliance with "standard servicing guidelines" without describing what they were or how compliance by BankUnited, FSB—a failed bank seized by

[9] T. 6-7

[10] T. 8-9.

[11] T. 17, 19.

[12] T. 33.

[13] T. 34.

the Office of Thrift Supervision and sent into FDIC receivership[14]—would have been determined.[15]

Among the many BankUnited, FSB records introduced by Mr. Gordon was a purported letter of intent to accelerate (entitled "Notice of Default"). The Homeowner objected on the grounds of hearsay—that a foundation or predicate for an exception had not been laid.[16] The Homeowner specifically pointed out the deficiencies in the predicate:

> There is no testimony, no evidence presented to the Court as to what was done to authenticate the trustworthiness and the accuracy of the records that came from Bank United. So far all we've heard is that Bank United sent us a bunch of documents, somebody looked at them. We don't know who. We don't know what. We don't know what the auditing process was. We don't know what the servicing standards are. None of that.[17]

As a result, the trial court required the Bank to provide more detail on the auditing process.[18] It was then that Mr. Gordon testified that his beliefs about the

[14] *See*, Assignment (R. 556).

[15] T. 35.

[16] T. 39.

[17] T. 43-44.

[18] T. 44.

auditing process came from reviewing policies and procedures of his employer—apparently as part of his training for his job of testifying in court.[19]

When it came to documents such as the acceleration letter, Mr. Gordon stated that there is a determination whether there is one and "whether or not it was done in accordance with the terms of the mortgage."[20] There was no testimony as to whether Mr. Gordon's training covered BankUnited's policies and procedures and no evidence about any routine practice for preparing and mailing such letters. There was no testimony about when the letter was sent, or for that matter, that it was ever sent at all. On *voir dire*, it was clarified that Mr. Gordon did not participate in the audit and boarding process and did not talk to anyone who did.[21] The judge, nevertheless, overruled the objection.[22]

Based on this predicate (about the boarding process), Mr. Gordon stated that the record of the acceleration letter was made at or near the time of the events it portrays by someone with knowledge, or from information from someone with

[19] T. 45-46.

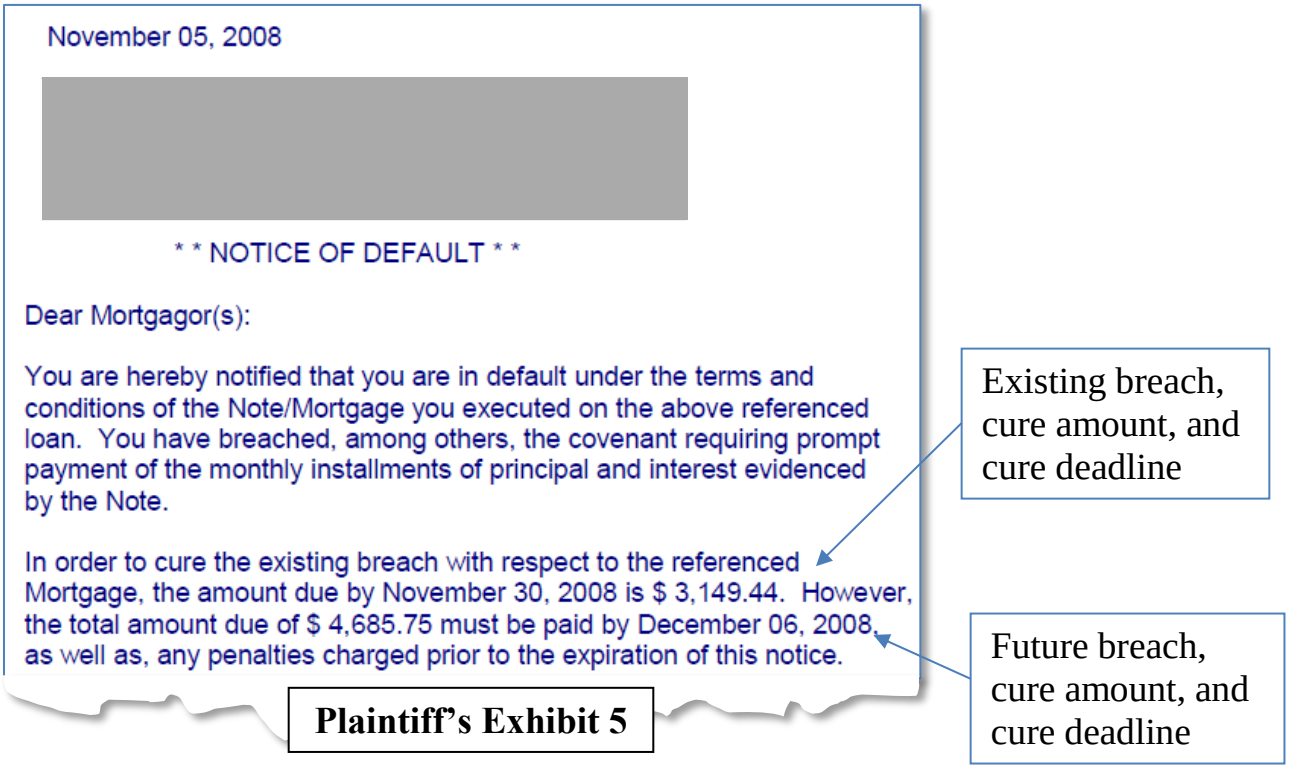
[20] T. 47.

