In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR HARBOR VIEW MORTGAGE LOAN TRUST MORTGAGE LOAN PASSTHROUGH CERTIFICATES, SERIES 2006-7, et al.,

Appellees.

ON APPEAL FROM THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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Key:

- The Appellee, Deutsche Bank National Trust Company, as Trustee for Harbor View Mortgage Loan Trust Mortgage Loan Passthrough Certificates, Series 2006-7, will be referred to as "the Bank."
- The Appellant, [redacted] will be referred to as "the Homeowner."
- Harrison Whittaker, the Bank's witness at trial, will be referred to as "Whittaker."
- The Transcript of the trial held on January 31, 2014 will be referred to as "Supp. R. ___" followed by the transcript page number.

SUMMARY OF THE REPLY ARGUMENT

The Bank failed to prove its standing to sue by competent, substantial evidence—an issue which was not waived by the Homeowner—because the only "evidence" adduced was testimony from the Bank's witness about the contents of documents which the trial court had excluded from evidence.

Likewise, the Homeowner did not "waive" the right to challenge the sufficiency of the evidence supporting the damages award since the law is clear that this argument may be raised for the first time on appeal after a non-jury trial. Nor was the evidence sufficient to support the judgment especially where the Bank's own evidence does not support the adjustable rate of interest reflected in the note.

And finally, the Bank also failed to point to any admissible evidence that the default notice was sent by first class mail. Without this evidence, the Bank was not entitled to the presumption that the notice was given when "sent." And even if it was entitled to this presumption, the notice itself fails to comply with Paragraph 22 of the mortgage because it required the Homeowner to cure a default that had not yet occurred. The judgment should therefore be reversed and the case dismissed.

ARGUMENT

I. The Bank failed to submit competent, substantial evidence that it had standing to sue at inception of the action.

A. The issue of the Bank's standing to sue was adequately preserved for appeal.

The Bank's threshold argument—that the Homeowner waived her right to challenge the Bank's standing by failing to "raise" standing as an affirmative defense[1]—takes a distorted view of both the law and the facts of this case. This is because the issue of lack of standing does not necessarily have to be raised as an affirmative defense in order for it to be preserved for appeal:

> The borrowers argue that the record does not conclusively show that Freddie Mac had standing at the time it filed the original complaint on March 11, 2009. Freddie Mac first responds that the issue is not preserved because the borrowers did not raise lack of standing as an affirmative defense. While that may have been preferable, the issue was nevertheless raised before the circuit court. As this court has explained, the issue of standing may be raised by motion rather than by pleading an affirmative defense.

McLagan v. Fed. Home Loan Mortg. Corp., 145 So. 3d 943, 945 (Fla. 2d DCA 2014), *but see Jaffer v. Chase Home Finance, LLC*, 155 So. 3d 1199 (Fla. 4th DCA 2014) (observing that, in the Fourth District, standing must be raised by affirmative defense) and dissenting opinion J. Conner (explaining that defense of failure to state a cause of action can be raised at trial). Thus, the Bank's standing to sue has

[1] Answer Brief, pp. 6-7.

also been adequately preserved for appellate review because the Homeowner raised the affirmative defense of lack of standing in her responsive pleading[2] (even though this defense was improperly struck by the trial court) and because the trial court properly overruled the Bank's objection to the Homeowner's line of questioning regarding the Bank's standing during trial.[3]

B. The Bank failed to prove its standing.

Turning to the substance of the argument, the Bank relies solely on inadmissible hearsay testimony from Whittaker regarding the contents of certain "business records" to support its contention that the Bank proved standing at inception.[4] But the "business record" which formed the basis of this testimony was expressly excluded from evidence.[5] And as explained in the Homeowner's initial brief, such rank hearsay testimony is not competent, substantial evidence of

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[2] Affirmative Defense VI "Lack of Standing," December 8, 2010 (R. 158).

[3] Supp. R. 37.

[4] Answer Brief, pp. 9-10. It should not go unnoticed that the Bank's waiver argument on appeal contradicts its technical admission argument at trial. If standing was not an issue because it had been waived, there would have been no need for the Bank to propound requests for admission and to argue at trial that the Homeowner had technically "admitted" the Bank's standing. (Supp. R. 12).

[5] Supp. R. 29.

anything.[6] To hold otherwise would be to eviscerate the hearsay and best evidence rules.

