In the District Court of Appeal
Second District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

DEUTSCHE BANK TRUST COMPANY AMERICAS FKA BANKERS TRUST COMPANY AS TRUSTEE FOR RASC 2001-KS3, et al.,

Appellees.

ON APPEAL FROM THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANTS

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Key:

- The Appellee, Deutsche Bank Trust Company Americas fka Bankers Trust Company as Trustee for RASC 2001-KS3will be referred to as "the Bank."
- The Appellants, [redacted] and [redacted] will be referred to collectively as "the Homeowners."
- Bankers Trust Company as Trustee will be referred to as "Bankers Trust."
- Homecomings Financial, LLC will be referred to as "Homecomings."
- Alicia Prather, the Bank's witness at trial, will be referred to as "Prather."
- The Transcript of the trial held on April 11, 2014 will be referred to as "T. ___" followed by the transcript page number.

SUMMARY OF THE REPLY ARGUMENT

Each of the five pieces of "evidence" fails to establish that the Bank had standing at inception either because this "evidence" is not evidence at all or, if it is, does not prove that the Bank and Bankers Trust were one in the same. And the Bank also conflates the Homeowners' negotiability argument into something that it is not. As succinctly argued in their brief, the reference to other documents to establish that the Bank was Bankers Trust would destroy the note's negotiability leaving the Bank with only one other option under the statute—proving that it was a nonholder in possession of the note with the rights of a holder. Since it failed to do this, it failed to prove standing.

The Bank also failed to point to any evidence that the default notice was sent by first class mail. Without this evidence, the Bank was not entitled to the presumption that the notice was given when "sent." And even if it was entitled to this presumption, the notice itself fails to comply with Paragraph 22 of the mortgage because it required the Homeowners to cure a default that had not yet occurred.

Finally, the Bank fails to point to any record evidence supporting the amount of accrued interest.

Therefore, the judgment should be reversed and the case dismissed.

ARGUMENT

I. The Bank failed to prove, through competent, substantial evidence, that it had standing to sue at the inception of the lawsuit.

A. None of the evidence relied on by the Bank proves that Bankers Trust and the Bank were the same entity on the day the lawsuit was filed.

None of the "evidence" which the Bank points to proves that it had standing at inception and therefore the judgment should be reversed and the case dismissed. First, the Bank's argument that because the "caption" of its complaint identified it as the successor to Bankers Trust (and therefore the Bank has standing) fails as a matter of law because pleadings are not evidence. *Schornberg v. Panorama Custom Home Builders*, 972 So. 2d 243, 246 (Fla. 2d DCA 2006) ("[T]he complaint is not evidence."); *Coggan v. Coggan*, 239 So. 2d 17, 19 (Fla. 1970) ("The claim of the defendant was manifested for the first time in his unsworn answer to the complaint for partition wherein he denied the existence of any cotenancy. This pleading cannot be considered as evidence."); *Turtle Lake Associates, Ltd. V. Third Federal Services, Inc.*, 518 So. 2d 959, 961 (Fla. 1st DCA 1988) ("Pleadings are not evidence, and since appellants never admitted the authenticity or veracity of the alleged mortgages, the trial court erred in relying on the provisions of documents not in evidence.").

Second, the fact that there is an assignment of mortgage in the record does not prove the Bank's standing because the assignment was never introduced into evidence at trial. Therefore, this is not evidence which was adduced at trial that this Court can consider competent, substantial evidence to support the judgment. *See e.g. Coca Cola Bottling Company v. Clark*, 299 So. 2d 78, 82 (Fla. 1st DCA 1974); *Bosem v. ARA Corp.*, 350 So. 2d 526, 528 (Fla. 3d DCA 1977) ("[D]ocuments not properly admitted into evidence cannot be the basis for a judgment, in that said documents are not properly before the court."). But even more fundamentally, this document should not be considered competent, substantial evidence because it is actually an assignment from Homecomings to the Bank.[1] And this evidence directly contradicts the Bank's claim that the Bank received the note from Bankers Trust because the Bank "is formerly known as [Bankers Trust], and they are the same company."[2] Either the Bank received the note from Homecomings or it received it from Bankers Trust—it simply cannot have it both ways.

