In the District Court of Appeal
Fourth District of Florida

CASE NO.

(Circuit Court Case No.

and

Appellants,

v.

BANK OF AMERICA, N.A. SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP F/K/A COUNTRYWIDE HOME LOANS SERVICING, LP,

Appellee.

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

REPLY BRIEF OF APPELLANTS

Respectfully submitted,

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KEY:

The conventions used in the Initial Brief will be continued here:

- "The Bank" will refer to the Appellee, Bank of America, N.A.;
- "The Homeowners" will refer to the Appellants, [redacted] and [redacted];
- "R. __" will refer to the Record on Appeal;
- "T__" will refer to the transcript of trial; and
- "UCC" will refer to the Uniform Commercial Code.

SUMMARY OF THE REPLY ARGUMENT

Contrary to the Bank's arguments, neither this Court, nor any other court, has ever held that the foundation for a business records exception to hearsay may be laid by testimony that is itself hearsay—hearsay that was fed to the witness specifically for the purpose of regurgitating it on the stand. The Bank provides no logical rationale for its invitation to change the law of Florida—a change that would extend far beyond the microcosm of foreclosure cases and would eviscerate hearsay as an objection to records.

The Bank identified no records—other than the inadmissible records of the prior servicer—to support the elements of its case, including the conclusion, upon which the judgment is necessarily based, that the Note was endorsed and in the possession of the original plaintiff, Countrywide, before it filed the case. Even if the Bank had proven that Countrywide possessed an endorsed note when it filed the case, the Bank failed to prove any authority to bring the action on behalf of the owner, Freddie Mac. While the Bank claims to be an Article III holder in its own right, its possession of the instrument was as an agent for purposes of enforcing it on behalf of Freddie Mac. Under Article III of the UCC, therefore, Freddie Mac is the holder of the note because it constructively possesses the note through its agent. The Bank, therefore, failed to prove that Countrywide had standing at the inception of the case, either as a holder or an authorized agent.

RESPONSE TO THE BANK'S STATEMENT OF THE CASE AND FACTS

The Bank makes several statements as though they are fact, but which are, in reality, merely assertions by its witness, the admissibility and probative value of which go to the heart of this appeal. For example, the Bank states that "[l]oan-servicing records indicate that the indorsement took place on or before February 11, 2006" and that "a notice-of-default letter was sent to [the Homeowners] in January 2009."[1] These are, however, assertions by the Bank's only witness, John Blade, about the contents of documents allegedly created by entities for which the witness had never been employed. Worse, they are documents with which he has no familiarity other than reading them and being told what to say about them by the current plaintiff in this case. Blade's inferences from inadmissible hearsay are not evidence, much less, something to state as "fact" in a Statement of Facts.

[1] Answer Brief, p. 2.

ARGUMENT

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

The Bank does not dispute that its only witness, John Blade, had no firsthand knowledge of any of the recordkeeping processes to which he testified—particularly those of the previous servicer. Instead, it seeks to convince this Court that Florida law permits a party to lay the foundation for a business records exception to hearsay with testimony that is itself hearsay—hearsay calculatedly fed to a witness for the sole purpose of regurgitating it in a court of law.

The Bank relies heavily on this Court's opinion in *Cayea v. CitiMortgage, Inc.*, 138 So. 3d 1214 (Fla. 4th DCA 2014)[2] which focused on whether [redacted] are admissible as business records—which is not applicable here. The case does not say, as the Bank contends, that any person can become a "records custodian or otherwise qualified witness" by being told what to say about records. It does not say that hearsay can be used as the basis for establishing a hearsay exception. (It is an understatement to say that such a ruling would have been surprising since it would completely eviscerate the hearsay objection to records.)

[2] Answer Brief, pp. 17-19.

Cayea is not helpful here precisely because the opinion does not say how the witness, Mr. Windsor, obtained his "familiarity" with CitiMortgage's records—whether, for example, he had ever worked in the relevant departments or whether, on the other hand, his "familiarity" was artificially created for purposes of litigation. In short, it does not say whether this foundational testimony (for the hearsay exception) was itself hearsay, and if so, whether a hearsay objection was even raised.[3] The same may be said for the other cases cited by the Bank: *Weisenberg v. Deutsche Bank Nat. Trust Co.*, 89 So. 3d 1111 (Fla. 4th DCA 2012) and *Lindsey v. Cadence Bank, N.A.*, 135 So. 3d 1164 (Fla. 1st DCA 2014).