[21] T. 49.

[22] T. 50.

knowledge.[23] Over objection, the court admitted the acceleration letter as Exhibit 5.[24]

The letter, on BankUnited letterhead, was dated November 5, 2008. It states that there was an existing breach (of the promise to make prompt monthly payments) and that the breach could be cured by the payment of $3,149.44 by November 30th. In addition, the letter warned of another breach—one that had not yet occurred—if it did not receive the December payment timely:



[23] T. 50.

[24] T. 51-52.

During the defense case, the Homeowner herself took the stand and unequivocally testified that she had never received the BankUnited acceleration letter (Plaintiff's Exhibit 5).[25]

At the conclusion of the trial, the Homeowner moved for an involuntary dismissal which pointed out, among other things, that the acceleration letter did not comply with the Mortgage because it provided less than thirty days to cure the breach.[26] The Homeowner also argued that there was no evidence that the acceleration letter was ever sent:

> They didn't send it certified, they didn't send it by courier or anything. They are just assuming because it is in the records, that she got it. Well, she specifically refutes that. So they didn't meet that condition precedent.[27]

The trial court took the case under advisement and later issued a judgment in favor of the Bank[28] accompanied by Findings of Fact and Conclusions of Law that stated that "[a]ll conditions precedent to bringing the action have been satisfied."[29]

This appeal ensued.[30]

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[25] T. 76-77.

[26] T. 113-115.

[27] T. 114.

[28] Final Judgment for Foreclosure, February 24, 2014 (R. 671).

[29] Findings of Fact and Conclusions of Law, February 24, 2014 (R. 677).

[30] Notice of Appeal, March 13, 2014 (R. 688).

SUMMARY OF THE ARGUMENT

The trial court erred in denying the Homeowner's Motion for Involuntary Dismissal for three reasons. First, the alleged acceleration letter did not comply with the Paragraph 22 of the Mortgage because it gave less than thirty days' notice for the Homeowner to cure the current default. Worse, the Bank also tried to use the letter to start the thirty day clock on the time to cure another default before it even occurred, thereby garbling the essential warning message to which the parties had agreed in the Mortgage.

Second, there was no evidence that BankUnited sent the acceleration letter—much less that it sent it by first class mail or that it was sent on the date printed on the letter. Nor was there evidence of what BankUnited's routine business practices were regarding the mailing of such letters. Without such evidence, the Bank was not entitled to a presumption of mailing or receipt. The only evidence on the subject was the Homeowner's unrebutted testimony that it was not received.

Third, the Bank's witness, Mr. Gordon, was spectacularly unqualified to introduce the acceleration letter from BankUnited, an entity for which he never worked. Even his "knowledge" of the boarding procedures used by his employer to adopt the predecessor's records was rank hearsay imparted to Mr. Gordon solely for the purposes of litigation.