Third, the power of attorney (Exhibit 4) provides the Bank no relief because even if its self-serving statement that the Bank was formerly known as Bankers

[1] Assignment of Mortgage attached to Plaintiff's Exhibit List, March 28, 2014 (R. 119).

[2] Answer Brief, p. 9.

Trust could be considered competent, substantial evidence, the document was not executed until after the lawsuit was filed. Nor does it indicate that this transformation from Bankers Trust into the Bank occurred before the lawsuit was filed. And this Court has already held that a power of attorney executed years after a foreclosure lawsuit was filed does not prove standing at inception, especially where the note is specifically endorsed to someone else. *Russell v. Aurora Loan Services, LLC*, __ So. 3d __, 2015 WL 1874456 (Fla. 2d DCA April 24, 2015).

Finally, Prather's testimony did not establish that the Bank and Bankers Trust were one in the same. To the contrary, she recanted her direct testimony about this and admitted she had no personal knowledge of this fact.[3] At best, then, Prather was guessing that this was true—which is not competent, substantial evidence of anything. *Perez v. Perez*, 11 So. 3d 470 (Fla. 2d DCA 2009) ("guesses or assumptions about facts cannot constitute evidence that would reasonably support a factual conclusion.").

Therefore, the Bank failed to prove its standing at inception.

B. The Bank distorts the Homeowners' argument regarding negotiability.

The Bank also distorts the Homeowners' argument regarding negotiability of the note into something that it is not. Specifically, the Homeowners argued in their

[3] T. 23.

brief that the note cannot be negotiated by the Bank (as a holder) because to do so requires reference and incorporation of other documents (such as the alleged merger agreements between Bankers Trust and the Bank).[4] And as this Court held long ago, incorporating terms of other documents into the terms of a mortgage promissory note destroys any negotiability the note may have. *Holly Hill Acres, Ltd. v. Charter Bank of Gainesville*, 314 So. 2d 209, 211 (Fla. 2d DCA1975).

And despite the Bank's attempts to confuse the issue, all the Homeowners' argument posited was that the Bank had the option (had it so pled) to prove that it was a non-holder in possession of the note with the rights of a holder.[5] But this required the Bank to prove each and every transfer of the note. *Russell*. And since the Bank failed to do this, it failed to prove its standing as a non-holder in possession.

Proving each and every transfer is even more paramount here since, as previously noted, the Bank's brief points to an assignment of mortgage transferring the note from Homecomings to the Bank. In other words, the Bank was required to prove that the note was transferred from the originating lender to Bankers Trust, who then transferred it to Homecomings, who then transferred it to the Bank. This

[4] Initial Brief, pp. 14-15.

[5] Initial Brief, pp. 15-16.

sequence of events would be strange indeed if, as the Bank claims, Bankers Trust and the Bank are one in the same such that it would be a "legal impossibility" for Bankers Trust to negotiate the note to the Bank.[6]

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

A. There is no evidence that the notice was sent by first class mail.

The Bank's answer brief does not dispute a key argument made by the Homeowners: that there is no evidence of <u>how</u> the acceleration notice was sent. Rather, the Bank argues that its witness's retelling of what she learned about how letters are "generated" and "sent" is enough to establish that it complied with the notice provisions of the mortgage.[7] But the existence of an acceleration notice in its files, even if authentic, does not entitle the Bank to the presumption it seeks.

Specifically, the Bank is attempting to rely on the legal fiction in Paragraph 15 of the security instrument which allows the court to "deem" that the Homeowners receive notice on the day it is mailed if the notice is sent by first-class mail to the Homeowners' notice address:

> 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

[6] Answer Brief, pp. 11-12.

[7] Answer Brief, pp. 15-16.

> when actually delivered to Borrower's notice address if sent by other means.[8]

But the witness's testimony does not establish that the notice was mailed first class mail. In fact, the testimony merely established how "our" default notices were sent out.[9] Nor did the witness introduce any documents such as a communications log or a return receipt which would prove that her employer's predecessor—a failed bank—mailed the notice to the Homeowners at all, much less that it mailed it by first class mail.

