In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION SUCCESSOR IN INTEREST TO WASHINGTON MUTUAL BANK F/K/A WASHINGTON MUTUAL BANK FA, et al.

Appellees.

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 conventions of the Initial Brief will be continued in the Reply Brief:

- The Plaintiff/Appellee, JPMORGAN CHASE BANK, NATIONAL ASSOCIATION SUCCESSOR IN INTEREST TO WASHINGTON MUTUAL BANK F/K/A WASHINGTON MUTUAL BANK FA will be referred to as "the Bank."
- The Defendants/Appellants, [redacted] and [redacted] will be referred to individually or collectively as "the Homeowners."

ARGUMENT

I. There was no evidence that the bank complied with the condition precedent of sending a notice of acceleration to the Homeowners.

A. Mailing the notice to the wrong address can never be "substantial compliance" with the notice provision of the Mortgage.

On appeal, the Bank does not dispute that it did not send the default letter (Exhibit 3) to the notice address as required by Paragraphs 22 and 15 of the Mortgage. Nor did it dispute that it failed to send the default letter to any address associated with the Homeowners. Instead, it argues that by sending the letter to the wrong address, it "substantially complied"[1] with the condition precedent specified in the Mortgage.[2]

First, the Bank argues that "the possibility exists that the letter was nevertheless delivered by virtue of the similarity of the addresses."[3] Of course, appellate counsel's speculation as to what is "possible" does not rise to the level of evidence or even an inference from evidence. *Lord v. State*, 667 So. 2d 817, 823

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[1] The Homeowners do not take up the gauntlet on the issue of whether Florida follows, or should follow, a "strict compliance" or a "substantial compliance" formula for resolving conditions precedent issues, although the latter would seem fraught with the peril of subjective and unpredictable, after-the-fact determinations. Here, the Bank's non-compliance is so flagrant, it would not satisfy Paragraph 22 even under the looser, "substantial compliance" test urged by the Bank.

[2] Answer Brief, p. 11.

[3] Answer Brief, p. 13.

(Fla. 1st DCA 1995) ("An inference recognizable in law cannot be based upon evidence that is so uncertain or speculative as to raise merely a conjecture or possibility."[emphasis added]). Nor can the verdict be supported by mere possibilities.

But more importantly, the Bank has missed the point that, under Paragraph 15 of the Mortgage, if the letter is not mailed to the notice address, it must prove that the Homeowners actually received it, and equally important, when they actually received it. Recall that Paragraph 15 provides a legal fiction that the borrower receives notice on the same day it is mailed. The Bank's notice relies on this legal fiction because the letter—which must give thirty days to cure the default—states that the borrower has thirty days from the date of the letter. Thus, it would never give sufficient notice were it not for the legal fiction of instantaneous delivery.

Here, the Bank cannot avail itself of the legal fiction because it admittedly did not mail the letter to the borrowers' notice address. So unless we are to suppose that the incorrectly addressed letter not only arrived at its intended destination, but somehow did so on the very same day it was allegedly mailed (September 29, 2009), the notice would have provided something less than the required thirty-days' opportunity to cure.

Second, the Bank points out that "the evidence does not show the letter was returned as undeliverable."[4] Of course, that statement presumes, without evidence, that the address on the letter did not exist or that the unintended recipient of the letter would have taken steps to return the misdirected missive. More to the point, the Bank, which bears the burden of evidence on the issue, adduced nothing to show that the defectively addressed letter would be either delivered to the Homeowners or returned as undeliverable.

B. There was no evidence that the notice would have been futile.

The Bank also argues that sending the notice would have been futile because the Homeowners intentionally discontinued payments.[5] There is no evidence, however, that the notice would have been futile—just the opposite. The uncontradicted evidence is that the Homeowners discontinued payments on the belief that they were actually ahead in their payments and on the belief—created by an employee of the Bank—that discontinuing payment would qualify them for a loan modification. That the missed payments would result in a foreclosure, rather than a loan modification, would seem to be the very purpose of such a notice. There was no evidence that the Homeowners would not have, or could not have,

[4] Answer Brief, p. 15.