STANDARD OF REVIEW

The standard of review for a trial court's ruling on a motion for involuntary dismissal is *de novo*. *Lizio v. McCullom,* 36 So. 3d 927 (Fla. 4th DCA 2010) (citing *Brundage v. Bank of Am.,* 996 So. 2d 877, 881 (Fla. 4th DCA 2008)). The burden is on the plaintiff to establish a *prima facie* case. *Tillman v. Baskin,* 260 So. 2d 509, 512 (Fla. 1972).

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); *Randy Intern., Ltd. v. Am. Excess Corp.*, 501 So. 2d 667, 670 (Fla. 3d DCA 1987).

Although a trial court's decision to admit evidence is generally reviewed for abuse of discretion, the *de novo* standard applies when the issue is whether the trial court erred in applying a provision of the Florida Evidence Code (here, § 90.803(6), Fla. Stat.). *See Shands Teaching Hosp. and Clinics, Inc. v. Dunn*, 977 So. 2d 594, 598 (Fla. 2d DCA 2007); *Lucas v. State*, 67 So. 3d 332, 335 (Fla. 4th DCA 2011); *see also Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006) (question of whether evidence falls within the statutory definition of hearsay is a matter of law subject to *de novo* review).

ARGUMENT

I. The Trial Court Erred in Denying the Motion for Involuntary Dismissal Where There Was No Evidence of Compliance with a Condition Precedent.

A. The Alleged Acceleration Letter Did Not Provide Thirty Days' Notice.

Paragraph 22 of the Mortgage that is the basis of this foreclosure action requires the Bank to provide written notice of breach prior to acceleration. That notice must provide thirty days to cure the default:

> 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 and sale of the Property. …[31]

Here, assuming that the letter was sent on the day which the letter was dated—November 5, 2008—the notice provided only twenty five days to cure the default:

> In order to cure the existing breach with respect to the referenced Mortgage, the amount due by November 30, 2008 is $ 3,149.44.[32]

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[31] Paragraph 22, Mortgage (R. 571) (emphasis added).

[32] Letter dated November 5, 2008, Plaintiff's Exhibit 5 (R. 589).

When this point was raised during the Homeowner's Motion for Involuntary Dismissal, the Bank made no argument in response, perhaps relying on the trial court's observation that "[t]here is also another line in there that has a December 6th payment amount."[33] The sentence that prompted this comment and that follows the one quoted above, states:

> However, the total amount due of $ 4,685.75 must be paid by December 06, 2008, as well as, any penalties charged prior to the expiration of this notice.

Given that the payment due for December was $1,536.31[34]—the exact difference between the two amounts stated in the letter—this second sentence was not a statement about what was needed to cure the current default, but what would be needed to cure an additional default in December, a default which had not yet occurred. Because Paragraph 22 of the Mortgage requires that the notice be sent "following Borrower's breach of any covenant or agreement in this Security Instrument,"[35] a notification about future, possible defaults does not comply with the condition precedent requirement. In other words, the Bank cannot start the thirty-day clock on the December payment a month before it is even due.

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[33] T. 114.

[34] See Plaintiff's Exhibit 6 (R. 600).

[35] Paragraph 22, Mortgage (R. 571) (emphasis added).

To allow this surplus language to supply the missing five days of notice for the November default would be particularly inequitable given that its use here is obviously intended as an unauthorized shortcut to providing the required notice after a December default. A proper notice of acceleration that intends to give a cure date for a cure amount that includes the December payment—would have to provide thirty days' notice (after the breach), making the letter here thirty days too early with respect to the projected December breach.

Even if notice of anticipatory breaches were permitted under the Mortgage, if a default does occur on December 1st, the recipient of this notice would have only five days to cure this additional default—meaning, at best, the letter provides only five days notice, not thirty. Stated differently, if a recipient of this notice cures the breach through November by payment on November 30, the letter claims that acceleration will still occur five days after a missed payment December 1st. There is no reading of Paragraph 22 that would permit such a foreshortening of the time between breach and acceleration. Thus, not only is the notice defective for the November default (being five days short), but because of the Bank's overreaching, it is also defective for the projected December default (providing, at best, only five days' time between breach and acceleration).

Even if the Bank were to offer some other interpretation for these two sentences, then the very fact that the letter is subject to differing interpretations would mean that it has failed the mission for which it was designed according to the parties' agreement in the Mortgage—to "specify" a cure amount and a deadline. If the reader may be confused by the way in which the information is presented, particularly when it includes unnecessary or untrue information (or not-yet-true information), then it does not serve its purpose.