Without evidence that the notice was mailed first class, the Bank was not entitled to the two presumptions of Paragraph 15: 1) that the letter was actually received by the Homeowners; and 2) that the letter was instantaneously delivered to the Homeowners on the same day it was mailed. First, without the presumption of receipt by the Homeowners, the Bank was required to prove actual receipt, a necessary fact for which there was no evidence. *Ramos v. Citimortgage, Inc.*, 146 So. 3d 126 (Fla. 3d DCA 2014).

Second, without the presumption of same-day receipt, even if—as the Bank claims—the letter provided a cure period of thirty days from when the letter was written, it would not comply with Paragraph 22. This is because even first class

[8]Mortgage, Composite Exhibit 1, ¶ 15 (R. Exh. 15).

[9] T. 30.

mail takes up to three days to deliver (*see* 39 CFR 121.1). A notice, therefore, delivered just as rapidly would still not afford the guaranteed thirty days to cure. Accordingly, the absence of evidence of the manner of mailing results in a two-fold failure of proof—a complete absence of evidence that: 1) the Homeowners received the notice (i.e. no evidence of actual receipt); and 2) the Bank provided the Homeowners thirty days to cure from actual receipt of the notice.

B. The Bank's argument that the letter provided the Homeowners thirty days to cure misinterprets its own letter, as well as the law

In their Initial Brief, the Homeowners pointed out that the default notice provided two defaults, including one that had not yet occurred.[10] The Bank's appellate response was simply that the notice "states that to cure the default, the [Homeowners] must pay the amount due of $142,698.35 within 30 days of the notice."[11]

The Bank's argument, however, disregards its own evidence which explicitly stated that in order for the Homeowners to "avoid foreclosure" they must pay both this "past due amount" as well as payments which have not yet come due:[12]

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[10] Initial Brief, pp. 25-37.

[11] Answer Brief, p. 18.

[12] Default Notice Dated November 9, 2011, Exhibit 2 (R. Exh. 61).

> To avoid foreclosure, you need to pay this amount no later than 30 days from the date of this notice. You also need to pay for all additional payments and fees that accumulate during this period.

As such, the Bank has conflated the length of time that the loan is in default and the length of time that must be accorded a borrower to cure a particular default about which the borrower has been put on notice. Paragraph 22, unequivocally requires that the borrower be given a full thirty days after a specified default to cure that default:

> … Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument…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; …[13]

The fact that the borrower may already be in default of the terms of the mortgage in one respect (for example, by failing to promptly notify the lender of a change of address or by transferring an interest in the property) would not permit the lender to give the borrower less than thirty days to cure a different default (such as nonpayment). Likewise, the fact that the Homeowners may have been in default due to nonpayment since November, did not permit the Bank to give only twenty days to cure the "default" it chose to specify—a default that did not even exist at the time it gave notice.

[13] Mortgage, Exhibit 1, ¶ 22 (R. Exh. 23). (emphasis added).

To understand the Bank's overreaching, it is important to note that there is an important difference between curing a default and bringing the loan current. A borrower can cure a default, but still be behind because a new payment came due in the interim. The mortgage clearly contemplates that a borrower can continue indefinitely in this way, curing successive defaults so as to avoid the draconian consequence of foreclosure, even though the loan is not current by one payment. As a result, the borrower always has a thirty-day grace period before foreclosure is initiated. And while one payment remains overdue during this period, the lender more than makes up for the lost time value of money through the successive late fees that the borrower will pay until completely current.

Here, the Bank's overreaching not only fails to provide the thirty-day grace period, but it rendered the alleged notice defectively ambiguous. The notice was designed, according to the parties' express agreement in the mortgage, to "specify"[14] the default and to precisely identify the action to cure. The alleged notice does not specify "the default," but refers to two that it claims must both be cured by the deadline.

[14]Specify means to mention specifically or to state precisely in full and explicit terms or detail so that misunderstanding is impossible. *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992).

Therefore the notice does not comply with Paragraph 22 of the mortgage even if the Bank could have proven when the notice was actually sent.

C. The proper remedy on remand is involuntary dismissal.

In order for there to be sufficient evidence to support the judgment, it necessarily follows that the Servicer sent the Homeowners a sufficient Paragraph 22 notice. Short of this, involuntary dismissal must be entered on remand. *Holt v. Calchas, LLC*, 155 So. 3d 499, 507 (Fla. 4th DCA 2015); *Blum v. Deutsche Bank Trust Co.*, 159 So. 3d 920 (Fla. 4th DCA 2015).

