In the District Court of Appeal
Fourth District of Florida

CASE NO.

(Circuit Court Case No.

---

and

Appellants,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE INDYMAC INDA MORTGAGE LOAN TRUST 2005-AR2, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-AR2 UNDER THE POOLING AND SERVICING AGREEMENT DATED NOVEMBER 1, 2005, et al.,

Appellee.

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

REPLY BRIEF OF APPELLANTS

Respectfully submitted,

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

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T. Transcript of Trial located at R. 275 and again at Volume 6 of the Record on Appeal

The Appellants, [redacted] and [redacted] will be referred to as the "Homeowners."

The Appellee, DEUTSCHE BANK NATIONAL TRUST COMPANY, will be referred to as "the Bank" or "Deutsche Bank."

SUMMARY OF THE REPLY ARGUMENT

The Bank expends much of the Answer Brief arguing that an appellant's brief is confined to citing cases that were cited to the trial judge—a position so patently incorrect that its refutation would appear unnecessary. The Bank does not address most of the substantive issues on appeal, such as the error in admitting numbers on a proposed judgment as substantive evidence. It does not dispute that the interest and attorneys' fees awarded in the judgment cannot be computed from the exhibits or that its witness did not know the applicable interest rate. It does not dispute that the trial court abused its discretion in denying the deposition of its witness.

Its only argument in support of the qualifications of its witness was that he had received some training from his current employer. Training that consists of being told what to say in the courtroom, however, is not a substitute for actual experience with, and responsibility for, the business activity for which the records at issue were created.

Accordingly, there was no admissible, competent evidence of the prima facie elements of the Bank's case, such as standing, performance of conditions precedent, and the amount of damages. The trial court should have sustained the Homeowners' evidentiary objections and granted an involuntary dismissal.

ARGUMENT

I. The Trier of Fact May Not Consider Information in Documents Merely Because They Were Read by a Document Reader Who Is Not a "Qualified" Witness.

A. The points on appeal were preserved.

Stripping away the rhetoric and hyperbole from the Answer Brief leaves little substance which would merit a reply. For example, the Answer Brief expends seven pages and cites approximately 27 cases to argue that authority not cited to the trial court cannot be cited to this Court.[1]

At the risk of belaboring the obvious, the Homeowners' only obligation to properly preserve the evidentiary errors complained of was to make clear, timely objections. To preserve an evidentiary objection for review, a party must give the trial court sufficient information to apprise the court of the issue and provide an opportunity for the court to correct the error. *See Braddy v. State*, 111 So. 3d 810, 872 (Fla. 2012) (Under the contemporaneous objection rule, an issue is properly preserved if the trial court knows that an objection was made, clearly understands the nature of the objection, and denies that request.) It simply is not the law that appellate counsel is restricted to citing cases that are cited below.[2]

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[1] Answer Brief, pp. 11-20.

[2] Nor is the Court required to ignore governing case law not cited by an appellant, as the Bank implies by repeatedly claiming that the Homeowners "abandoned" *United Auto. Ins. Co. v. Affiliated Healthcare Centers, Inc.*, 43 So. 3d 127 (Fla. 3d DCA 2010) by not citing it in their brief. Answer Brief, pp. 15, 19, 26, n. 48.

Here, the trial transcript is replete with multiple colloquies between the Homeowners' counsel and the court in which the objection to the hearsay that is the core of this appeal was contemporaneously and clearly stated—objections that the trial court understood and expressly denied.[3] The Answer brief does not suggest otherwise.[4]

The Answer Brief does suggest that this Court should "reject" the fact that no copy of the Note was attached to the Complaint—not because it was—but because, according to the Bank, the Homeowners' counsel "affirmatively stipulated" to that fiction.[5] In reality, defense counsel merely asked for clarification as to what documents were being shown the witness so that he could speed the process of reviewing them:

> MR. ANTHONY: Your Honor, to move this along, if counsel can clarify that this is the note and mortgage, that they are attached, copies of which are attached to the complaint as well as all the documents that were emailed to me the night before the compel hearing, then I'll just go ahead and stipulate to that.[6]

[3] Specific citations to the record are contained in the Initial Brief (pp. 5, 7-9) and will not be repeated here.

[4] Answer Brief, p. 6 ("Defendants disputed and periodically objected to Plaintiff's testimonial and documentary evidence presented at trial.")

[5] Answer Brief, p. 2, n. 2.

[6] T. 26.