It is black letter law that the thirty day notice be strictly observed. *See Kurian v. Wells Fargo Bank, Nat. Ass'n*, 114 So. 3d 1052, 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).

Accordingly, the trial court erred in failing to grant an involuntary dismissal on the grounds that the Bank failed to comply with a condition precedent. Alternatively, the evidence was inadequate (nonexistent) to support the judgment.

B. There Was No Evidence That the Acceleration Letter Was Sent.

Even if the letter of intent to accelerate had been dated five days earlier, there was no evidence as to when it was sent, or even if it was sent at all. The testimony regarding the letter was that it was found among the Carrington records that Mr. Gordon believed came from the failed bank, BankUnited, FSB. Mr. Gordon never testified that BankUnited sent the letter on the same date that appears on the letter. And while he had been trained to describe the generalities of the process used by Carrington to "board" records from other servicers—a process he had never participated in—there was no testimony that Carrington verified that the letter was sent, and if so, when.

More importantly, there was no testimony about BankUnited's policies and procedures for preparing and mailing notices of acceleration. For example, Paragraph 15 of the Mortgage requires that all notices "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."[36] Yet there was no evidence that the letter was mailed by first class mail (or hand delivered). Nor was there testimony that it was BankUnited's normal routine practice to send such letters by

[36] Paragraph 15, Mortgage (R. 569).

first class mail. *See Brown v. Giffen Indus., Inc.*, 281 So. 2d 897, 900 (Fla. 1973) (the requirement of showing proper mailing satisified by proof of general office practice); *Berwick v. Prudential Prop. & Cas. Ins. Co.*, 436 So. 2d 239, 240 (Fla. 3d DCA 1983) (same).

Nor was Mr. Gordon even qualified to provide such testimony. *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).

Juxtaposed against this yawning abyss of nonexistent evidence was the Homeowner's unequivocal, unrebutted testimony that she never received the letter.[37] Notably, because the Bank is only entitled to the Paragraph 15 presumption that notice was given to the mortgagor when it proves that it sent the letter by first class mail, the Homeowner's denial of receipt is perfectly valid evidence—and here, the <u>only</u> evidence.

Accordingly, not only was there no evidence that would entitle the Bank to a <u>presumption</u> that its predecessor mailed the letter, there was no evidence that would support even a <u>finding</u> that it had mailed the letter. And even if one were to assume that the mere existence of the document implies that it was sent, there still

[37] T. 76-77.

was no evidence that it was actually placed in the mail on the date printed at the top of the letter. The trial court erred in failing to grant the Motion for Involuntary Dismissal. Alternatively, there was insufficient evidence to support the judgment.[38]

II. The Acceleration Letter Was Inadmissible Because Bank's Witness Was Not Qualified 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.

This issue presents the question of 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 asks 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 the record-keeping policies of an entirely different entity which actually created and kept the records.

[38] The Homeowner was not required to make a contemporaneous objection to the sufficiency to the evidence to preserve this issue for appeal. Fla. R. Civ. P. 1.530(e); *see Hall v. Wilson,* 530 So.2d 410, 411 n. 1 (Fla. 3d DCA 1988).

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.

Mr. Gordon was not a records custodian or otherwise "qualified witness"

Here, the Bank's only witness, Mr. Gordon, was a professional testifier whose job duty with Carrington was to review documents pertaining to the subject loan so that he can communicate the hearsay within those documents to the court. His only connection with the documents admitted into evidence, over objection, was that he had read them.

To properly authenticate the documents before admitting them into evidence, Mr. Gordon 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 the acceleration letter (as well as every other 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 record was made at or near the time of the event;
2) The record was made by or from information transmitted by a person with knowledge;
3) The record was kept in the ordinary course of a regularly conducted business activity;
4) It was a regular practice of that business to make such a record; 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, Mr. Gordon needed to be a "qualified" witness—one who is in charge of the activity constituting the usual business practice or sufficiently experienced with the activity to give the testimony. *Mazine v. M & I Bank*, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011) (judgment of foreclosure after bench trial reversed where bank's only witness "had no knowledge as to the preparation or maintenance of the documents offered by the bank"); *Snelling & Snelling, Inc. v. Kaplan*, 614 So. 2d 665, 666 (Fla. 2d DCA 1993) (witness who relied on ledger sheets prepared by someone else was neither the custodian nor 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) (adjuster not qualified to testify about the usual business practices of sales agents at other offices). *See also 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'"); *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); *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825 (Fla. 3d DCA 2014) (without the proper foundation, the documents relied upon by the professional witness were indisputably hearsay).