To the extent that this Court is persuaded that the Fifth District's decisions in *Gorel v. Bank of New York Mellon*, __ So. 3d __, 40 Fla. L. Weekly D1094 (Fla. 5th DCA May 8, 2015) and *Vasilevskiy v. Wachovia Bank, Nat. Ass'n*, __ So. 3d. __, 2015 WL 2414502 (Fla. 5th DCA May 22, 2015) hold otherwise, those decisions should be distinguished or outright rejected by this Court. First, "prejudice," or the idea that a breach must be material, is an affirmative defense. And when a plaintiff seeks to avoid an affirmative defense (like the Bank did at trial), it must file a reply asserting that avoidance. Fla. R. Civ. P. 1.100(a). Failure to file a reply waives this "affirmative defense to the affirmative defense." *See e.g. Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981). This rule logically arises from the

due process consideration that the Homeowners must be put on notice that prejudice is an issue to be tried.

And even if it had filed a reply to raise "prejudice" as an avoidance of the Paragraph 22 defense, the Bank also had the burden of proving such a claim. *See Richardson v. Wilson*, 490 So. 2d 1039, 1040 (Fla. 1st DCA 1986) ("the burden of showing that the statute of limitation comes within a statutory exception is on the plaintiff"). The Bank adduced no evidence that the Homeowners suffered no prejudice.

Second, the Court should simply reject *Gorel* and the majority's decision in *Vasilevskiy* and adopt instead Judge Palmer's well-reasoned dissent in *Vasilevskiy*. Noting that the bank did not attempt to avoid the borrower's Paragraph 22 defense by providing evidence that the borrowers were <u>not</u> prejudiced, Judge Palmer correctly observed that there should not be any "materiality test" with regards to Paragraph 22.

III. There is no competent, substantial evidence to support the interest award.

The Bank's apparent foundational argument—that the Homeowners waived the issue of the interest award because they did not object to Prather's testimony regarding this amount at trial[15]—fails as a matter of law because it is black letter

[15] Answer Brief, p. 20.

law that the sufficiency of the evidence to support the judgment may be raised for the first time on appeal. Fla. R. Civ. P. 1.530(e). *Colson v. State Farm Bank, F.S.B.*, __ So. 3d __, 2015 WL 1650300, * 1 (Fla. 2d DCA April 15, 2015) ("As has been consistently stated in foreclosure cases, a sufficiency of the evidence claim may be raised for the first time on appeal."). In this sense, Rule 1.530(e) is the functional equivalent of a motion for judgment notwithstanding the verdict—except that the trial court plays the role of a jury and the appellate court plays the role of the trial judge reviewing the jury's verdict. It would simply be redundant to argue to the trial court that the evidence is insufficient. In its factfinding capacity, the trial court has already found it sufficient. The oversight role goes to the appellate court.

For comparison purposes, Fed. R. Crim. P. 29 (motion for judgment of acquittal) is the criminal version of a judgment notwithstanding and the verdict. And the majority of the circuits "have ruled that a defendant does not have to make a Rule 29 motion in a bench trial to preserve the usual standard of review for a sufficiency of the evidence claim on appeal." *US v. Grace*, 367 F. 3d 29, 34 (1st Cir. 2004). Thus, in the federal criminal context at least, an appellate court reviewing the sufficiency of the evidence of a convicted crime decides "whether, after viewing the evidence in the light most favorable to the prosecution, any

rational trier of fact could have found the essential elements of the crime proven beyond reasonable doubt." *Id*.

Additionally, the Bank does not point to any record evidence explaining what the adjustable interest rate was for the years preceding the judgment or any information (such as the Current Index) which would explain the applicable rate at any period of time. Rather, it relies solely on Prather's testimony which, the Bank admits, was not even the amount of interest awarded in the judgment.[16] And this clear contradiction notwithstanding, Prather's testimony simply does not explain how the interest accrued. Therefore, reversal is required. *Boyette v. BAC Home Loans Servicing, LP*, __ So. 3d __, 2015 WL 1211771, * 1 (Fla. 2d DCA March 18, 2015).

[16] Answer Brief, p. 20.

CONCLUSION

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

Dated: July 7, 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 July 7, 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 July 7, 2015.

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