In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

THE BANK OF NEW YORK MELLON, et al.,

Appellees.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Key:

- The Appellee, the Bank of New York Mellon f/k/a the Bank of New York, as trustee for the Certificate holders of CWABS, Inc., Asset-Backed Certificates, Series 2007-1, will be referred to as "the Bank."
- The Appellant, [redacted] will be referred to as "the Owner."
- Alcira Chow, the mortgagor, will be referred to as "the Borrower."
- Specialized Loan Servicing will be referred to as "the Servicer."
- Giovanni Amaya, the Bank's witness at trial, will be referred to as "Amaya."
- The Transcript of the trial held on June 26, 2014 will be referred to as "T. ___" followed by the transcript page number.

SUMMARY OF THE REPLY ARGUMENT

The Bank does not dispute that its witness failed to lay the business records exception for introduction of the payment history at trial or that he was even qualified to do so in the first place. Instead, it argues that there is competent, substantial evidence to support the principal and interest award simply by looking at the note and default notice admitted into evidence. But the Bank's own "simple math" fails to reconcile this amount forcing the Bank to concede in its brief that reference to the payment history is necessary. And this error was also not harmless because the Bank did not prove (or even attempt to show) that there was no reasonable possibility that the error contributed to the judgment.

Moreover, the Bank lacked standing at inception. The only evidence it offered to prove that it was in possession of the note on the day the lawsuit was filed was an inadmissible hearsay document. But even if it had been admissible, the document proved that a different entity was in possession of the note. Nor does the fact that a copy of the note attached to the complaint prove the Bank's standing since that pleading does not prove the Bank's possession of the original note on the day the lawsuit was filed.

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

ARGUMENT

I. There is no competent, substantial evidence to support the damages award.

The Bank does not dispute that it failed to lay the business records exception for admission of the payment history (Exhibit 4) or that Amaya was not even qualified to lay the record's exception in the first place. Rather, it asserts that the error was "harmless" because the final judgment amounts were somehow supported by other evidence admitted at trial.[1] But, since this assertion is belied by the record evidence and the Bank's own "simple math," there is no competent, substantial evidence which supports the damages award.

Without the payment history, there is no competent, substantial evidence of the Bank's damages.

The Bank attempts to establish the amounts due and owing through admission of the note, the default letter, and Amaya's testimony (although it never cites to any testimony the witness actually gave). There are multiple fallacies to this argument.

First, the Bank's own brief explains why a "simple amortization" of the loan is insufficient to establish the amount of principal owed. Indeed, after performing this so-called amortization, the Bank admits that its math does not hold weight and

[1] Answer Brief, p. 12.

then actually points to the payment history to explain the variance in its numbers.[2] In other words, without the payment history the proper amount of principal cannot be determined with exactness.

And this makes sense because the Bank's argument presumes—without any evidentiary support in the record—that the Borrower only made the minimum principal and interest payment, each month for seven months. But since the Bank's own admission in its brief clearly refutes this premise, a simple amortization cannot establish the amount of principal owed on the note. And not only does the Bank's math fail it when determining principal, but its math also fails to establish the accrued interest since that award would necessarily be a function of its incorrect principal award.

But the Bank's problems run deeper than simple math since its argument is predicated on establishing a default through the default notice. This notice, however, does not actually specify a date of default. Rather, it asserts that the Borrower's "loan is in serious default because the required payments have not been made."[3] The notice does not explicitly state that the "required payment" the Borrower did not make was the September 1, 2007 monthly payment. In fact,

[2] Answer Brief, p. 13, n. 3.

[3] Default Notice, Exhibit 3 (R. 285).

when identifying this document, Amaya testified that it was merely a notice which informed the Borrower that the loan was past due for $9,098.18.[4]

Nevertheless, even if the default notice could establish a September 1, 2007 default, it cannot establish that the Borrower did not cure the default. Stated differently, all the notice establishes (at best) is that, as of October 3, 2007, the Borrower owed $9,098.18 on the loan. It does not establish that the Borrower never paid this amount. Rather, the Bank relied upon the payment history for this purported fact:

> MR DELEON [the Bank's lawyer]: Mr. Amaya, I'm handing you documents, here, that have been marked as Plaintiff's 1-D for identification. Can you tell the Court what those documents are, please?
>
> AMAYA: There's a copy of the payment history of the loan in question, showing that the last payment was received on 8/21/2007, applied for 8/1/2007. No payments were made after time. The loan is still in default.[5]

In short, the Bank's argument asks that the Court find competent evidence to support the principal and interest award through guesses and assumptions. But 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 notice

[4] T. 15.