[5] Answer Brief, p. 12, 16.

brought the loan current had they received the notice.[6] Indeed, Mr. [redacted] testified that it was his expectation that he would start paying again a few months after he suspended his payments.[7]

The Bank cites this Court to *Florida Nat. Bank of Miami v. Bankatlantic*, 589 So. 2d 255 (Fla. 1991) which held that, in a commercial setting, a borrower can be subject to prepayment penalty fees even when the lender has elected to accelerate the loan. There, the borrower had been planning to sell the mortgaged property (an apartment complex) far in advance of any default, but found himself constrained by a prepayment penalty in the note and mortgage. Consequently, he stopped making payments and, after the lender accelerated the loan (but before foreclosure), he sold the property and repaid the lender. The borrower argued that, having "elected" the remedy of acceleration, the lender could not collect a prepayment penalty. The court held that the borrower must pay the prepayment fees because the sale was not under duress and he should not "profit from his own intentional default." *Id.* at 258. The case did not hold that the Bank was excused

[6] Indeed, the Bank's emphasis on the intent to default cuts against its futility argument. It would seem more plausible that notice would be "futile" where an inability to pay caused the borrower to "unintentionally" default. Here, there was no evidence of an inability to pay.

[7] Transcript of Proceedings Before Judge Jacqueline Hogan Scola August 20, 2013(R. 348) ("T-2.__"), pp. 43-44.

from any condition precedent in the mortgage (the bank had, in fact, sent default letters even though the mortgage did not require it). Nor was there evidence that the lender told the borrower to default as the Bank told the Homeowners in this case.

C. The March 2009 Default Letter cannot be substituted as notice for a default that occurred in August.

As its fallback position, the Bank would have this court accept the March 29th default letter submitted by the Homeowners as evidence of its compliance with Paragraph 22.[8] This document, the Defendants' Exhibit C,[9] asserts that the Homeowners had defaulted February 1, 2009 and were required to cure the deficiency thirty days from the date of the letter (March 31, 2009). Along with the letter, the Homeowners submitted the envelope which showed that the letter was not actually mailed March 31st, but rather, three days later on April 3rd.[10] Because the letter is deemed given when it was mailed,[11] it gave only twenty-seven days to cure the default, and therefore, failed to provide the thirty-day cure period required by Paragraph 22.

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[8] Answer Brief, p. 17-21.

[9] R. 278, 273 (with envelope).

[10] T-2. 56.

[11] Mortgage, ¶ 15 (R. 232).

The very point of adducing this defective notice was to show that it cannot be presumed that the notice proffered by the Bank, the letter dated September 29, 2009, was actually mailed on that day. Along with another late-mailed notice in December of 2006 (which the court excluded as irrelevant), it showed that the Bank routinely mailed its letters on a different day than was stated in the letter.[12] Yet, the Bank, apparently believing that only twenty-seven days' notice is also "substantial compliance," actually seeks to use this belatedly mailed notice as a cure for the defectively addressed notice it put into evidence.

Even if it had not been sent late, this March letter—asserting a default in February—cannot serve as notice of an August default. While, the Bank now seeks to demonstrate through its incomplete payment records that the Homeowners had never cured the February default,[13] this new position conflicts with its own evidence and pleadings.[14] First, the Bank's own exhibit (the September letter) unequivocally states that the Homeowners defaulted in August.[15] The Bank's witness also testified repeatedly that the default was August 1, 2009.[16] The Bank

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[12] T-2. 56-60.

[13] Answer Brief, pp. 20-21.

[14] "Complaint says they haven't paid August 1…" Transcript of Proceeding before Judge Jacqueline Hogan Scola, July 24, 2009 (Supp R. 1) ("T-1.__"); p. 20.

[15] Plaintiff's Exhibit 3 (R. 238).

[16] T-1. 46, 80-81, 83.

cannot now, for the first time while on appeal, claim that the default was actually in February.

The very fact that the Bank attempted to send a September notice of default (to the wrong address) contradicts its new position that the Homeowners had always been in default since February such that no further notice was needed to accelerate. And if the Bank's payment records do not show that the Homeowners cured the February default and subsequently defaulted again in August, then those records are hopelessly in conflict with its defectively mailed notices of default—a fact that only casts further doubt on the accuracy and reliability of the Bank's recordkeeping. Indeed, it has all along been the Homeowners' position (and unimpeached testimony) that the Bank was not accurately reflecting their payments.

