In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted] and [redacted]

Appellants,

v.

ASTORIA FEDERAL SAVINGS AND LOAN ASSN.,

Appellee.

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

REPLY BRIEF OF APPELLANTS

Respectfully submitted,

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KEY:

The Appellants and Defendants below, [redacted] and [redacted] will be referenced as "the [redacted]

The Appellee and Plaintiff below, ASTORIA FEDERAL SAVINGS AND LOAN ASSN., will be referred to as "the Bank."

SUMMARY OF THE REPLY ARGUMENT

The Borshell affidavit upon which the Bank now hopes to rely (for the first time on appeal) was not "summary judgment evidence" because it was not identified as such in the motion. And while Borshell is the only affiant who claimed to know that the Bank held the note prior to filing this case, her statement is inadmissible because—if it is based on anything—it is based on a document that was never identified, much less attached and "sworn or certified."

Similarly, the Bank relies on Borshell for the first time to authenticate the notice of acceleration. However, like the actual affiant, Bagdon, Borshell did not testify that the letter was among the Bank's business records or that she personally located it. Nor did she provide any information from which the court could conclude that she was qualified to authenticate the document or lay the foundation for a business records exception.

Because the Bank did not present "convincing evidence of mailing" the notice, the [redacted] denial of receipt created an issue of fact. Additionally, the letter did not "substantially" comply with the condition precedent of Paragraph 22 because, at best, it only promised to deliver the required information telephonically (i.e. not in writing) at some later date.

Summary judgment should have been denied.

ARGUMENT

I. An Issue of Fact Remained As to Whether the Bank Had Standing When the Case Was Filed.

A. The Borshell affidavit was not identified as evidence in support of the Bank's summary judgment.

The Bank repeatedly lumps all its affiants together to make broad, unsupported statements about their testimony, such as:

> Here, records custodians Bernadette McDonnell, Paula Borshell and Edward Bagdon, had personal knowledge of Appellee's business records, and they knew how and when the data entries were made, who made them, and that the records were made in the regular course of Appellee's business.[1]

and:

> Thus, the records custodians' affidavits attesting that Appellee owned and held the note prior to filing the foreclosure complaint was admissible summary judgment evidence that Appellee held the note and mortgage prior to filing the foreclosure complaint.[2]

These references to the affiants as a group is an intentional obfuscation, because in reality, only one person ever claimed to know that the Bank held the note prior to the filing of the foreclosure action—Paula Borshell. Borshell's

[1] Answer Brief, p. 13.

[2] Answer Brief, p. 13.

affidavit, however, was never identified as evidence in support of the Bank's Amended Motion for Summary Judgment.

The motion has an oblique reference to an "affidavit of indebtedness," although no affidavit by that name exists.[3] Only the Bagdon affidavit—entitled "Affidavit Supporting Plaintiff's Motion for Summary Judgment"—was submitted with that motion (in March of 2013).[4] The Borshell affidavit, entitled "Affidavit in Opposition to Defendant's Motion for Summary Final Judgment"[5] materialized months earlier (June of 2012) as an exhibit to the Bank's opposition to the summary judgment motion. The Bernadette McDonnell affidavit had been supplied even earlier (in April of 2012) in support of the Bank's first version of its summary judgment motion.

Because Fla. R. Civ. P. 1.510(c) requires that the Bank's motion "specifically identify any affidavits…on which the movant relies," it could not

[3] Amended Motion for Summary Final Judgment of Foreclosure and for Entry of Supplemental Order and for Award of Attorneys' Fees and Costs, served March 8, 2013 (R. 520).

[4] Affidavit Supporting Plaintiff's Motion for Summary Judgment, dated December [?], 2012 (R. 525).

[5] Affidavit in Opposition to Defendant's Motion for Summary Final Judgment, dated June [?], 2012 (R. 525).

have relied upon the Borshell affidavit at summary judgment, nor did it.[6] The Bank cannot now prop up the summary judgment ruling with an affidavit that was never part of its summary judgment evidence.[7]

B. Borshell was not a records custodian or otherwise qualified witness.

The Bank's repeated references to its affiants as "records custodians" are misleading because none of them testified that they were. Both McDonnell and Bagdon merely said they were "authorized to handle business records." Other than signing as "Assistant Secretary" of some unidentified entity, neither affiant describes their job responsibilities or explains how they would be qualified to introduce business records. Borshell identifies herself as an "Assistant Secretary for Plaintiff" but does not describe how her job responsibilities would give her personal knowledge of the Bank's business records.