Even when looking strictly at the quantity of a witness's knowledge, rather than its source, *Cayea* favors the Homeowners. *Cayea* specifically distinguished *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780 (Fla. 4th DCA 2011) because the witness there "did not know who entered the data into the computer and he could not verify that the entries were correct at the time they were made. *Cayea*, at

[3] Notably, dicta in *Cayea* has the deceptive appearance of endorsing a low threshold for the qualifications of a witness—the statement that "the witness just need be well enough acquainted with the activity to provide testimony." *Id*. at 1217. In reality, the "well enough acquainted" standard is a rigorous one that originated with *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. That case 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.

1218. He also relied on data supplied by the prior servicer with which he was even "less familiar" *Id*.

Here, Blade's professed familiarity was identical. He did not know who entered the data into the computer, could not verify that the entries were correct when made, and blindly relied on data supplied by a prior servicer with which he was even less familiar. Just as *Cayea* distinguished *Glarum*, this case must be distinguished from *Cayea*.

In each of the *Cayea*, *Weisenberg*, and *Lindsey* cases, the witness worked for the same company that produced the data and knew how the department that was responsible for collecting and applying payments performed its duties. In contrast, Blade did not work for the company that created the key documents (or the entries in the documents)—the vast majority of the documents and data in evidence.[4] Nor could he explain how his own employer, Bank of America, set up the automatic debiting system for this loan or specifically how it worked.[5]

[4] Exhibit 5 (Instance Detail), Exhibit 6 (Payment History), Exhibit 7 (Notice of Intent to Accelerate and return receipt), and Exhibit 8 (Account Information Statement—a compilation of data from Exhibit 6).

[5] T. 205, 210, 212.

A. A prior servicer's records are not admissible without testimony concerning the accuracy-checking of the transferal process.

Because Blade did not work for the company that created the documents, the Bank points to the fact that Bank of America used the same computer systems to store the records as did its predecessor, as if that somehow speaks to the trustworthiness or accuracy of the recordkeeping processes of the prior servicer.[6] This is analogous to claiming that, because a business keeps its predecessor's documents in the same filing cabinet used by the predecessor, the information on the papers inside should be presumed to be accurate.[7]

But in fact, Bank of America's use of the same computer systems as its failing predecessor, Countrywide, means that it never checked the accuracy of Countrywide's records, something that might have occurred during a normal boarding process. This distinguishes the one Florida case cited by the Bank in which records from a previous servicer had been admitted, *WAMCO XXVIII, Ltd. v. Integrated Elec. Environments, Inc.*, 903 So. 2d 230, 232 (Fla. 2d DCA 2005).

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[6] Answer Brief, p. 4, 28

[7] Nor does the use of the same file cabinet establish a "total continuum and uninterrupted flow" as the trial judge opined. (T. 152). The policies and procedures for entering data in the "file cabinet" could be completely different. Blade's only knowledge about the policies and procedures—of his own bank, let alone that of Countrywide—were based on hearsay.

The Bank also relies upon a federal trial court decision in which a judge denied a motion to strike a summary judgment affidavit. *In re Sagamore Partners, Ltd.*, 11-37867-BKC-AJC, 2012 WL 3564014 (Bankr. S.D. Fla. 2012)[8] Although the judge in *Sagamore* cited *WAMCO* (despite the absence of the critical testimony that the transferred records had been checked for accuracy), the passage quoted by the Bank in its Brief is not from *WAMCO* or any Florida case. The quoted passage opines that a prior servicer's records are admissible because banks: 1) maintain accurate records; and 2) often rely on their predecessor's records.

The myth that bank records used in foreclosures are particularly trustworthy was discussed in the Initial Brief (pp. 29-31). That servicers do not invest in the loan and therefore suffer no financial penalty if the records of its predecessor are inaccurate was also discussed in the Initial Brief. (pp. 31-32).[9] The Bank did not respond to these points. And, in any event, unlike *WAMCO* (at 233), there was no evidence in this case that Bank of America or the owner, Fannie Mae, relied upon

[8] Answer Brief, p. 23.

[9] Even if the Bank owned (purchased) the loan, or had officially brought this case on behalf of the owner (as opposed to asserting that it can enforce the loan on its own behalf), there is no evidence to suggest that the owner did not simply absorb the risk that the servicing records prior to purchase are inaccurate or build in a discount for such risk. The notion that banks "rely" on the accuracy of such records in any real financial sense is simply result-oriented wishful thinking—and an end-run around time-honored evidentiary rules.

the accuracy of the prior servicer's records. Instead, Blade simply testified that he relied upon the records, as is, in giving his testimony.[10]

B. Even if a witness's familiarity with the preparation of the records can be based partly on hearsay, here, it was based completely on hearsay—hearsay which was communicated for purposes of litigation.