D. The credibility of the witnesses did not factor into the legal conclusion reached by the trial judge.

Here, the trial judge reached the legal conclusion that the Bank was not required to comply with Paragraph 22 of the Mortgage because "[the Homeowner] was aware that he was not paying the mortgage." The Bank seeks to characterize this conclusion as somehow based on an assessment of the credibility of the

witnesses so as to persuade this Court not to reevaluate that decision.[17] Yet, nothing in the record or in the Answer Brief points to any testimony that the judge discounted as not credible. In fact, the judge was expressly guided by a firm belief that the Homeowners were telling the truth—that they were aware that they were not paying the mortgage.[18]

But it is the consequence of nonpayment that is relevant here. The consequence of foreclosure was not one about which the Homeowners were aware. Indeed, they had been misled to believe that the consequence would be an offer for a loan modification. Communication and clarification of the consequence is the function of the notice. Tellingly, the Bank has cited no case where a lender has been relieved of a default notice requirement merely because the borrower knew they had withheld certain payments that the lender claimed was due and owing.

E. Because the "misapplication reversal" remains a mystery, the remainder of the payment records are suspect.

The Bank argues at length that the "misapplication reversal" did not increase the arrearage, despite the fact that its own record shows it as a deduction from an "escrow amount." (Notably, the Homeowners' payments are booked in the same column as increases.) Given that the Bank's own witness could not explain why

[17] Answer Brief, p. 24-25.

[18] T-2. 76-77.

the money was subtracted or where the money went, it is nonsensical for the Bank to point to other entries, as it does in its Answer Brief,[19] as evidence that it did not increase the arrearage. If, as surmised by its own witness, the transaction is a correction of a recordkeeping error somewhere else in the document,[20] it can only mean that some other, unidentified entry or entries in the record are erroneous (perhaps the very entries cited by the Bank in its Answer Brief).

In any event, the issue mentioned by the Homeowners in their Initial Brief was not whether the misapplication reversal triggered a default, but whether it triggered a decision to accelerate—a turn of events about which the Homeowners' were entitled to know.[21] The Bank did not address this issue in its Answer Brief, nor could it given that there is no evidence on the issue.

The misapplication reversal—or rather, the witness's ignorance about it—is also relevant to the Homeowners' second issue: the absence of competent evidence of damages.

[19] Answer Brief, pp. 22-23.

[20] T-1. 81.

[21] Initial Brief, pp. 23-24.

II. The evidence of the amount due and owing was completely nonexistent, or at best, insufficient to support the judgment.

A. The total amount due and owing (and many of the addends) were never put into evidence.

The Bank apparently does not dispute that more than $203,000 of the judgment has no support in the record. In its Answer Brief, it does not avail itself of the opportunity of pointing this Court to the precise entries in its ironically named "Detailed Transaction History" (Plaintiff's Exhibit 4) which support the interest and various escrow payments awarded in the judgment.

Instead, the Bank argues that the Homeowners did not offer testimony or evidence to "rebut" the numbers that magically appeared in the final judgment.[22] Of course, it is black letter law (and as such, needs no citation) that the Bank bears the burden of proof of its damages. The Homeowners need not disprove them.

The Bank seeks to distinguish the nearly identical case of *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 39 Fla. L. Weekly D1159 (Fla. 2d DCA May 30, 2014) on the representation that "[u]nlike the witness in *Wolkoff*, Appellee's witness confirmed with certainty that the amounts reflected in the proposed final judgment were contained in the Detailed Transaction History admitted into

[22] Answer Brief, p. 30.

evidence."[23] The initial and insurmountable problem for the Bank, however, is that no one knows what amounts were in the proposed final judgment when the Bank's witness made that statement. The Bank has forgotten—or hopes that this Court has forgotten—that the final judgment executed in this case was not the proposed judgment shown the witness.[24] Because the document (the originally proposed judgment) was never marked or introduced as an exhibit, the record is completely silent as to any of the amounts due, with the exception of the principal allegedly due and the attorneys' fees.[25]

B. The evidence was inadequate to support the amount of principal due.

The Bank explains in great detail that which the Homeowners already explained in their Initial Brief—that the principal due could exceed the principal borrowed by an amount equal to deferred interest.[26] The Homeowners never disputed that the principal amount could increase—the question is: should it have

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[23] Answer Brief, p. 29.