Additionally, the Bank's reference to the request for admissions it propounded[7] do not establish standing at inception. First, the request for admissions were never introduced or read into the record—rather, they were merely referenced by its counsel.[8] In fact, when the Bank's counsel made a motion to "deem" the admissions "technically admitted," the trial court responded that it "was not going to rule on it."[9] This "decision"—the functional equivalent of relieving the Homeowner of a technical admission—was not cross-appealed by the Bank.

But even more fundamentally, the admissions do not establish standing at inception. At best, the admissions established that the Bank owned and held the note and mortgage at the time the admissions were served.[10] Standing, however, must be established as of the date the complaint is filed. *Eagles Master Ass'n v. Bank of America, N.A.*, __ So. 3d __, 2015 WL 3915871, * 2 (Fla. 2d DCA June

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[6] Initial Brief, p. 18.

[7] Answer Brief, p. 11, n. 2.

[8] Supp. R. 8; 12.

[9] Supp. R. 21.

[10] Plaintiff's Request for Admissions, February 22, 2011, ¶ 7 (R. 176).

26, 2015); *Ham v. Nationstar Mortg., LLC*, __ So. 3d __, 2015 WL 2189768, * 3 (Fla. 1st DCA May 12, 2015) Thus the fact that the Homeowner may have admitted that the Bank owned and held the note and mortgage as of service of the request for admissions (which was almost two years after the complaint was filed) is of no consequence.

II. The Bank failed to submit competent, substantial evidence of its measure of damages.

A. The issue of sufficiency of the evidence to support the damages award may be raised for the first time on appeal.

Citing absolutely no applicable authority whatsoever, the Bank baldly argues that the Homeowner "has waived [her] ability to challenge the damages award as [she] has failed to object to the sufficiency to the evidence…"[11] This argument fails as a matter of law, however, because it is unwavering black letter law that the sufficiency of the evidence to support the judgment may be raised for the first time on appeal. Fla. R. Civ. P. 1.530(e); *Colson v. State Farm Bank, F.S.B.*, __ So. 3d __, 2015 WL 1650300, * 1 (Fla. 2d DCA April 15, 2015) ("As has been consistently stated in foreclosure cases, a sufficiency of the evidence claim may be raised for the first time on appeal."). In this sense, Rule 1.530(e) is the functional equivalent of a motion for judgment notwithstanding the verdict—except that the

[11] Answer Brief, p. 12.

trial court plays the role of a jury and the appellate court plays the role of the trial judge reviewing the jury's verdict. It would simply be redundant to argue to the trial court that the evidence is insufficient. In its factfinding capacity, the trial court has already found it sufficient. The oversight role goes to the appellate court.

For comparison purposes, Fed. R. Crim. P. 29 (motion for judgment of acquittal) is the criminal version of a judgment notwithstanding and the verdict. And the majority of the circuits "have ruled that a defendant does not have to make a Rule 29 motion in a bench trial to preserve the usual standard of review for a sufficiency of the evidence claim on appeal." *U.S. v. Grace*, 367 F.3d 29, 34 (1st Cir. 2004). Thus, in the federal criminal context at least, an appellate court reviewing the sufficiency of the evidence of a convicted crime decides "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond reasonable doubt." *Id*. The Bank's "threshold" argument should therefore be summarily rejected.[12]

[12] The same holds true regarding the Bank's argument that the sufficiency of the evidence to support the fee award was waived. (Answer Brief, pp. 15-16). In fact, the Homeowner preemptively addressed this issue in her initial brief, arguing that the sufficiency of the evidence to support a fee award can be raised for the first time on appeal and citing the Fourth District's decision in *Diwakar v. Montecito Palm Beach Condo. Ass'n*, 143 So. 3d 958 (Fla. 4th DCA 2014). (Initial Brief p. 24). The Bank cites no law to the contrary.

B. There is insufficient evidence to support the damages award.

The Bank argues that because Whittaker parroted "yes" each time the Bank's attorney asked him whether the payment history matched up to the figures the Bank drew on the judgment, that there is competent, substantial evidence of damages.[13] But no matter how many times Whittaker answered "yes," the payment history did not reflect the change of interest rates during the years preceding the judgment. And this alone requires reversal. *Boyette v. BAC Home Loans Servicing, LP*, 164 So.3d 9 (Fla. 2d DCA 2015).[14]

III. The Bank failed to submit competent, substantial evidence that it complied with the notice provisions of the mortgage.

A. The Bank tried the issue of compliance with Paragraph 22 by consent.

At trial, the Bank was the proponent of the default notice (Exhibit 3). And since this document was introduced unprompted by the Homeowner, the issue of its sufficiency (and therefore the Bank's compliance with Paragraph 22 of the mortgage) was tried by consent. Fla. R. Civ. P. 1.190(b); *Scariti v. Sabillon*, 16 So. 3d 144, 145-46 (Fla. 4th DCA 2009) ("An issue is tried by consent when there is

[13] Answer Brief, p. 14.

