In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted]

Appellant,

v.

NATIONSTAR MORTGAGE, LLC, 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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Key:

- The Appellee, Nationstar Mortgage, LLC, will be referred to as "the Servicer."
- The Appellant, [redacted] will be referred to as "the Homeowner."
- Federal National Mortgage Association will be referred to as "Fannie Mae."
- Patrick Dugan, the Servicer's witness at trial, will be referred to as "Dugan."
- The Transcript of the trial held on October 17, 2014 will be referred to as "T. ___" followed by the transcript page number.

SUMMARY OF THE REPLY ARGUMENT

The Servicer would have this Court believe that its documents were admissible at trial simply because its witness, Dugan, took a five-week "training" course in Louisville, Texas. But in order to be competent to introduce these documents into evidence, Dugan had to meet the rigorous "well-enough acquainted" standard established by case law. And since the witness was only acquainted with the Servicer's documents through hearsay "training," the Servicer's exhibits should have been excluded from evidence.

Further, the Servicer failed to establish a *prima facie* case for foreclosure. First, it failed to establish its standing as Fannie Mae's agent—and neither attaching a copy of the note to the complaint nor its witness's conclusory testimony that the Servicer was the "holder" proved this disputed allegation.

Second, the Servicer failed to prove that it complied with the notice provisions of the mortgage. The notice at trial impermissibly overreached, rendering it facially ambiguous. And while the Homeowner had no duty to prove that she was "prejudiced" by this, she actually did because the unconverted testimony was that the Servicer itself could not even tell her how much was owed to cure the default.

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

ARGUMENT

I. The Servicer's witness was spectacularly unqualified to lay the business records exception and therefore the documents introduced through him should have been excluded from evidence.

Dugan was not an "other qualified witness."

The Servicer cites to *Cooper v. State*, 45 So. 3d 490 (Fla. 4th DCA 2010) for the proposition that Dugan was "well enough acquainted" to testify about the documents he introduced at trial. But Dugan 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 Homeowner's position, because, unlike Dugan, 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 Servicer claims, that a witness may meet the "well enough acquainted" standard simply because he participated in a five-week "training" session in Louisville, Texas where he walked around to different departments and asked questions.[1]

Dugan's "boarding" testimony fails to establish the business records exception.

The Servicer 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 servicer's records" are admissible—but this decision actually supports the Homeowner's argument that the payment history should have been excluded.

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

[1] T. 46 (testimony concerning Dugan's "training."). Notably, the Servicer never proffers a reason why this Court should ignore the rules and accept this litigation-motivated compilation of hearsay, rather than require that the persons with whom Dugan allegedly spoke appear in court, or at a minimum, provide a certification under § 90.902, Fla. Stat.

evidence of a continuing business relationship between the two entities (*Id*.)—which is not present here since the prior servicer is a bankrupted entity.

Here, the Servicer never established that it relied upon the accuracy of the prior servicer's records for a business 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.*

Moreover, Dugan's "boarding" testimony referred to in the Servicer's answer brief explained the boarding process in general.[2] *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*, 165 So. 3d 776, 778 (Fla. 5th DCA 2015) (testimony regarding "the specifics" of the current servicer's verification process is sufficient evidence of the trustworthiness of the prior servicer's records.).

While Dugan answered affirmatively when the trial court *sua sponte* asked him whether the Homeowner's loan was boarded pursuant to this process,[3] he

[2] Answer Brief, pp. 12-13.

[3] T. 31. In so doing, the trial court also impermissibly interjected itself into the litigation such that it could no longer be considered "impartial." *McFadden v. State*, 732 So. 2d 1180 (Fla. 4th DCA 1999) (reversing final order of violation of probation where trial judge impermissibly supplied essential elements of the state's

clearly lacked the requisite personal knowledge to answer this because, as the Servicer concedes in its answer brief, his knowledge of the boarding process was entirely based on hearsay.[4] And to the extent that Dugan was testifying about the Servicer's routine practice for boarding, he was wholly unqualified to give that testimony because he did not work for the Servicer when the loan was allegedly boarded.[5] *See Eig v. Ins. Co. of N. Am.*, 447 So. 2d 377, 379 (Fla. 3d DCA 1984) (testimony from witness who was not an employee of the company at the relevant time was incompetent to establish the routine practice of that company).