Moreover, none of the affiants stated how long they had been employed by the Bank or what training they had received. None specified a date that the Bank

[6] Transcript of Summary Judgment Hearing, May 29, 2013 (Supp. R. 1)

[7] While *Ferris v. Nichols*, 245 So. 2d 660 (Fla. 4th DCA 1971) holds that an affidavit in support of an earlier summary judgment motion may be used to support a later summary judgment motion (where there was no new affidavit), it did not hold that the movant could do so without identifying the earlier affidavit as something upon which it would rely.

came into possession of the note or whether they were employed there at the time. And although the [redacted] pointed out in their Brief that the affiant must affirmatively demonstrate competence to testify (with something more than the self-serving statement that he or she has personal knowledge),[8] the Bank did not respond to this point. Instead, the Bank simply and robotically repeated the affiants' empty claims that they had personal knowledge.[9]

The Bank cites to *Weisenberg v. Deutsche Bank Nat. Trust Co.*, 89 So. 3d 1111 (Fla. 4th DCA 2012) for the general proposition that a servicer's summary judgment affidavit complied with the business records exception to hearsay, where the servicer demonstrated that she was familiar with bank's record-keeping system and had knowledge of how data was uploaded into system."[10] In that case, however, an entire deposition bolstered the affidavit by affirmatively demonstrating (rather than merely claiming) that she had detailed personal knowledge of record-keeping policies and procedures.[11] Here, there is no evidence

[8] Initial Brief, p. 18.

[9] Answer Brief, p. 13.

[10] Answer Brief, p. 12-13.

[11] Similarly, the recent decision in *Lindsey v. Cadence Bank, N.A.*, Case No. 1D13-4686 (Fla. 1st DCA, April 24, 2014) turned on the fact that a deposition demonstrated that the affiant was qualified to lay the foundation for the admission of printouts attached to her affidavit.

to establish how the affiant acquired her alleged, self-proclaimed knowledge of the records.

C. Borshell's claim that the Bank held the note prior to the filing of this foreclosure action was inadmissible hearsay because she never identified or attached any business record associated with that claim.

More importantly, despite Borshell's broad representation that "information in this affidavit is taken from business records," neither she, nor the other two affiants, stated that there was any document among those records that would indicate when the Bank became the holder of the Note. Nor did they attach a copy of such a record to their affidavits as required by Fla. R. Civ. P. 1.510(e).

Thus, having disclaimed any personal knowledge beyond what was in the records, Borshell's failure to identify any record that would date the transfer to the Bank—much less attach a copy—makes her claim that the Bank "held the note prior to the filing of this foreclosure action" rank hearsay. Because summary judgment evidence must be admissible (Fla. R. Civ. P. 1.510(c)), there was no summary judgment evidence that the Bank held the note before filing the case.

The trial court, therefore, erred in granting summary judgment and the case should be reversed and remanded.

II. An Issue of Fact Remained as to Whether the Bank Had Mailed the Required Default Notice.

A. The default letter attached to the affidavit was never authenticated as summary judgment evidence.

On the issue of authenticating the default letter, the Bank once again turns to the Borshell affidavit—even though it was never identified as summary judgment evidence—apparently because the affidavit drafted for her signature tracked the "magic words" of the business records hearsay exception more closely than that of the actual affiant, Bagdon. But, like Bagdon, she did not swear or certify that the document she attached as an acceleration notice was a true and correct copy of any business record with which she was "familiar." And like Bagdon, Borshell never testified that she personally located and copied the notice from those records.

Because all summary judgment evidence must be admissible, the requirement of Fla. R. Civ. P. 1.510(e) that a document attached to an affidavit be "sworn and certified" should be viewed as demanding the same testimony that would make that document admissible as an exhibit at trial. A document cannot be admitted at trial merely because a witness utters "magic words" in the abstract. *See Yang v. Sebastian Lakes Condo. Ass'n, Inc.*, 123 So. 3d 617, 621 (Fla. 4th DCA 2013). The witness must, under oath, positively identify the document as a true and correct copy of a business record and the witness must have personal

knowledge of that fact. *See Rosemont Farms Corp. v. Blueberries, S.A.*, 48 So. 3d 207, 209 (Fla. 4th DCA 2010) (affiant found to have authenticated an attached letter when he stated under oath that he personally prepared and sent the letter).

Here, Borshell never commits herself to anything about the origin and authenticity of the document. Because she could not be held to have perjured herself if it should be revealed at trial that the notice was not a copy of a business record, the requisite foundation was not laid.

If there is one thing that the parties agree on, it is this statement in the Bank's Answer Brief:

> The notice of default was attached to the affidavits executed by Ms. Borshell and Mr. Bagdon, and were ostensibly properly authenticated.[12]

"Ostensible" means "outwardly appearing as such," "pretended" or "presented as being true…but usually hiding a different motive or meaning."[13] The notice of default was attached to the affidavits to give the false appearance of proper authentication. In reality, none of the affiants actually authenticated the document.

