In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

CITIMORTGAGE, INC., et al.,

Appellees.

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

REPLY BRIEF OF APPELLANTS

Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

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Key:

- The Appellee, CitiMortgage, Inc., will be referred to as "the Bank."
- The Appellants, [redacted] and [redacted] Valdes, will be referred to as "the Homeowners."
- Nicole Lopez, the Bank's witness at trial, will be referred to as "Lopez."
- The Transcript of the trial held on May 15, 2014 will be referred to as "R. Supp. ___" followed by the supplemental record page number.

SUMMARY OF THE REPLY ARGUMENT

The Bank does not dispute that the trial court improperly struck the Homeowners' motion to dismiss and refused them leave to amend their *pro-se* answer. Instead, it argues that this error was "harmless." However, the harmless error standard was not met here because the Bank did not prove that there was no reasonable possibility that the error contributed to the judgment.

Moreover, the Bank failed to prove a *prima facie* case for foreclosure on multiple grounds. First, it failed to prove its standing where its witness's guesses and the Bank's other exhibits were insufficient evidence that it owned and held the note on the day the lawsuit was filed. Additionally, it failed to prove, by competent and substantial evidence, that it sent the Homeowners a default notice as required by the mortgage—and the very authority the Bank relies upon in its brief supports this position. The Bank also asks the Court to take a position that is contrary to Florida law—that submission of affidavits is sufficient to constitute an evidentiary hearing prior to awarding attorney's fees. Finally, the Bank's witness was wholly incompetent to lay the business records exception while the rule of completeness required production of the full payment history.

Therefore, the judgment should be reversed and the case dismissed or, alternatively, a new trial should be ordered.

ARGUMENT

I. The Bank failed to prove that there was no reasonable possibility that the trial court's error in striking their motion to dismiss and denying amendment contributed to the judgment.

The Bank does not dispute that its amended complaint superseded its original complaint and that the trial court should have liberally allowed the Homeowners to amend their *pro-se* answer.[1] Rather, it argues that the trial court's error in refusing to permit error was "harmless." But, as the Florida Supreme Court recently held, this test required that the Bank (as the beneficiary of the error) prove that there was no reasonable possibility that the error contributed to the judgment:

> To test for harmless error, the beneficiary of the error has the burden to prove that the error complained of did not contribute to the verdict. Alternatively stated, the beneficiary of the error must prove that there is no reasonable possibility that the error contributed to the verdict.

Special v. West Boca Medical Center, __ So. 3d __, 2014 WL 5856384, at * 3 (Fla. Nov. 13, 2014). *See also Hurtado v. Desouza*, __ So. 3d __, 2015 WL 1727851, at * 1 (Fla. 4th DCA April 15, 2015 ("Applying the new standard, we cannot say that the admission of this evidence was harmless because the plaintiff failed to 'prove that the error complained of did not contribute to the verdict.'").

[1] Answer Brief, p. 13.

The Bank advances a simplistic two-part argument in support of its harmless error proposition, with the first part asserting that it proved a *prima facie* case for foreclosure and the second arguing that the Homeowners failed to submit any evidence in support of their proposed affirmative defenses.[2] Putting aside the fact that the Bank did not prove a *prima facie* case for foreclosure, the Bank's argument fails to appreciate that the Homeowners did not submit any evidence because the trial court refused to allow Mr. [redacted] to testify.[3] In fact, the trial court did not even want to hear the Homeowners' proffer of their affirmative defenses[4] and therefore this was made, pursuant to the court's instructions, outside the presence of the court.[5] Thus, the error was not "harmless" and the judgment should be reversed.

[2] Answer Brief, p. 14.

[3] R. Supp. 92.

[4] R. Supp. 93.

[5] R. Supp. 99.

II. The Bank failed to prove a *prima facie* case for foreclosure.

A. There was no competent, substantial evidence that the Bank had standing to sue at the inception of the action.

Lopez's guesses do not establish that the allonge was affixed prior to the day the lawsuit was filed.

