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

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Key:

- The Appellee, CitiMortgage, Inc. will be referred to as "the Bank."
- The Appellants, [redacted] and [redacted] will be referred to collectively as "the Homeowners."
- Kathy Subosky, the Bank's witness at trial, will be referred to as "Subosky."
- The Transcript of the trial held on July 30, 2014 will be referred to as "T. ___" followed by the transcript page number.

SUMMARY OF THE ARGUMENT

The Bank's argument hinges on Subosky's bare-bones testimony that Mr. made a phone call to the Bank asserting that a "P.O. Box was much easier" and that the notice was mailed first class mail. But Subosky was wholly unqualified to give this testimony because she had no personal knowledge of the facts other than what she read in her "business records"—records she either did not introduce or for which she failed to lay the predicate.

However, even if it had been admissible, this testimony does not provide competent, substantial evidence that the Bank complied with the mortgage's notice provisions. All it established was that the Bank sent a notice to a P.O. Box and then, months later, Mr. made a phone call indicating that a P.O. Box was easier.

Additionally, the Bank's argument that it "substantially complied" with the notice provisions fails as a matter of law since this is an argument the law cannot credit. Nor has the Bank shown that compliance with the notice provisions would have been futile.

And since it is black letter law that failure to comply with the notice provisions requires dismissal of the case, the judgment should be reversed with instructions to enter an involuntary dismissal.

ARGUMENT

❖ The Bank did not establish a *prima facie* case for foreclosure.

A. Subosky's testimony about the default notice was entirely inadmissible.

The Bank asserts that Subosky could testify about the Homeowners' alleged change of notice address because she reviewed certain "business records"[1]—and then fails to mention that testimony regarding the contents of those records is inadmissible until the record itself is admitted into evidence. This is exactly what the Fifth District held in *Webster v. Chase Home Finance, LLC,* 155 So. 3d 1219 (Fla. 5th DCA 2015) and is precisely why the trial court erred when it initially allowed Subosky to testify about the alleged change over the Homeowners' hearsay objection.[2]

Further, the comment log was also inadmissible to "bolster" Subosky's testimony[3] because hearsay cannot be used to bolster trial testimony. *Linn v. Fossum*, 946 So. 2d 1032 (Fla. 2006) (expert witnesses cannot testify on direct examination that they relied on hearsay opinions of other experts in forming their opinions); *Taylor v. State*, 855 So. 2d 1, 22-23 (Fla. 2003) (noting that prior

[1] Answer Brief, p. 12.

[2] T. 18-19.

[3] Answer Brief, p. 12.

consistent statements are generally inadmissible to corroborate or bolster a witness's trial testimony because such statements are usually hearsay). Nor was the comment log admissible under the business records exception since Subosky did not provide any testimony regarding the five requirements for the exception which are:

1) The hearsay document was made at or near the time of the event;
2) The hearsay document was made by or from information transmitted by a person with knowledge;
3) The hearsay document was kept in the ordinary course of a regularly conducted business activity;
4) It was a regular practice of that business to make such the hearsay document; and
5) The circumstances do not show a lack of trustworthiness.

§ 90.803(6), Fla. Stat.; *Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008).

And for these same reasons, Subosky's testimony that the notice was allegedly mailed by first class mail[4] on the day it was allegedly written[5] is likewise unavailing. The Bank argues that Subosky could testify to "any matter within her personal knowledge…"[6] but then fails to explain how these facts were within her

[4] T. 45.

[5] T. 26.

[6] Answer Brief, p. 17.

personal knowledge. The implication, then, is that her "personal knowledge" was based on her review of the Bank's records.[7] But, again, she failed to introduce those records or show how she was qualified to testify to them.

Finally, the Bank's assertion that the "regenerated replica" was admissible as a "duplicate" under §90.953, Fla. Stat. is misplaced. This is because fashioning likenesses of writings by other than photographic or electrophotographic (xerographic) means are not within the definition of a duplicate. *See O'Neal v. Bolling*, 409 So. 2d 1171, 1172 (Fla. 3d DCA 1982) (typed up likenesses of

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[7] Indeed, this appears to be exactly what Subosky testified to at trial when asked whether she had any record whether the notice was mailed:

> MR. ACKLEY [Homeowners' attorney]: Do you have any record of the mailing of this letter?
>
> MS. HILLIS [Bank's lawyer]: Asked and answered.
>
> THE COURT: Go ahead and answer that question.
>
> THE WITNESS: Once it shows in the system, it's mailed; that's my record?
>
> MR. ACKLEY: When [you] say once it shows in the system it's mailed, you're saying you rely on the system to mail it; is that correct?
>
> THE WITNESS: That not what I said. Once I see in the system; it's been mailed.

T. 23.

promissory notes were not duplicates under 90.951(4), Fla. Stat.). Thus, Subosky's testimony regarding the default notice was inadmissible.

B. There is no competent, substantial evidence which would support a finding that the Bank complied with the mortgage's notice provisions.

"Competent, substantial evidence is defined as such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred." *KEA v. State*, 802 So. 2d 410 (Fla. 3d DCA 2001). However, there is no evidence in the record which would establish a substantial basis of fact from which the Court could reasonably infer that the Homeowners gave the Bank notice of an alternate mailing address at any time before the notice was allegedly sent.

Initially, the Bank argues that "the notation next to the P.O. Box entry reflecting a date of January 21, 2011 simply indicates the date of the notation…It does not mean this address change was only valid for that date."[8] However, Subosky testified that the notice change was a result of a phone call[9] and that this call was reflected by the collection note.[10] At best, the only reasonable inference

[8] Answer Brief, p. 11. In support of this argument, the Bank cites to page 47 of the trial transcript. But that testimony was recross examination explaining that: 1) the collection note did not reflect a specific address; and 2) the collection note was specific to one day—January 21, 2011. (T. 47).