Mr. Gordon was not qualified to lay the foundation for the Acceleration Letter from BankUnited—an entity for which he had never worked.

While Mr. Gordon was not qualified to lay the foundation even for those records that originated from his employer, Carrington, he was even less qualified to establish a business records hearsay exception for the acceleration letter—a document generated and maintained by BankUnited, FSB. That he was never employed by BankUnited even further distanced him from any personal knowledge of how it was created or maintained. *Glarum v. LaSalle Bank Nat. Ass'n,* 83 So. 3d 780, 783 (Fla. 4th DCA 2011) (one servicer's employee not qualified to testify about records of a previous servicer when, as here, the witness had no personal knowledge as to when or how the entries were made); *Yang v. Sebastian Lakes Condo. Ass'n, Inc.*, 123 So. 3d 617 (Fla. 4th DCA 2013) (witness from successor HOA management company did not have personal knowledge of the prior management company's practice and procedure and had no way of knowing whether the data obtained from that company was accurate); *Thompson v. Citizens Nat. Bank of Leesburg, Fla.*, 433 So. 2d 32, 33 (Fla. 5th DCA 1983) (summary judgment reversed where affiant could not state that he had personal knowledge of matters contained in bank's business records, that the records were complete, or that they were kept under his supervision and control).

Mr. Gordon had no personal knowledge of the boarding process.

Mr. Gordon did not testify about the creation or mailing of the proffered acceleration letter. Instead, he testified about the transition process when the records from BankUnited were "boarded" into Carrington's system. He claimed that Carrington employed some unspecified auditing procedures to verify their accuracy before they were uploaded.[39] With respect to the acceleration letter, the review consists solely of a determination whether the letter complies with the terms of the mortgage and if it did not, Carrington sends a new breach letter.[40] (Given that the letter does not comply, either this review did not take place or was performed incorrectly.)

The Bank relied upon the case of *WAMCO XXVIII, Ltd. v. Integrated Elec. Environments, Inc.*, 903 So. 2d 230, 233 (Fla. 2d DCA 2005) for the proposition that knowledge of this boarding process allows the proponent of the records from a predecessor company to skip the requirements of the business records hearsay exception.[41] This case appears to suggest that proof that one has accurately copied records from another company is sufficient for the business records hearsay

[39] T. 46-49.

[40] T. 48.

[41] T. 36, 40, 107, 109-111.

exception, even if the information is incorrect. It also suggests that, after testimony regarding the boarding process, the burden of proof suddenly shifts to the objecting party to prove that the previous company's records are untrustworthy. *Id*. at 233.[42]

Fortunately, this Court need not address whether *WAMCO*'s view of adopted business records should be adopted in face of numerous contrary opinions (cited above) because it differs from this case in two major respects. First, the WAMCO witness was personally involved in overseeing the collections of the subject loans and "described the process that [his employers] use to verify the accuracy of information received in connection with loan purchases." *Id*. at 233

In stark contrast, Mr. Gordon did not participate in the audit and boarding process or even talk to anyone who did.[43] Instead, he simply read about the

[42] While the court in *WAMCO* cites nothing for this notion, it is undoubtedly based upon the common (but dated) view that bank records are particularly trustworthy. However, the era when that might have been true is long gone, at least in the context of foreclosure litigation. 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) (case involving the same plaintiff and original plaintiff's counsel as this case in which the court commented: "…many, many mortgage foreclosures appear tainted with suspect documents.").

[43] T. 49.

boarding procedures as part of his training to testify—his preparation in anticipation of litigation.[44]

The necessary "familiarity" with record keeping procedures must be obtained by way of a business-related duty—performing or supervising the activity in question. *Lassonde v. State*, 112 So. 3d 660 (Fla. 4th DCA 2013) (While a store clerk was able to testify as to how the store re-rings merchandise, he was not qualified to introduce a receipt because he had no responsibilities regarding that business practice of the store.). Thus familiarity by way of a litigation-related duty is insufficient.