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[12] Answer Brief, p. 20 (emphasis added).

[13] Dictionary.com Unabridged. Random House, Inc.; Encarta Dictionary: English (North America).

B. Even if the purported default letter had been admissible, it merely presents a disputed issue of fact.

The [redacted] argued that their sworn testimony that they never received the acceleration notice raises an inference that it was never sent.[14] The Bank responded that the denial of receipt does not automatically overcome the rebuttable presumption that mail that is sent is received. The Bank, therefore, concedes that the presumption is rebuttable and that a denial of receipt creates an issue of fact, at least as to whether the letter was received.[15]

This Court has ruled that only "convincing evidence of mailing is not rebutted merely by evidence that the notice was not actually received." *Best Meridian Ins. Co. v. Tuaty*, 752 So. 2d 733, 737 (Fla. 3d DCA 2000) (emphasis added). In *Best Meridian*, this Court held that evidence of routine practice in

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[14] Initial Brief, pp. 13-14, 20-22. The [redacted] therefore, strongly disagree with the Bank's conclusion that "[i]t is undisputed that Appellee mailed the Notice of Default to Appellants in compliance with Paragraph 15 and 22." (Answer Brief, p. 21). It was disputed below and on appeal.

[15] Answer Brief, p. 17. The Bank also cites to cases involving certificates of service by attorneys or the court. (*Scott v. Johnson*, 386 So. 2d 67, 69 (Fla. 3d DCA 1980); *World On Wheels of Miami, Inc. v. Int'l Auto Motors, Inc.*, 569 So. 2d 836, 837 n. 1 (Fla. 3d DCA 1990)) Those cases rely upon Fla. R. Civ. P. 1.080(f) (now Fla. R. Jud. Admin. 2.516(f)) which specifically provides that "the certificate is taken as prima facie proof of such service…" Presumably, this rule embodies the sentiment that certifications of officers of the court are trustworthy—a belief that cannot be rationally transferred to financial institutions.

preparing and mailing notices (including testimony that they were placed in mailing envelopes, delivered to the mail room, stamped with postage, and deposited in the United States postal mailbox) was not convincing evidence of mailing:

> While Best Meridian's evidence is sufficient to make a prima facie case at trial, Best Meridian's showing does not rise to the "convincing" level which would prohibit the insured from questioning the mailing by denying receipt.

Id. at 737. Thus, even this extensive evidence of routine practice did not meet the "'convincing evidence' threshold." *Id.*

Here, there was absolutely no evidence that the notice was sent (or when it was sent) apart from whatever inference might be derived from the existence of the unauthenticated letter itself. The [redacted] therefore, were entitled to have a fact finder evaluate the credibility and knowledge of the [redacted] in juxtaposition to Borshell. *See also Bank of Am. N.A. v. Evans*, 948 So. 2d 998 (Fla. 3d DCA 2007) ("unequivocal denial of having received [the] contract created an issue of fact on that question, notwithstanding the rebuttable presumption of receipt which arose from corporate testimony as to [its mailing practices]…").

C. The alleged default letter did not comply with the requirements of the Mortgage because it did not specify the amount or date of the default.

[The Bank did not substantially comply with the contract it drafted.]

The Bank posits that it need only "substantially comply" with the agreement that it drafted, and therefore, should not be held to the letter of the notice requirement in Paragraph 22. While it seems implausible that the enforcement of contracts would be gauged by a measure of performance as vague and subjective as "substantial," this Court need not reach that issue because non-compliance, such as that in this case, is never "substantial" compliance.

As the Bank itself admits, it was required to send a letter that specified the default and the action required to cure the default at least 30 days from the date that the default must be cured.[16] The alleged acceleration letter did not deliver that information in writing, but rather, it simply promised that the Bank would deliver that information later and telephonically. Even if the [redacted] had received the letter and called as instructed, the information was not delivered in writing. And to the extent the requirement of a writing was intended to provide proof that the correct information was delivered, the problem becomes immediately apparent: there is no record evidence of what was, or would have been, told to the [redacted]

[16] Answer Brief, p. 24.

Worse, because the borrower's call must happen after the letter is delivered, there is no evidence that the information was, or would have been, delivered thirty days before the deadline to cure. Even though the letter gives the borrower thirty-five days to cure (a cushion of five days), the information would not be delivered until the borrower "contacts" the Bank. Even the most conscientious borrower may be unable to call immediately or may be thwarted by busy phone lines. Thus, the mere promise to deliver the required information at some later date does not comply (substantially or otherwise) with the requirements of the Mortgage.

CONCLUSION

The judgment should be reversed and the case remanded for further proceedings.

Dated: April 28, 2014

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this April 28, 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.

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