Ultimately, there was no stipulation to the issue being discussed—admissibility of the documents—much less, to any belief (which would have been mistaken) that a note was attached to the Complaint:

> MR. ANTHONY: I've reviewed the documents, Your Honor.
>
> THE COURT: Okay. Hand them to the witness, please.
>
> MR. KATZ: Just to clarify, are we stipulating as to the admissibility of these or you want me to go through them one by one with the witness?
>
> MR. ANTHONY: One by one. Those are all hearsay.[7]

That the Bank should ask this Court to blind itself to the record fact that the Bank did not attach a note to its Complaint based solely on a statement of counsel—particularly the passing ambiguous comment here—speaks volumes about the Bank's commitment to the principle expressed in the judicial system's motto: "We who labor here seek only truth."

B. The Answer Brief does not address the substantive issues.

The Answer brief does not dispute most of the points raised by the Homeowners:

- It does not dispute that the trial court erred in letting the witness introduce as substantive evidence figures given him by the Bank's counsel by way of a proposed final judgment.[8]

[7] T. 27.

[8] Initial Brief, pp. 28-32.

- It does not dispute that the trial court abused its discretion in denying the deposition of its witness (the word "deposition" is not mentioned in the Answer Brief).[9]
- It does not dispute that providing admissible evidence from a qualified witness is not impractical because § 90.902, Fla. Stat. already provides an easy method for doing so.[10]
- It does not dispute that the bank records used in foreclosure are known to be unreliable.[11]
- It does not dispute that it had no financial incentive to insure the reliability of records it inherited from an entity forcibly shut down by the FDIC, particularly where, as here, there is no business purpose for the records separate from introducing them as evidence in court.[12]
- It does not dispute that its witness relied upon documents that were not in evidence.[13]

[9] Initial Brief, pp. 32-33.

[10] Initial Brief, pp. 23-25.

[11] Initial Brief, pp. 26-28.

[12] Initial Brief, pp. 6, 23, 28.

[13] Initial Brief, pp. 30 (amounts due and owing); 7, 10, 36 (Pooling and Servicing Agreement).

- It does not dispute that its witness did not know the applicable interest rate and does not dispute that the interest awarded in the judgment cannot be computed from the rate to which he testified.[14]
- It does not dispute that the attorneys' fees awarded cannot be computed from the documents in evidence.[15]

C. Being told about record-keeping procedures is not a substitute for personal knowledge ("training" is another word for "hearsay").

The Bank does attempt to respond to the point that its witness, George Kanuck, was not qualified to introduce records that: 1) were prepared by entities or departments for which he had never worked; and 2) pre-dated his employment with the servicer, One West. The Bank's response is that it had trained him.[16] In the portion of the transcript cited by the Bank, the witness testified that his belief that the business practices of the various servicing entities are the same came from his "training."[17] A corollary issue, therefore, becomes: whether a person with no hands-on business experience with the records or record-keeping policies of a company can be "trained" (by some other company) to have the requisite personal knowledge of the records and policies.

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[14] Initial Brief, p. 31.

[15] Initial Brief, p. 31.

[16] Answer Brief, p. 30.

[17] T. 34-35.

First, "training" for purposes of regurgitating information to the fact-finder is nothing more than a synonym for "hearsay." Had the witness said, "my boss told me to testify that the business practices of the various servicing entities are the same …" there would be no question that his "knowledge" is not personal, but rather, is based upon classic hearsay. Simply substituting "my boss trained me" for "my boss told me" does not alter the fact that the witness has no personal knowledge.

Hearsay knowledge cannot be allowed to substitute for personal knowledge gained through an actual job-responsibility tied to the business activity. *See Lassonde v. State*, 112 So. 3d 660 (Fla. 4th DCA 2013) (because a store clerk "had no responsibilities regarding the business practices of the [store]" he was not qualified to introduce the receipt as a business record). The nature of Kanuck's job responsibilities—reading records to judges—is insufficient precisely because his familiarity with those records was not gained in the course of performing or supervising the business activity in question.

Second, the hearsay knowledge that the Bank sought to introduce here was of the worst kind because it was specifically imparted to the witness solely for purposes of testifying. It creates, and was intended to create, an artificial "familiarity" with the records and policies so that the testimony would appear admissible and credible. To permit this sort of "training" to suffice for personal

knowledge is to have the business record exception to hearsay swallow the rule because there is no record that a witness cannot be told (or "trained") to say meets the exception.

Accordingly, testimony-related training does not alter the fact that Kanuck was not a qualified witness and his testimony and the Bank documents introduced through him should have been excluded.