The Bank admits that the allonge affixed to the note tendered at trial contains a date of August 14, 1995 next to the words "NOTE DATED" and explicitly states that it purported to be an allonge to a note dated August 14, 1995.[6] The Bank then inexplicably argues that the Bank held the note on the day the lawsuit was filed through Lopez's testimony that, "to the best of [her] knowledge," the allonge was attached to the note on August 14, 1995.[7]

Despite the obvious discrepancies between the witness's testimony and what is reflected on the face of the allonge (i.e. that the allonge only refers, albeit incorrectly, to the date the note was executed not the day the allonge was affixed), there is a more serious flaw with Lopez's testimony: it is based on assumptions and guesses. And it is black letter law that guesses and assumptions are not competent, substantial evidence of anything. *Holt v. Calchas, LLC*, 155 So. 3d 499, 507 (Fla. 4th DCA 2015) (testimony that borrower did not recall receiving the acceleration

[6] Answer Brief, p. 3.

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

notice "was neither evidence that she did receive, nor did not receive, the notice; her testimony was simply that she did not recall if she received the notice"); *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.").

Lopez's testimony therefore failed to establish the Bank's status as the holder of the note on the day the lawsuit was filed.[8]

The assignments and merger agreements also do not establish the Bank's standing.

The Bank also argues that the assignments and merger agreements "establish [that the Bank] acquired the note and mortgage almost five years before it filed the original complaint."[9] But these documents do not establish that the loan was transferred to the Bank. At best, these documents establish that the Bank merged with ABN Amro—without any explanation regarding what, if any, assets ABN Amro had at the time of the merger.

[8] The Bank conflates the Homeowners' argument regarding the August 14, 1995 date on the allonge into an argument regarding whether the endorsement was executed in 1995 or 1985. (Answer Brief, p. 18). This is not what the Homeowners argued. Rather, the Homeowners asserted that this date incorrectly references the date the note was executed – not the day the endorsement was created.

[9] Answer Brief, p. 17.

But even more telling is the Bank's own concession in its brief that the allonge reflects a purchase by JPMorgan Chase from the receiver of the original lender.[10] If, as the Bank suggests, JPMorgan Chase purchased the note and mortgage from the original lender, then the original lender could have never assigned the loan to a different entity in the first instance. And if this is true then the Bank cannot claim standing through the assignments and merger agreements.

B. There was no competent, substantial evidence that the Bank mailed the notice of default.

The authority the Bank cites supports the Homeowners' position.

The Bank argues that "Lopez's testimony and the admittance of the breach letter into evidence created a rebuttable presumption the letter was mailed and received."[11] But it fails to note that, in the case it cites for this proposition, *Jelic v. CitiMortgage, Inc.*, 150 So. 3d 1223 (Fla. 4th DCA 2014), the lender not only submitted an affidavit averring that the notice was mailed, but it also attached to the affidavit the notice and the documents which proved that the notice was sent. *Id*. at 1224.

[10] Answer Brief, p. 20.

[11] Answer Brief, p. 20.

In contrast here, Lopez admitted that she did not have any document which proved that the notice was sent.[12] And despite the Bank's claims to the contrary, this document was not the Bank's "entire computer system" but merely a "mark" in the system indicating that the notice was generated and mailed.[13] Clearly, this is a document the Bank could have brought to trial if it wanted to.

The proper remedy on remand is dismissal.

In order for there to be sufficient evidence to support the judgment, it necessarily follows that the Bank sent the Homeowners a sufficient Paragraph 22 notice. Short of this, involuntary dismissal must be entered on remand. *Holt v. Calchas, LLC*, 155 So. 3d at 507; *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 2015 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.

[12] R. Supp. 91.

[13] *Id.*

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.