The Servicer also asserts that the Homeowner makes the "far-fetched assertion" that Dugan's testimony was based on witness-coaching.[6] But there is nothing far-fetched about this. Dugan was, admittedly, a professional witness.[7]

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case by asking questions the prosecutor failed to ask). In fact, nearly all of Dugan's boarding testimony came from *sua sponte* questions asked by the court rather than the Servicer's counsel. (T. 21-25).

[4] Answer Brief, p. 13.

[5] T. 10 (testimony that Dugan had been employed with the Servicer since March 2014); T. 32 (testimony that the loan was boarded before it was in default); T. 40 (testimony that the default date reflected on the acceleration notice was March 1, 2010—or four years before Dugan was hired).

[6] Answer Brief, p. 14.

[7] T. 9 (testimony that Dugan's duties required him to "manage" a portfolio of loans that he reviewed for loss mitigation, mediations, and trials); T. 47 (testimony that Dugan attended trials on a daily basis).

His only connection to the documents was through his training.[8] But when the Homeowner inquired whether his "training" consisted of how to testify in court, the Servicer objected on relevancy grounds—an objection the trial court sustained.[9] Thus, the Servicer cannot be heard to complain on appeal that the Homeowner's argument is "unsupported" because the trial court sustained its own objection.[10]

Therefore, the payment history was simply a document incorporated into the Servicer's records and should have been excluded. *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).

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[8] T. 21 (testimony that Dugan's knowledge of the boarding process was through "training"); T. 38 (testimony that Dugan only knew about the Servicer's letter writing process through is "training.").

[9] T. 46.

[10] Just as disingenuous is the Servicer's assertion that "there was no testimony or other evidence raised to contradict or undermine [Dugan's] testimony on direct examination." (Answer Brief, p. 15). Leaving aside that the Homeowner has no duty to rebut testimony that is not competent evidence, the Servicer conceded in its brief (on the very page before it makes this argument) that the Homeowner testified that the Servicer "incorrectly stated her loan was past due at some point in the past and she made a…payment that [the Servicer] never cashed." (Answer Brief, p. 14). While the Servicer labels this testimony "self-serving" (Answer Brief, p. 23), it is no more "self-serving" than Dugan's hearsay testimony that the loan was properly boarded.

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

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

Merely attaching a copy of the note endorsed in blank to the complaint is not enough to establish standing at inception.

The Servicer argues that "[a]ttaching a copy of the note indorsed in blank to the complaint is 'sufficient as a matter of law' to establish U.S. Bank had standing at lawsuit inception."[11] This statement is incorrect for several reasons.

First, U.S. Bank has nothing to do with this case. But more importantly, the Servicer'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 original note. *Keifert v. Nationstar Mortg., LLC*, 153 So. 3d 351, 353 (Fla. 1st DCA 2014); § 673.2011(2) Fla. Stat. Leaving aside that attachments to complaints are not evidence,[12] the Servicer is asking this Court to leap over a gap in its logic—to simply assume that the Servicer itself made the copy from an original in its possession. But there are many ways that the Servicer could come by a photocopy,

[11] Answer Brief, p. 18.

[12] *See e.g. Coggan v. Coggan*, 239 So. 2d 17, 19 (Fla. 1970) ("… 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.").

which is why transfer of an original instrument is required for the recipient to be entitled to enforce its terms. This Court should reject the Servicer's proffer of a photocopy of a note as evidence—just as the Servicer itself would reject an attempt to pay this debt with a photocopy of a check.[13]

Nor does Dugan's testimony that the Servicer was "the holder"[14] establish anything of substance. First, Dugan did not testify that the Servicer was the holder as of the day the lawsuit was filed. In fact, he did not testify at all when the Servicer allegedly became the "holder." *Cf. Sosa v. U.S. Bank Nat. Ass'n*, 153 So. 3d 950, 951 (Fla. 4th DCA 2014) ("A witness who testifies at trial as to the date a bank became the owner of the note can [prove standing at inception].").