[5] T. 16.

"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.").

And just as important, as the Bank appears to concede in its brief, none of the aforementioned documents (including the payment history itself) support any of the other damage awards, including the hazard insurance award; the flood insurance award; or the taxes award. Thus, there is no evidence whatsoever—competent or otherwise—supporting these damages.

The error was not harmless because the Bank failed to prove that there was no reasonable possibility that the error contributed to the judgment.

The Bank's argument that the trial court's error was "harmless" also fails because the error does not withstand the harmless error test (which the Bank does not even attempt to do). And 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.'").

And while the Bank does not even attempt to meet its burden under the test, the record clearly reveals that the principal and interest awards were predicated on the payment history since Amaya expressly testified so:

> MR DELEON [the Bank's lawyer]: And so, the judgment that we're going to ask the Court to enter today in principal of $618,527.97, and a grand total of $1,126,700.50, is that supported by the payment history?
>
> AMAYA: Yes it is.[6]

The Bank also wrongly insinuates that the Owner had the burden of disputing the amounts the Bank claimed owed to it.[7] 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).

Thus, the error was not "harmless" and the judgment should be reversed.

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[6] T. 16-17

[7] Answer Brief, p. 14.

Involuntary dismissal is the proper remedy on remand.

Finally, the Bank argues that if reversed, the case should be remanded for judgment in its favor the "amount of the damages proven at trial."[8] However, since the Bank clearly failed to establish an evidentiary basis for the damages awarded at trial, reversal for entry of dismissal is warranted. *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 153 So. 3d 280, 283 (Fla. 2d DCA 2014) ("[A]ppellate courts do not generally provide parties with an opportunity to retry their case upon a failure of proof." [internal quotation omitted]).

II. The Bank failed to prove it had standing at the inception of the case.

A. The collateral routing history was neither admissible nor competent evidence of the Bank's standing.

The Bank's reliance on Calloway supports the Owner's position.

The Bank 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 the collateral routing history was an admissible document—but this decision actually supports the Owner's argument that this document should have been excluded from evidence.

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

[8] *Id*. at 15.

normal business record might have. *Id*. at 1071. *Calloway* goes on to say that 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 there was no testimony that the Servicer had a continuing business relationship with the Bank of America (the prior servicer). But even more fundamentally, there was not even testimony that the Servicer "relied" on Bank of America's records in the first instance.

Additionally, on the same day that the Fourth District decided *Calloway* it also held that documents which were merely incorporated into a subsequent business's records do not fall within the business records exception. *Landmark American Insurance Company v. Pin-Pon Corp.*, 155 So. 3d 432, 442 (Fla. 4th DCA 2015). But the Servicer never established that it relied upon the accuracy of Bank of America's records for a business purpose (or, again, that it relied on the accuracy of the records for any purpose). 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* and *Pin Pon*.

Moreover, Amaya failed to provide any testimony that the Servicer verified the collateral routing history for accuracy after receiving it from Bank of America.

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 sufficient evidence of the trustworthiness of the prior servicer's records.). Rather, Amaya gave general testimony that this document was "boarded" onto his employer's records—without explaining what, if anything, this boarding process consisted of.[9] As such, the collateral routing history was simply a document "uploaded"[10] (i.e. incorporated) into the Servicer's records. It should have been excluded from evidence.

Even if admissible, the collateral routing history proves a party other than the Bank had standing to sue.

But even if it had been admissible, the collateral routing history cannot be considered competent, substantial evidence of the Bank's standing because, if it proves anything, it is that Bank of America was in possession of the note on the day the lawsuit was filed. And since Bank of America (rather than the Bank) was in possession of the note on the day the lawsuit was filed, it was the party who had

[9] T. 42-44.

[10] T. 44.

standing to sue. *Tremblay v. U.S. Bank, N.A.*, __ So. 3d __, 2015 WL 2089069, at * 1 (Fla. 4th DCA May 6, 2015) ("…Bank's attachment of a copy of the note with a blank indorsement was insufficient to establish standing because Bank's only witness testified that his employer—the servicer—had been the holder of the note since August of 2005. Based on this testimony, the servicer was the proper party to initiate the action, not Bank.").[11]

There was no other admissible evidence on the issue of standing at inception.