The Bank also urges this Court to adopt, as a new standard in Florida, a hornbook description of federal law such that hearsay may be used, in part, to lay the foundation for a hearsay exception.[11] Even if this were the standard reported by the hornbook, it would not be applicable here since Blade's knowledge—particularly of the prior servicer's records—is not based "in part" on hearsay, but rather completely on hearsay.

Upon a closer reading, however, the hornbook separates knowledge about the recordkeeping processes of the business (which it says must be "firsthand") and knowledge about the preparation of the particular documents being offered (which may be a "mix" of hearsay and firsthand observations). *Fed. Evid.* §8:78, citing *United States v. Franco*, 874 F.2d 1136 (7th Cir. 1989) (a criminal case usually cited as holding that a law enforcement agent can be a qualified witness to

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[10] T. 199-200.

[11] Answer Brief, p. 26, *citing*, 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:78 (4th ed. 2014) ("*Fed. Evid.* §8:78").

introduce the business records of an accused). Thus, even if the Court were to adopt this new standard it would not avail the Bank because Blade had no firsthand knowledge of the recordkeeping processes, especially those of the prior servicer.

Most importantly, neither the hornbook, nor any case found by either party to this appeal, suggests that, if hearsay is permitted in the "mix," it may be hearsay imparted to the witness solely for purposes of parroting those very words in a court of law.

* * *

In summary, the Homeowners do not contend that a witness is unqualified to introduce business records unless he or she actually created the records or knows who did. To be qualified, however, the witnesses must have, at a minimum, firsthand familiarity with the processes for creating and maintaining the records—not just familiarity with what they say. Nor is it sufficient for the witness to know how to access computerized records, any more than knowledge of how to open a file cabinet qualifies one to testify about how the records inside were created.

And for purposes of satisfying the trustworthiness criterion in the business records exception to hearsay, that familiarity must be developed by way of firsthand experience in performing, supervising, or implementing the recordkeeping processes as part of the business of that entity. To permit

"familiarity" to be gained by way of training for the job of testifying would be too susceptible to abuse.

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

A. There was no admissible evidence that the necessary endorsement was placed on the Note before the case was filed.

The Homeowners argued in the Initial Brief that the "Instance Detail" (Exhibit 5) was inadmissible because it predated Bank of America's purchase of Countrywide by two years. This meant: 1) it could not be introduced through Blade; and 2) it had been changed to include the words "Bank of America" in its title and to display the name of a law firm that did not appear until four years after the case was filed. Moreover, while Blade was only too ready to assert that the document showed that Countrywide had received the fully endorsed Note in February, on closer questioning, he admitted to being confused as to whether the records were actually sent to the "custodian" indicated on the record.[12]

Other than its general argument that Blade could introduce any document created by any company so long as the Bank had told him what to say, the Bank's Answer Brief did not dispute, or even address, any of these problems with the Instance Detail. Nor did the Bank identify any other "evidence" from which the

[12] Initial Brief, pp. 35-39, citing to T. 85-86, 92-95; Exhibit 5 (Exh. R. 31).

factfinder could have concluded that, on the day it filed its complaint, Countrywide was actually in possession of the Note it claimed to be lost.

Thus, if this Court concludes that a Bank of America employee cannot introduce what he claims to be a Countrywide record—which has not only been altered but which is not completely understood by the witness—then there is no evidence of standing at inception and the judgment must be reversed.

There was no evidence that Countrywide (the previous servicer) was authorized to bring the action.

In the Initial Brief, the Homeowners pointed out that being an Article 3 holder under the UCC cannot substitute for the requirement that a servicing agent prove that it was authorized to bring suit by the note owner.[13] In its Answer Brief, the Bank is cagey with the Court, describing Freddie Mac's ownership of the loan as merely "alleged."[14] To remind the Court, this was alleged by the Plaintiff, not the Homeowners.

To address the point that Countrywide could not have been an Article 3 holder (because mere possession for purposes of enforcing it on behalf of the

[13] Initial Brief, pp. 39-40.

[14] Answer Brief, p. 37.

owner is not a "transfer" under the UCC), the Bank cites this Court to a single Kansas opinion, *Bank of Am., N.A. v. Inda*, 303 P.3d 696 (Kan. Ct. App. 2013).