[14] The Bank argues that "even a person unfamiliar with how to decipher a payment history would be able to ascertain that the interest rate for 2013 is identifiable." (Answer Brief, p. 16). But the document the Bank refers to, titled a "detailed transaction history," merely reflects an interest rate of 5.706% and a "run date" of 7/30/2013 (R. 1093). It does not indicate that the interest rate in 2013 was 5.706%.

no objection to the introduction of evidence on that issue."). *Cf. Bank of America, National Association v. Asbury*, __ So. 3d __, 2015 WL 3404042, * 4 (Fla. 2d DCA May 27, 2015), Silbermann, J., specially concurring (noting that based on bank's conduct at trial, compliance with notice provisions may have been tried by consent, but borrower failed to argue this on appeal.).

Furthermore, the demand letters were a key element of the Bank's *prima facie* foreclosure case. *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825, 826 (Fla. 3d DCA 2014). Therefore, in order for there to be competent, substantial evidence to support the judgment (as required to withstand a motion for involuntary dismissal), it necessarily follows that the Bank sent the Homeowner a sufficient Paragraph 22 notice—an issue which, as previously discussed, is never waived.

B. There is insufficient evidence that the notice was sent by first class mail.

A key argument made by the Homeowner was that there is no evidence of <u>how</u> the acceleration notice was sent. In response, the Bank did not point to any actual testimony on that issue. In fact, the word "mail" was not ever uttered during trial. Nor did the Bank point to any documents such as a communications log or a return receipt which would prove that the Bank's predecessor mailed the notice to the Homeowner at all, much less that it mailed it by first class mail.

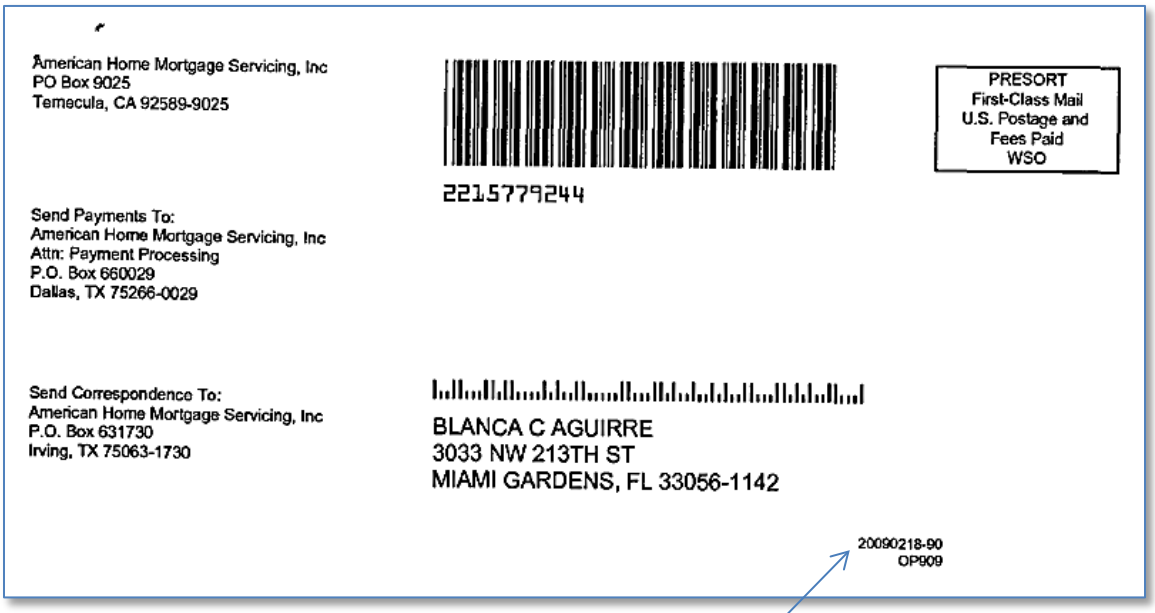
Instead, the Bank argues that the words "PRESORT First-Class Mail U.S Postage and Fees Paid WSO" reflects how the notice was sent.[15] To the extent that this self-serving, conclusory statement could offer even an inference that the notice was sent in accordance with this statement, it is an out-of-court statement offered for the truth of the matter asserted—and thus, inadmissible hearsay.