Additionally, the Bank's reference to Amaya's testimony and the power of attorney (Exhibit 6) to support the Bank's standing at inception[12] is also insufficient. First, the testimony the Bank references was testimony about the "corrective" assignment of mortgage.[13] But the Bank fails to mention that its attorney expressly withdrew that document from evidence and asserted that the

[11] The Bank also did not prove (or even try to prove) that Bank of America was its agent so that the Bank would have been in constructive possession of the note on the day the lawsuit was filed. *Cf.* § 673.2011, Fla. Stat. Ann., cmt. ("Negotiation always requires a change in possession of the instrument because nobody can be a holder without possessing the instrument, either directly or through an agent.) (emphasis added).

[12] Answer Brief, p. 20.

[13] T. 27; 30.

Bank would not be relying on it.[14] Thus, Amaya's testimony about this document was rank hearsay. *See Sas v. Federal National Mortgage Association*, 112 So. 3d 778 (Fla. 2d DCA 2013).

Nor does the power of attorney establish the Bank's standing at inception. At best, this document establishes that years after the lawsuit was filed the Servicer had authority to act on the Bank's behalf with respect to certain trusts. It does not indicate that the subject note and mortgage were a part of any of those trusts or if they were, when they became a part. This document was therefore also insufficient to establish the Bank's standing. *Russell v. Aurora Loan Services, LLC*, __ So. 3d __, 2015 WL 1874456, at * 3 (Fla. 2d DCA April 24, 2015) (power of attorney executed years after lawsuit was filed which does not reference subject loan insufficient to establish standing to sue at inception).

B. The copy of the note attached to the complaint does not establish that the Bank had standing on the day the lawsuit was filed.

The Bank relies heavily on a copy of the note attached to the complaint to establish its standing at the inception of the action.[15] Its argument is unavailing.

Indeed, the Bank's burden at trial was to prove not only that the note was endorsed in blank, but that either it (or its agent) was in physical possession of the

[14] T. 28.

[15] Answer Brief, pp. 15-19.

original note. *Kiefert v. Nationstar Mortgage, LLC*, 153 So. 3d 351, 352 (Fla. 1st DCA 2014); *Tremblay*, at *1; § 673.2011(2) Fla. Stat. Leaving aside that attachments to complaints are not evidence,[16] the Bank is asking this court to leap over a gap in its logic—to simply assume that the Bank itself made the copy from an original in its possession. But there are many ways that the Bank could come by a photocopy, which is why transfer of an original instrument is required for the recipient to be entitled to enforce its terms.[17] This Court should reject the Bank's proffer of a photocopy of a note as evidence—just as the Bank itself would reject an attempt to pay this debt with a photocopy of a check.

The Bank's reliance on *American Home Mortgage Servicing, Inc. v. Bednarek*, 132 So. 3d 1222 (Fla. 2d DCA 2014) is misplaced. There, the plaintiff introduced the original note at trial and provided testimony tracing the history of the loan from its inception until the day the plaintiff received the documents

[16] *See e.g. 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.").

[17] The Florida legislature thought proof of possession of the original note was so important it implemented the certification requirements found in § 702.015, Fla. Stat. for complaints filed after July 1, 2013.

necessary to proceed with foreclosure. *Id*. at 1223. The Second District concluded that since the plaintiff possessed the note it had standing to sue. *Id*.

Here, however, there was no testimony or evidence tracing the loan from its inception until the day the Bank received the documents necessary to proceed with foreclosure. Rather, the evidence established that the note was never in the Bank's physical possession (since the collateral routing history only shows how the note went in and out of Bank of America's possession) nor was there any evidence or testimony that Bank of America held the note on behalf of the Bank.

C. The proper remedy on remand is involuntary dismissal.

Where a foreclosing plaintiff fails to establish its standing at the inception of the lawsuit, reversal of the final judgment and entry of an involuntary dismissal on remand is appropriate. *See Joseph v. BAC Home Loans Servicing, LP*, 155 So. 3d 444 (Fla. 4th DCA 2015); *Fischer v. U.S. Bank National Association*, 152 So. 3d 1289 (Fla. 4th DCA 2015); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So. 3d 152 (Fla. 1st DCA 2014); *Correa v. U.S. Bank, N.A.*, 118 So. 3d 952, 955 (Fla. 2d DCA 2013); *cf. Guerrero v. Chase Home Fin., LLC*, 83 So. 3d 970, 973 (Fla. 3d DCA 2012) (remanding with specific directions to allow the plaintiff to properly reestablish the note upon a proper pleading—but only because the evidence

"confirmed the current owner/holder's entitlement to foreclose the mortgage attached to the complaint").

Therefore, on remand, the trial court should be instructed to enter an involuntary dismissal.

CONCLUSION

The Court should reverse the judgment and remand for entry of dismissal of the case.

Dated: May 26, 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 May 26, 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 May 26, 2015.

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