C. An affidavit of attorney's fees cannot be substituted as testimony over objection.

The Bank also asks this Court to take a position which is contrary to Florida law—that an "affidavit" is "testimony" sufficient to constitute an evidentiary hearing.[14] In fact, the law is clear that the submission of an affidavit is insufficient to constitute a full evidentiary hearing. *Davis v. National Collegiate Student Loan Trust 2004-2*, 134 So. 3d 1065, 1065 (Fla. 4th DCA 2013) ("neither the submission of affidavits nor argument is sufficient to constitute an evidentiary hearing."). *See also Boca Stel 2, LLC v. JPMorgan Chase Bank Nat. Ass'n*, 159 So. 3d 140, 142 (Fla. 5th DCA 2014); *Avi-Isaac v. Wells Fargo Bank, NA*, 59 So. 3d 174, 177 (Fla. 2d DCA 2011); *Sperdute v. Household Realty Corp.*, 585 So. 2d 1168, 1169 (Fla. 4th DCA 1991) ("[A]n evidentiary hearing involves taking evidence. Neither the submission of affidavits nor argument of counsel is sufficient to constitute an evidentiary hearing.").

Therefore, the submission of the Bank's fee affidavits over the Homeowners' objection was insufficient to constitute an evidentiary hearing on the issue of attorney's fees. There is thus insufficient evidence to support this portion of the judgment.

[14] Answer Brief, pp. 23-24.

D. The Bank's documents should have been excluded from evidence.

Lopez was not an "other qualified witness."

The Bank cites to *Cooper v. State*, 45 So. 3d 490 (Fla. 4th DCA 2010) for the proposition that Lopez was "well enough acquainted" to testify about the documents the Bank introduced at trial. But Lopez bears no resemblance to the witness in *Cooper*. The "otherwise qualified witness" in that case was a Verizon store manager for multiple retail stores, with actual experience (not just training for purposes of providing testimony) in data servicing, and records processing, as well as customer, billing, and technical support. *Cooper*, therefore, validates the Homeowners' position, because, unlike Lopez, the witness introducing the phone records in *Cooper* testified about his own company's records and gained his familiarity with the records through business-related (not litigation-related) duties.

In reality, the "well enough acquainted" standard is a rigorous one that originated with the Fifth District's opinion in *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592 (Fla. 5th DCA 1980), which held that an adjuster from one insurance company was not qualified to testify about the business practices of another insurance company. *Alexander* cited to *Mastan Co. v. Am. Custom Homes*, Inc., 214 So. 2d 103 (Fla. 2d DCA 1968) which upheld the exclusion of bookkeeping

records because the witness was not qualified, despite being one of three bookkeepers making entries. *Alexander* does not suggest, as the Bank claims, that a witness may meet the "well enough acquainted" standard simply because she provided general testimony that she was familiar with the Bank's "practices" for loan servicing. In fact, it suggests the opposite.

But even if Lopez's parroted testimony regarding the Bank's alleged "practices" was sufficient to qualify Lopez as an "other qualified witness," the mere existence of "practices" is not evidence of a "routine practice." There must be evidence that the intent expressed in a "practice" is actually implemented and enforced such that it has become an established custom or habit. *See Shands Teaching Hosp. & Clinics, Inc. v. Dunn*, 977 So. 2d 594, 597 (Fla. 1st DCA 2007); *Hartford Acc. & Indem. Co. v. Ocha*, 472 So. 2d 1338, 1340 (Fla. 4th DCA 1985); *Nationwide Mut. Ins. Co. v. Jones*, 414 So. 2d 1169, 1171 (Fla. 5th DCA 1982).[15]

Fairness required the full payment history.

The Bank also relies on the Fourth District's decision in *Bank of New York v. Calloway*, 157 So. 3d 1064 (Fla. 4th DCA 2015) for the proposition that "prior

[15] For this same reason, Lopez's testimony regarding the Bank's practice of mailing default notices was insufficient to prove the default notice was mailed – especially since she admitted that she did not have any record with her indicating that the alleged "practice" had been implemented and enforced. (R. Supp. 91).

servicer's records" are admissible—but this decision actually supports the Homeowners' argument that the rule of completeness required that the Bank produce the full payment history.