And this is particularly true if the notice was, in fact, sent "presort mail." Presort mail is a form of bulk mailing where the mailer "presorts" the mail by destination in return for a lower postage fee from the Postal Service. *U.S. Postal Serv. v. Postal Regulatory Com'n*, 717 F.3d 209, 210 (D.C. Cir. 2013). Often, the sorting is performed by third party vendors who pick up outgoing mail for their customers, sort it, and then deliver it to the Postal Service. *See e.g. Duggan v. Zip Mail Services, Inc.*, 920 SW 200, 201 (Mo. App. 1996).

If the statement "presort" was made by an unidentified third-party vendor, then the trial witness was even less qualified to introduce that document as a business record because it would not be a business record of his company. The document reflecting these words was merely something "found" amongst the Bank's records—and therefore inadmissible. *Landmark American Insurance Company v. Pin-Pon Corp.*, 155 So. 3d 432, 442 (Fla. 4th DCA 2015).

[15] Answer Brief, p. 24.

But more importantly, even if the words upon the copy of an envelope were not hearsay, they would only prove the Homeowner's point that the notice was not timely. Because presorting takes time, it virtually guarantees that a letter will not reach the U.S. Postal Service on the same day that it is written. Indeed, if the envelope were to qualify as evidence, it would prove that the date of mailing does not correspond to the date appearing on the letter:



Date on envelope: February 18, 2009.
(Date of letter: February 17, 2009)

Accordingly, if the Bank wishes to travel under the notion that the "envelope" qualifies as admissible evidence, then it is bound by that evidence which proves that it did not give the Homeowner the full thirty days to cure any of the defaults mentioned in the letter, much less those that had not yet occurred.

Accordingly, the absence of evidence of the manner of mailing results in a three-fold failure of proof—a complete absence of evidence that: 1) the Homeowner received the notice (i.e. no evidence of actual receipt); 2) the Bank sent the notice in the manner required for it to be deemed "sent" under Paragraph 15 of the mortgage (i.e. no evidence that the notice was mailed first class mail to the Homeowner's notice address); and 3) that it was placed in the hands of the U.S. Postal Service on the date stated in the letter.[16]

C. The Bank's argument that the letter provided the Homeowner thirty days to cure misinterprets its own letter, as well as the law

In her Initial Brief, the Homeowner pointed out that the default notice provided two defaults, including one that had not yet occurred.[17] The Bank's appellate response was simply that the notice "states with no uncertainty '***TOTAL DUE***: $1,406.51.'"[18]

[16] And the Bank's argument that the request for admissions established compliance with Paragraph 22 (Answer Brief, p. 30, n. 6) also fails for the reasons argued in Argument I(B), *supra*.

[17] Initial Brief, pp. 25-37.

[18] Answer Brief, p. 30.

The Bank's argument, however, dodges the issue and disregards its own evidence which explicitly stated that the Homeowner must pay any payments which come due after the letter in order to "cure the default":[19]

> If any other payments or expenses become due at or prior to the time an attempt is made to cure this default, they will be added to the Total Due and must also be paid in order to cure the default.

As such, the Bank has conflated the length of time that the loan is in default and 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.[20]

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 since February 2009, did not permit the Bank to give only

[19] Default Notice Dated February 17, 2009, Exhibit 3 (R. Exh. 1083).

[20] Mortgage, Exhibit 2, ¶ 22 (R. Exh. 1073). (emphasis added).

sixteen days to cure the "default" it chose to specify—a default that did not even exist at the time it gave notice.

To understand the Bank's overreaching, it is important to note that there is an important difference between curing a default and bringing the loan current. A borrower can cure a default, but still be behind because a new payment 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 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.

Here, the Bank's overreaching not only fails to provide the thirty-day grace period, but it rendered the alleged notice defectively ambiguous. The notice was designed, according to the parties' express agreement in the mortgage, to "specify"[21] the default and to precisely identify the action to cure. The alleged

[21]Specify means to mention specifically or to state precisely in full and explicit terms or detail so that misunderstanding is impossible. *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992).

notice does not specify "the default," but refers to two that it claims must both be cured by the deadline.

D. The proper remedy on remand is involuntary dismissal.

In order for there to be sufficient evidence to support the judgment, there must be evidence that the Bank sent the Homeowner a sufficient and timely 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).

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 *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 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 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 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 Homeowner 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.

Therefore the notice does not comply with Paragraph 22 of the mortgage even if the Bank could have proven when the notice was actually sent.

CONCLUSION

The Court should reverse the judgment and remand for further proceedings.

Dated: July 28, 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 July 28, 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 28, 2015.

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