That opinion, however, also does not involve the "transfer" problem because, there, Bank of America had always remained in possession of the note and had assigned a beneficial interest to Freddie Mac.[15] Thus, the Kansas court expressly held that Bank of America could enforce the note "upon a showing…that Bank of America remained in possession of the note." *Id*. at 703.

There was no such showing of continuous possession in this case. In fact, the Bank seeks to convince the Court that Countrywide first obtained possession in February of 2006.

Aside from the fact that a servicer is not a "transferee" of the Note as contemplated by Article 3, it is also not in "possession" of the Note under Article 3. This is because, when an agent is in the possession of an instrument on behalf of its principal, the UCC considers the principal to be the holder. The Comment to § 3-201 of the UCC explicitly acknowledges that possession may be effected constructively through an agent. § 673.2011, Fla. Stat. Ann. ("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.)

[15] Answer Brief, pp. 36-37.

(emphasis added). *See also, Bankers Trust (Delaware) v. 236 Beltway Inv.*, 865 F. Supp. 1186, 1195 (E.D. Va. 1994) (the UCC "sensibly recognizes that a party has constructive possession of a negotiable instrument when it is held by the party's agent…or when the party otherwise can obtain the instrument on demand" [internal citations omitted]); *In re Phillips*, 491 B.R. 255, 263 (Bankr. D. Nev. 2013) ("Thus, a person is a "holder" of a negotiable instrument when it is in the physical possession of his or her agent.")[16]

In fact, the use of an agent to possess the instrument on behalf of the holder is such a common banking practice that it was officially authorized by the 1998 amendments to Article 9 of the UCC[17] (which brought mortgage loans within its purview for the specific purpose of facilitating securitization[18]). The drafters'

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[16] *Quoting*, Lary Lawrence, *Lawrence's Anderson on the Uniform Commercial Code § 1–201:265* (3d ed. 2012).

[17] These changes were enacted in Florida in 2001, effective 2002, §§ 679.1011-.709 Fla. Stat.; s*ee* § 679.3131(3) Fla. Stat. regarding requirements for use of an agent to possess the collateral.

[18] Dale Whitman, *Transfers of Mortgage Notes under New Article 9*, *available at:* http://dirt.umkc.edu/files/newart9i.htm. (apparent purpose of change was to insulate issuers of mortgage-backed securities from attacks by bankruptcy trustees "without the bother of taking physical possession of the notes in question, a process that they often consider irksome"); Steven Schwarcz, *The Impact of Securitization of Revised UCC Article 9*, 74 Chicago-Kent L. Rev. 947 (1999); H. Bruce Bernstein, *Commercial Finance Association: Summary of the Uniform Commercial Code Revised Article 9*, *available at:* https://www.cfa.com/eweb/DynamicPage.aspx?Site=cfa&WebKey=9d83ef78-8268-4aae-95e1-7f4085764e46

Comment 3 to § 9-313 explicitly equated possession by an agent with actual possession by the principal. § 679.3131, Fla. Stat. Ann. ("if the collateral is in possession of an agent of the secured party for the purposes of possessing on behalf of the secured party, and if the agent is not also an agent of the debtor, the secured party has taken actual possession").

This explains why mailmen and attorneys can "hold" the instrument without becoming Article 3 holders—the true holder remains in constructive possession of the note. Here, if anyone is an Article 3 holder, it is the owner, Freddie Mac, not the servicer, because it is Freddie Mac who has always been in possession of the Note through its agents, Countrywide and Bank of America. Furthermore, this explains the "continuous possession" requirement in the Kansas case, as well as this Court's pronouncement *Elston/Leetsdale, LLC v. CWCapital Asset Mgmt. LLC*, 87 So. 3d 14 (Fla. 4th DCA 2012), which requires, at a minimum, that a servicer show that the note owner had ratified the foreclosure.

(revised Article 9 facilitated mortgage-backed securitization); David Peterson, *Cracking the Mortgage Assignment Shell Game*, 85 Fla. Bar J. 11, 12 (November 2011) (revisions to Article 9 addressed the needs of banks in the securitization chain by treating mortgages as personal property that could be transferred without regard to the real estate records).

B. There was no admissible evidence that a notice of acceleration was sent and no admissible evidence of the amounts due and owing.

The Bank points to nothing other than the inadmissible records of the prior servicer to support these elements of its case.

CONCLUSION

This Court should reverse and remand for entry of judgment for the Homeowners.

Dated: September 29, 2014

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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 September 29, 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. I also certify that this brief has been electronically filed this September 29, 2014.

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