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[13] Additionally, the cases cited by the Servicer in support of its proposition are inapposite. *AS Lily LLC v. Morgan*, 164 So. 3d 124 (Fla. 2d DCA 2015) only addressed standing at the time of trial, not at the inception of the case. *Clay Cnty. Land Trust #08-04-225-0078-014-027, Orange Park Trust Servs., LLC v. JPMorgan Chase Bank, Nat'l Ass'n*, 152 So. 3d 83 (Fla. 1st DCA 2014) does not address the issue of proving possession of the endorsed note at inception as that issue was apparently never raised. *U.S. Bank Nat'l Ass'n v. Knight*, 90 So. 3d 824 (Fla. 4th DCA 2012) merely reversed an order granting a motion to dismiss because the "four corners of the complaint" showed the plaintiff had standing and the allegations of the complaint (that it possessed the endorsed note) must be taken as true for ruling on a motion to dismiss. *Id*. at 826. At the risk of stating the obvious, this appeal involves a trial where the Servicer must actually prove its allegations.

[14] T. 10.

But just as importantly, Dugan did not work for the Servicer on the day the lawsuit was filed.[15] Therefore, there was no way he could know—absent some document which he did not bring with him to trial—that the Servicer was the holder on the day the lawsuit was filed. So even if he had testified that the Servicer was the holder on the day the lawsuit was filed, this testimony would have been rank hearsay. *Sas v. Federal Nat. Mortg. Ass'n*, 112 So. 3d 778 (Fla. 2d DCA 2013).[16]

The Servicer possessing a note as an agent can never be an Article 3 holder.[17]

The Servicer does not cite any authority refuting the Homeowner's contention that an agent possessing a note for the sole purpose of enforcing it on behalf of someone else can never be an Article 3 holder. Rather, it claims that

[15] *Cf*. T. 10 (testimony that Dugan had been employed with the Servicer since March 2014) with the date of the complaint was filed (May 27, 2011).

[16] The Servicer also incorrectly—or, at best, incompletely—states the standard of review regarding its standing as "competent, substantial evidence." (Answer Brief, p. 7). Rather, the sufficiency of the evidence to support a finding of standing is reviewed *de novo*. *Jarvis v. Deutsche Bank Nat. Trust Co.*, __ So. 3d __, 2015 WL 3760659, * 1 (Fla. 4th DCA June 17, 2015) ("We review the sufficiency of the evidence to prove standing to bring a foreclosure action *de novo*.").

[17] In her Initial Brief, the Homeowner incorrectly asserted that "this Court" had decided a number of Fourth District opinions, including *Elston/Leetsdale, LLC v. CWCapital Asset Mgmt. LLC*, 87 So. 3d 14 (Fla. 4th DCA 2012). These were typographical errors for which the Homeowner apologizes.

Fannie Mae's "ownership" of the loan was irrelevant to the Servicer's right to enforce the instrument.[18]

But the Servicer's own complaint alleged that its "authority" to file this lawsuit (and therefore its right to enforce the note)[19] was derived solely from Fannie Mae. It could not be an Article 3 holder since its rights were derivative. In other words, the Servicer was not the thief who could cash the stolen blank check[20] since it was required to ask Fannie Mae's permission before filing suit.

And this is why the Servicer's argument that its allegation in its complaint is "irrelevant"[21] makes a mockery of the rules of court. The pleadings frame the issues. *Carvell v. Kinsey*, 87 So. 2d 577, 579 (Fla. 1956) ("This court is without authority to re-cast the pleadings for the parties. It is the responsibility of litigants to frame the issues by presenting to the trial court proper pleadings drafted in accordance with the requirements of our Rules of Civil Procedure."). In this case,

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[18] Answer Brief, p. 19.

[19] Complaint, May 27, 2011, ¶ 3 (R. 7).

[20] *See* § 673.2031, Fla. Stat., cmt. (2012) ("A thief who steals a check payable to bearer becomes the holder of the check and a person entitled to enforce it...."); § 673.2011, Fla. Stat., cmt. (2012) ("[I]f an instrument is payable to bearer and it is stolen by Thief or is found by Finder, Thief or Finder becomes the holder of the instrument when possession is obtained. In this case there is an involuntary transfer of possession that results in negotiation to Thief or Finder.").

[21] Answer Brief, p. 5; 19.

the Servicer's complaint framed the issue as one of agency—and then it simply failed to prove this disputed allegation at trial.

B. There is no competent, substantial evidence that the Servicer complied with conditions precedent to foreclosure.

The Servicer's argument that the acceleration notice complied with Paragraph 22 misinterprets its own letter, as well as the law.