Indeed, as the Fourth District noted in *Calloway*, documents that are created by a previous servicer do not come with the traditional hallmarks of "reliability" a normal record might have. *Id*. at 1071. And mere reliance by the business adopting the records is insufficient by itself to establish trustworthiness. *Id*. There must be evidence of a continuing business relationship between the two entities (*Id*.)—which is not present here since at least one of the prior servicers (Washington Mutual, according to the allonge) was a failed bank.

Here, the Bank never established that it relied upon the accuracy of the prior servicers' records for a business purpose—or any purpose whatsoever. And without this business reliance—as opposed to a litigation reliance—there is no "substantial incentive for accuracy" that is free from any litigation self-interest as required by *Calloway.*

Moreover, Lopez failed to provide any specific testimony that the Bank verified the "archived" payment history for accuracy after receiving it from the prior servicer. *Cf. WAMCO XXVIII, Ltd. v. Integrated Electronic Environments, Inc.*, 903 So. 2d 230, 233 (Fla. 2d DCA 2005) (witness personally verified

accuracy of prior servicer's records before boarding information into current servicer's records); *Le v. U.S. Bank*, __ So. 3d __, 2015 WL 2414456 * 1 (Fla. 5th DCA May 22, 2015) (specific testimony regarding current servicer's verification process is sufficient evidence of the trustworthiness of the prior servicer's records.).

Therefore, not only did fairness require that the Bank produced the entire payment history—but the law also required that Lopez was sufficiently competent to lay a predicate for admission of the prior servicers' payment histories. But since she was not, the "archived" payment history was simply a document incorporated into the Bank's records. *See, Landmark American Insurance Company v. Pin-Pon Corp.*, 155 So. 3d 432, 442 (Fla. 4th DCA 2015) (documents which were merely incorporated into a subsequent business's records do not fall within the business records exception).

Nor does the Bank's argument that the Homeowners "waived" this argument pass muster.[16] Without citation to any authority, the Bank contends a waiver occurred because the trial court offered a "hearing" and a "deposition" on the final judgment figures and the Homeowners failed to seek rehearing on this issue. Not only is there no legal authority for this proposition, but it also wrongly insinuates

[16] Answer Brief, p. 31.

that the Homeowners had the burden of disproving the amounts the Bank claimed owed to it. This is plainly incorrect since the amount of damages was a *prima facie* element the Bank was required to prove. *Ernest v. Carter*, 368 So. 2d 428, 429 (Fla. 2d DCA 1979).

But really, the Bank has taken the quote out of context. Immediately after "offering" a hearing and deposition, the court said "[i]n the meantime, it's not going to stall a writ of possession and all that stuff. So let's go."[17] Because this comment was, on its face, procedurally nonsensical (apparently referring to discovery and a hearing to determine the amount of the judgment after the home was auctioned off), the "offer" was at best, purely rhetorical. Thus, there was nothing for the Homeowners to "waive."

[17] R. Supp. 82. Notably, this comment indicates that, even before the evidence was closed and argument presented, the trial court had already decided that a judgment was going to be entered against the Homeowners and their property sold.

CONCLUSION

The Court should reverse the judgment and remand for entry of dismissal of the case or, in the alternative, with instructions that the trial court vacate its orders striking the Homeowners' motion to dismiss and motion for leave to amend their *pro-se* answer.

Dated: June 11, 2015

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: 
THOMAS ERSKINE ICE
Florida Bar No. 0521655

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.

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this June 11, 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 June 11, 2015.

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

SERVICE LIST

Nancy M. Wallace, Esq.
Akerman LLP
106 East College Avenue, Suite 1200
Tallahassee, FL 32301
nancy.wallace@akerman.com
Counsel for Appellee

Kristen M. Fiore, Esq.
Akerman LLP
106 East College Avenue, Suite 1200
Tallahassee, FL 32301
kristen.fiore@akerman.com
elisa.miller@akerman.com
michele.rowe@akerman.com
Counsel for Appellee

Willam P. Heller, Esq.
Akerman LLP
Las Olas Centre II, Suite 1600
350 East Las Olas Boulevard
Fort Lauderdale, FL 33301
william.heller@akerman.com
lorraine.corsaro@akerman.com
Counsel for Appellee