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

[25] The Bank correctly asserts that the Homeowners' trial counsel agreed to the amount of $1,200 for attorneys' fees (T-2 77) and for that reason, it was not disputed on appeal. The Homeowners did point out, however, that despite the Bank witness's claim that all the amounts in the judgment were reflected in the payment history, the attorney fee figure—like the other figures—cannot be located there (Initial Brief, p. 26).

[26] Answer Brief, pp. 31-33; Initial Brief, pp. 29-31.

increased and by how much? The Bank never answers the question as to how deferred interest (converted to principal) could be computed from the records if interest itself cannot be computed from the records.

Instead, the Bank is content to argue that, because the new principal balance does not exceed the cap of 125 percent of the amount borrowed, its accuracy is somehow beyond question.[27] It also argues that the figure is "supported" by the payment history,[28] but again, that document simply and summarily states the figure parroted by the witness. The history includes none of the information necessary for actually computing the figure. In fact, that information would necessarily be contained within the four years of payments which, for reasons unbeknownst to the Bank's own witness,[29] were not included in the history.

Moreover, the witness never testified how the figure—which is not contained within the actual list of entries on the record—was computed, who computed it, or if it was computed at all. Like the interest rate, it is merely a static figure displayed in the top right corner with no apparent connection to the entries.

[27] Answer Brief, p. 32.

[28] Answer Brief, p. 33.

[29] T-1. 71-72.

The Bank next argues that its judgment was also supported by "competent substantial evidence" in the form of an Affidavit.[30] Suffice it to say that the affidavit was never part of the evidence at this trial. Nor would such un-cross-examined testimony normally be admissible. *See Beasley v. Wolf*, 151 So. 2d 679, 682 (Fla. 3d DCA 1963); *Wagner v. Bank of Am., N.A.*, 143 So. 3d 447, 448 (Fla. 2d DCA 2014). Even if this affidavit and the records attached were to be considered, they do no more than the records admitted at trial. They too merely state a summary figure for the accrued principal without any supporting evidence.

Finally, the Bank claims it was required only to produce "some evidence" of its damages to support the judgment in its favor.[31] That evidence, however, must be "competent." Merely reading an unexplained figure appearing on a Bank record is insufficient to prove the principal amount due.

Nor could "some evidence" of the principal due justify an affirmance of the remaining dollar amounts in the judgment which were not supported by <u>any</u> evidence, much less, competent evidence.

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[30] Answer Brief, p. 33.

[31] Answer Brief, p. 34.

C. The Bank had its day in court.

Faced with these evidentiary deficiencies, the Bank asks this Court, in the alternative, to remand for "further proceedings"—an apparent euphemism for what it hopes will be an opportunity to supply missing evidence in a "do-over."[32] In support of this requested procedure, the Bank cites *Wagner v. Bank of Am., N.A.*, 143 So. 3d at 448 in which the court reversed in part and remanded for a recalculation of damages based on the payment history in evidence. It instructed the trial court to strike property inspection fees that were not reflected in the bank's exhibit. Thus, the *Wagner* court did not permit the bank to submit additional evidence and expressly limited the judgment to the amounts shown in the records already in evidence.

Ayers v. Thompson, 536 So. 2d 1151 (Fla. 1st DCA 1988), also cited by the Bank, likewise remanded with instructions for the trial court to decrease the compensatory damages awarded to the amount shown by the evidence or to include findings that would justify a punitive award. Again, the court did not invite or permit additional evidence. So too, in the Bank's case of *Buss Aluminum Products, Inc. v. Alumflo, Inc.*, 722 So. 2d 269 (Fla. 2d DCA 1998), the court remanded with instructions to the trial court to determine what portion of its

[32] Answer Brief, p. 35.

damage award was attributable to the single breach of warranty count that survived the appeal. Once again, the plaintiff was not awarded a retrial for having failed to prove its damages at trial.

Following these cases here (and presuming that the Bank had satisfied conditions precedent) would mean remanding with instructions for the entry of zero damages (except perhaps the $1,200 in attorneys' fees) since none of the amounts are supported by the payment history in evidence.

CONCLUSION

The Court should reverse and remand with instructions to enter an involuntary dismissal in favor of the Homeowners.

Dated: January 6, 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 January 6, 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 January 6, 2015.

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