In their Initial Brief, the Homeowner pointed out that by requiring the Homeowner to bring the loan up-to-the-minute current, the Servicer impermissibly overreached and gave the Homeowner less than thirty days to cure the default.[22] The Servicer's appellate response was simply that the notice "specified:…the action required to cure the default."[23] This argument, however, conflates the length of time that the loan is in default with the length of time that must be accorded a borrower to cure a particular default about which the borrower has been put on notice. Paragraph 22, unequivocally requires that the borrower be given a full thirty days after a specified default to cure that default:

> … Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument…The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days

[22] Initial Brief, pp. 36-37.

[23] Answer Brief, p. 27.

> from the date the notice is given to Borrower, by which the default must be cured; …[24]

The fact that the borrower may already be in default of the terms of the mortgage in one respect (for example, by failing to promptly notify the lender of a change of address or by transferring an interest in the property) would not permit the lender to give the borrower less than thirty days to cure a different default (such as nonpayment). Likewise, the fact that the Homeowner may have been in default due to nonpayment did not permit the Servicer to give less than thirty days to cure the "default" it chose to specify.

To understand the Servicer's overreaching, it is important to note that there is an important difference between curing a default and bringing the loan current.[25] A borrower can cure a default, but still be behind because a new payment (or, in this case, additional and undefined "charges and credits") came due in the interim. The mortgage clearly contemplates that a borrower can continue indefinitely in this way, curing successive defaults so as to avoid the draconian consequence of foreclosure, even though the loan is not current by one payment. As a result, the borrower always has a thirty-day grace period before foreclosure is initiated. And

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[24] Mortgage, Exhibit 2, ¶ 22 (R. Exh. 23). (emphasis added).

[25] A difference not discussed in the not-yet-published case of *Green Tree Servicing, LLC v. Milam*, 2D14-660, 2015 WL 4549200 (Fla. 2d DCA 2015).

while one payment remains overdue during this period, the lender more than makes up for the lost time value of money through the successive late fees that the borrower will pay until completely current.

In summary, the sequence guaranteed by Paragraph 22 is 1) breach; 2) notice specifying a particular breach; 3) thirty days to cure the specified breach; 4) acceleration. The notice here was not only premature in that it pre-dated the specified breach, but it impermissibly gave the Homeowner only twenty days to cure the specified breach.

The proper remedy on remand is dismissal.

In order for there to be sufficient evidence to support the judgment, it necessarily follows that the Servicer sent the Homeowner a sufficient Paragraph 22 notice. Short of this, involuntary dismissal must be entered on remand. *Holt v. Calchas, LLC*, 155 So. 3d 499, 507 (Fla. 4th DCA 2015); *Blum v. Deutsche Bank Trust Co.*, 159 So. 3d 920 (Fla. 4th DCA 2015).[26]

To the extent that this Court is persuaded that the Fifth District's decisions in *Gorel v. Bank of New York Mellon*, 165 So. 3d 44 (Fla. 5th DCA 2015) and

[26] The Servicer argues that *Holt* and *Blum* are distinguishable simply because the Homeowner "received" the letter. (Answer Brief, p. 26). But receipt is only half the battle—the Servicer still has to prove that the letter complies with the requirements of the mortgage.

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. And when a plaintiff seeks to avoid an affirmative defense (like the Servicer 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 Homeowner 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 Servicer 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 Servicer adduced no evidence that the Homeowner suffered no prejudice.[27]

[27] In fact, the undisputed evidence was such that the Homeowner was prejudiced by the Servicer's failure to comply with Paragraph 22 since she testified that when she called the number listed on the default notice to find out how much she had to pay, the Servicer was unable to tell her this amount. (T. 104). Furthermore, the Servicer's reference to the alleged language of the Paragraph 22 notice at issue in

Second, the Court should simply reject *Gorel* and the majority's decision in *Vasilevskiy* (and *Green Tree Servicing*) 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 not prejudiced, Judge Palmer correctly observed that there should not be any "materiality test" with regards to Paragraph 22.

CONCLUSION

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

Dated: July 31, 2015

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Astoria Federal Sav. and Loan Ass'n. v. Kaufman, 158 So. 3d 675 (Fla. 5th DCA 2015) must be summarily disregarded since this language is not contained in the actual opinion. *Shaw v. Jain*, 914 So. 2d 458, 461 (Fla. 1st DCA 2005) (citations omitted). *See also Jaylene, Inc. v. Moots*, 995 So. 2d 566, 570 (Fla. 2d DCA 2008).

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 July 31, 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 July 31, 2015.

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