Here, Mr. Gordon had no responsibilities regarding the business practices of the Bank in boarding the records. The nature of his job responsibilities—reading records to judges—is insufficient precisely because his "familiarity" was artificially created—by his own words—"in anticipation of trial."[45]

Moreover, "training" for purposes of regurgitating information to the fact-finder is nothing more than a synonym for "hearsay." Had the witness said, "My boss told me to testify that the policy was that these records are verified for accuracy and trustworthiness…" there would be no question that his "knowledge"

[44] T. 8-9, 45-46.

[45] T. 8-9.

is not personal, but rather based on rank hearsay. And it is hearsay of the worst kind because it is deliberately communicated to him for the specific purpose of testifying in court—i.e. improper witness coaching to create the façade of familiarity. Simply substituting "my boss trained me" for "my boss (or my company) told me" does not alter the fact that the witness has no personal knowledge. To hold that hearsay knowledge can be substituted for personal knowledge gained through an actual job-responsibility tied to the business activity is to allow the business record exception to swallow the rule because there is no document that a witness cannot be told (or "trained") to say meets the exception.

The second distinction between *WAMCO* and this case is that the testimony came from a vice president of WAMCO, which was the owner of the loan, not a mere servicer. *WAMCO XXVIII, Ltd. v. Integrated Elec. Environments, Inc.*, 903 So. 2d at 232. The WAMCO witness testified that the company had "relied on the documentation and balance information that it received from [the previous bank] at the time WAMCO purchased the loans." *Id*. 233.

Here, there can be no business-related reliance on the accuracy of records concerning nonperforming loans purchased from a failed bank. The only business goal of the purchaser would be to have the court to enforce the loan in accordance with the records it bought—whether they are accurate or not. More importantly,

the testimony here comes from a servicing agent as the keeper of records created by other, defunct servicers. Because it did not itself invest in the loan, any financial incentive to ensure the accuracy of these second-hand records is highly attenuated, if it exists at all. 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 are inaccurate.

Accordingly, because Mr. Gordon was not a qualified witness, his testimony, and the Bank exhibits introduced through him—particularly the acceleration letter—should have been excluded.[46]

The Bank failed to prove a prima facie case

Had the trial court properly applied the hearsay rule to exclude the acceleration letter, a key element of a *prima facie* foreclosure case would be missing. *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d at 826 ("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']

[46] Which is not to say that records of predecessor banks can never be admitted without bringing a diaspora of live witnesses to a Florida courtroom. Section § 90.902(11), Fla. Stat. provides that the testimony of a records custodian or qualified person (who often still works for the successor bank) may be admitted through an affidavit (a "certification or declaration"). *See also* § 90.803(6)(c), Fla. Stat.; *Yisrael v. State*, 993 So. 2d at 957; *Mazine v. M & I Bank*, 67 So. 3d at 1132.

outstanding debt on the note." [emphasis added]); *Ernest v. Carter*, 368 So. 2d 428 (Fla. 2d DCA 1979) (same); *see DiSalvo v. SunTrust Mortg., Inc.*, 115 So. 3d 438, 439 (Fla. 2d DCA 2013) (unauthenticated notice of acceleration insufficient for summary judgment); *Bryson v. Branch Banking & Trust Co.*, 75 So. 3d 783 (Fla. 2d DCA 2011) (copies of default letters that purportedly were sent to mortgagor were not self-authenticating and thus could not be considered).

Accordingly, even if the belated acceleration letter had met the requirements of the mortgage, the trial court erred in admitting it into evidence and in relying upon this inadmissible document to deny the Motion for Involuntary Dismissal. Alternatively, because the acceleration letter was inadmissible, there is no admissible evidence to support the Judgment. Nor is there evidence to support the statement in the Findings of Fact and Conclusions of Law that "[a]ll conditions precedent to bringing the action have been satisfied."

CONCLUSION

The judgment should be reversed and the case remanded to the trial court for entry of an order granting involuntary dismissal.

Dated: September 8, 2014

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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 September 8, 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 September 8, 2014.

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