II. Involuntary Dismissal Should Have Been Granted Because There Was No Admissible Evidence to Support the Judgment.

A. There was no admissible evidence of the amounts due and owing.

As mentioned above, the Bank does not dispute that it was error to permit the witness to use dollar amounts on a proposed judgment as substantive evidence—especially when there is no support for those amounts in the exhibits in evidence, much less, those that were properly in evidence. The Bank, therefore, failed to adduce admissible evidence of its damages.

B. There was no admissible evidence that the Bank complied with conditions precedent.

The Bank does not address how Kanuck would be qualified to introduce the "default letter" or "notice of acceleration" that was prepared by a company for which he never worked. Nor does the Bank address how he could testify that it was sent by that company prior to his employment with any banking entity.

C. There was no admissible evidence of the Bank's standing at the inception of the case.

In their Initial Brief, the Homeowners argued that there was no evidence that the Bank was the holder of the Note when the case was filed, other than Kanuck's testimony which he said was based upon a document not in evidence. As stated in the Initial Brief:

> At trial, the only evidence of when the Plaintiff (Deutsche Bank) came into possession of the Note—and the only evidence that it had any ownership interest in the Note at all—was Kanuck's improper testimony about documents not in evidence. Specifically, he testified that his belief that Deutsche Bank owned or had received an interest in the loan was based solely on the PSA [Pooling and Servicing Agreement] which he did not bring to court. [fn: T. 32, 79-80.] Because this testimony was inadmissible, the Homeowners were entitled to an involuntary dismissal of the case.[18]

The Bank's only response was to repeatedly point to this testimony as the definitive proof of standing prior to filing[19]—without ever addressing how such testimony could possibly be admissible. The Bank never addressed the actual point on appeal, which was that Kanuck was not qualified to talk about the PSA, and secondarily, that testimony about documents not in evidence is inadmissible.

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[18] Initial Brief, p. 36.

[19] Answer Brief, p. 18 ([A]s will be shown by Plaintiff's trial witness, that testimonial evidence proved that Plaintiff had standing when the instant action was filed on August 4, 2009 because DEUTSCHE BANK had acquired its interest in the subject mortgage loan during November 2005."); 34-35 (in which the Bank emphasized the testimony); 36 (in which the Bank presents its trial counsel's argument about the testimony).

The Bank does argue in a footnote that *McLean v. JP Morgan Chase Bank Nat. Ass'n*, 79 So. 3d 170 (Fla. 4th DCA 2012) (which held that an undated blank endorsement appearing after the case is filed does not prove standing at the inception of the case) is inapplicable because it is a summary judgment case.[20] In support of this idea, the Bank cites to *Stone v. BankUnited*, 115 So. 3d 411 (Fla. 2d DCA 2013). In *Stone*, however, this Court merely distinguished *McLean* on the fact that there was testimony from a trial to consider—not just documents, as is the case at summary judgment. That testimony (from a witness far more qualified than Kanuck) was that the plaintiff had acquired the loan from the original lender through a purchase assumption agreement executed prior to the filing of the complaint. *Id*. at 413. In *Stone*, however, the admissibility of this testimony was not an issue on appeal. Either the purchase assumption agreement was properly admitted (by a qualified witness) or the borrower raised no objection to either the testimony or the document.

The Bank also cites to *Am. Home Mortg. Servicing, Inc. v. Bednarek*, 132 So. 3d 1222, 1223 (Fla. 2d DCA 2014)—another case in which a bank's witness testified about the transfer of the loan apparently without objection from the borrower.[21] Neither case holds that the logic of *McLean* (that undated

[20] Answer Brief, p. 36, n. 73.

[21] Answer Brief, p. 36, n. 73.

endorsements cannot be used to date transfers) does not apply at a bench trial. More importantly, because the admissibility of the evidence is not mentioned, they do not hold that testimony by an unqualified witness about a document not in evidence is admissible.

Accordingly, there was no admissible evidence that the Bank had standing when it filed this case and the involuntary dismissal should have been granted.

CONCLUSION

The judgment should be reversed and the case remanded for entry of judgment in favor of the Homeowners.

Dated: April 17, 2014

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 respectfully 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

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this April 17, 2014 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.

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

Deanne Torres, Esq.
KAHANE & ASSOCIATES, P.A.
8201 Peters Road, Ste 3000
Plantation, FL 33324
dltorres@kahaneandassociates.com
notice@kahaneandassociates.com
mmuniz@kahaneandassociates.com