[9] T. 41.

[10] T. 45-46.

which could be inferred from the evidence was that on January 21, 2011 (months after the default notice was allegedly mailed) the Homeowners called the bank and said that a P.O. Box was "much easier."

The only competent evidence in the record regarding the substitute notice address, then, was Mr. [redacted] testimony that he never authorized any servicer to send notices to any address other than the property address.[11] And since this is the only testimony on the point, the Bank's argument that the Homeowners waived "any right to demand [the Bank] prove…notice was given in writing…"[12] is without merit. And there is likewise no support in the record that the sole beneficiary of the written-notice requirement was the Bank.[13] Clearly, the written-notice requirement benefitted both parties since written notice of change of address is tangible evidence that the notice address had been changed.

Nor is mere "substantial compliance" with the mortgage's notice provisions sufficient. *Samaroo v. Wells Fargo*, 137 So. 3d 1127, 1129 (Fla. 5th DCA 2014) ("Wells Fargo contends that it 'substantially' complied with the contractual notice

[11] T. 52.

[12] Answer Brief, p. 13.

[13] Answer Brief, p. 14.

requirements, an argument we cannot credit.").[14] But since the Bank failed to prove compliance (substantial or otherwise) with the mortgage's notice provisions the Homeowners' motion for involuntary dismissal should have been granted.

C. There is no evidence to support the Bank's futility argument, which was, in any event, waived.

In *Ramos v. CitiMortgage, Inc*, 146 So. 3d 126 (Fla. 3d DCA 2014), a decision decided on nearly the same facts involving the Bank, the Bank argued (as it does here)[15] that it should have been excused from complying with the mortgage's notice provisions because, if the borrowers had been unable to meet their monthly payment obligation, then they would not have been able to pay the cure amount necessary to bring the loan current. *Id*. at 129. This Court rejected that argument on the record before it, concluding that it was unable to conclude "as a matter of law, that sending the required default notice to the Ramoses as required by the mortgage would have been a futile gesture." *Id*. The Court should similarly

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[14] The Bank cites *U.S. Bank Nat'l Ass'n v. Busquests*, 135 So. 3d 488 (Fla. 2d DCA 2014) for the proposition that substantial compliance "applies in the mortgage foreclosure context." (Answer Brief, p. 15). But this decision never uses the term "substantial compliance." Rather, it indicates that the language in the Paragraph 22 notice at issue "adequately describe[d] the nature of the proceedings" and that the use of the word "may" when explaining that the borrower had the right to reinstate was not fatal because reinstatement was subject the provisions of Paragraph 19 of the mortgage. *Busquests*, 135 So. 3d at 490.

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

reject the Bank's futility argument here, especially in light of Mr. [redacted] testimony that he actually attempted to make payments which the Bank refused to accept.[16]

Moreover, the entire point of a final warning is that it provides the incentive for extraordinary measures that might not otherwise be taken—the appeals to family and friends, the selling of other, more liquid assets, etc. The failure to make individual payments can never be taken as an admission that the money to cure the default could not have been raised on an emergency basis had the notice been sent and received.

Indeed, the notice itself provides that the Homeowners were eligible for homeownership counseling and provided a phone number the Homeowners could call "to discuss the circumstances of the default with one of [the Bank's] loan counselors."[17] Unless this language was inserted by the Bank to give the Homeowners false hope, there is nothing in the record to indicate that sending the notice as required by the mortgage would have been futile.

Additionally, the Bank waived this futility argument because it did not assert it as an avoidance to the Homeowners' condition precedent affirmative defense in

[16] T. 51-52.

[17] Demand Notice, Exhibit 4 (Exh. R. 277).

its reply.[18] And when a party asserting affirmative relief seeks to avoid an affirmative defense (like the Bank apparently intends to do on appeal), it must file a reply. Fla. R. Civ. P. 1.100(a). In this sense, a reply is thought of as an affirmative defense to an affirmative defense. *Crosslands Properties, Inc. v. Univest Crossland Trace, Ltd.*, 516 So. 2d 320, 322 (Fla. 2d DCA 1987); *Hertz Commercial Leasing Corporation v. Seebeck*, 399 So. 2d 1110, 1111 (Fla. 5th DCA 1981). But where a party seeking affirmative relief fails to file a reply, it waives the right to later assert an affirmative defense to an affirmative defense. *See e.g. Dober v. Worrell*, 401 So. 2d 1322 (holding that plaintiff seeking to toll statute of limitations affirmative defense asserted by defendant waived the "affirmative defense to the affirmative defense" by failing to assert it in a reply). Any futility argument has therefore been waived.

D. Insufficient evidence of compliance with Paragraph 22 warrants dismissal of the case.

Insufficient evidence of compliance with Paragraph 22 of the mortgage requires dismissal of the action. *Holt v. Calchas, LLC*, 155 So. 3d 499, 507 (Fla. 4th DCA 2015) ("insufficient evidence of compliance with paragraph twenty-two justifies dismissal of the entire case."). And perhaps more importantly, failure to

[18] Reply to Defendants' Affirmative Defenses, April 4, 2013 (R. 134-138).

send the default notice to notice address likewise requires dismissal. *Blum v. Deutsche Bank Trust Co.*, 159 So. 3d 920 (Fla. 4th DCA 2015) (reversing for dismissal where default notice was not sent to the notice address defined in the mortgage as the property address.). Therefore, the Court should instruct the trial court to involuntarily dismiss the action.

CONCLUSION

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

Dated: May 18, 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 18, 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 18, 2015.

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