In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] AND [redacted]

Appellants,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY,

Appellee.

ON APPEAL FROM THE 19th JUDICIAL
CIRCUIT IN AND FOR ST. LUCIE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANTS

Respectfully submitted,

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INTRODUCTION

Given the hyperbole so ever-present in appellate briefs, it is difficult to summon the words that will adequately communicate the sheer, unmitigated disdain for candor that permeates the BANK's[1] rambling Answer Brief. This appalling lack of candor persists even after the brief was amended to remove argument based on a statute that was long ago declared unconstitutional and to add a whispered footnote about binding authority directly contrary to its position.[2]

For example, the BANK devotes an entire section to the notion that the [redacted] were not even entitled to fees because this case was dismissed without prejudice to bringing a second suit.[4] The BANK never addresses how this argument—even if it were not sanctionably contrary to existing law—could possibly have been preserved when trial counsel stipulated to the [redacted] entitlement to fees.[5]

Another example is the BANK's assertion that the [redacted] failed to cite to the record when stating that the BANK did not agree to the dismissal of this case,

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[1] The "BANK" is the Plaintiff/Appellee, DEUTSCHE BANK NATIONAL TRUST COMPANY.

[2] Amended Answer Brief, p. 41, n. 1.

[3] The "[redacted] are the Defendants/Appellants, [redacted] and [redacted]

[4] Section III, pp. 39-41.

[5] Tr. at 5-6 (App.89-90), pointed out in the Initial Brief, pp. 1, 2, 11, 14.

but rather, contested the dismissal at every possible turn.[6] The BANK goes so far as to ask the Court to strike the [redacted] argument that the final order was factually incorrect on this point.[7] This impliedly accuses the [redacted] of misleading this Court or suggests that, somehow, the BANK itself was not sure whether or not it agreed to the dismissal.

Worse, the [redacted] did, in fact, cite to the record when it first raised the topic on page 16 of their Brief:

> The dismissal of the action did not occur until December, 2010, and the BANK certainly did not agree to the dismissal. [fn. 52: Final Judgment of Dismissal, dated December 28, 2010 (App. 76).] In fact, the BANK moved for rehearing to challenge the dismissal. [fn. 53: Motion for Rehearing, dated December 15, 2010; Supplement to Motion for Rehearing dated March 7, 2011 (App. 66).]

(emphasis added to footnoted record citations).

The BANK, however, directed this Court to the following page of the Initial Brief, where the [redacted] had said "Again, the record confirms that the parties did

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[6] Answer Brief, (Statement of The Case & Facts) p. 11, 32:

> The December 26, 2012 Order [App.122-126] also ruled that "the issue of standing at the time the complaint was filed was addressed by the 4th District Court of Appeal in the previously cited Jeff-Ray case ion [sic] 1990, which is why an agreed order of dismissal was entered by the court." [App.124], which Appellants dispute [p.17, IB] but without any citation to any record or Appendix in Appellants' Initial Brief. Appellants' argument on this point should be stricken.

(emphasis added).

[7] *Id*.

not agree to a dismissal of the action." (emphasis added). The word "again," however, had been carefully excised from the quote.[8]

The fact that the BANK did not agree to the dismissal is an indisputable truth that the BANK knows and should have readily conceded. The BANK's request that this Court strike any argument that the trial court was mistaken in its belief to the contrary (especially when the request is based on a false characterization of the Initial Brief) is rooted in a staggering lack of candor that cries out for an order to show cause why sanctions should not be levied.[9]

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[8] Answer Brief, p. 11:

> Appellants' argument [p.17, IB] that, "the record confirms that the parties did not agree to a dismissal of the action," … is not supported by any citation to any record or Appendix in Appellants' Initial Brief.

[9] "[A]ppellate counsel … has an independent ethical obligation to present both the facts and the applicable law accurately and forthrightly. … The heart of all legal ethics is in the lawyer's duty of candor to a tribunal. …" *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 571-573 (Fla. 2005); *see also Hagood v. Wells Fargo N.A.*, 38 Fla. L. Weekly D1437 (Fla. 5th DCA 2013) (sanctioning all counsel whose name appeared on a brief because each is responsible for its content).

ARGUMENT

I. It is a *Per Se* Abuse of Discretion to Decline to Award a Single Dollar in Attorneys' Fees and Costs in the Face of Uncontradicted Evidence and Expert Testimony Regarding Reasonable Fees and Expenses.

A. Testimony is valid evidence.

A recurrent theme of the Answer Brief is that the [redacted] introduced no evidence of their fees because no documents were admitted as exhibits.[10] At the risk of stating the obvious, testimony is evidence. Black's Law Dictionary defines "evidence" as: "Something (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact."[11]

All the facts required for a fee award—such as the existence and terms of the contingency fee contract[12]—were admitted into evidence via an hour and a half of sworn testimony. While some of the testimony might have been properly excluded under a "best evidence rule" objection, none was ever made. As pointed out in the Initial Brief, it is quintessential "gotcha" litigation to now say that the [redacted]

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[10] *See e.g.*, Amended Answer Brief, p. 6 (arguing that PDFs of counsel's file—essentially the pleadings in the case—were not introduced into evidence); Amended Answer Brief, pp. 21-24 (arguing that cases cited by the [redacted] should be distinguished because the time expended was shown by exhibits, rather than testimony).

[11] *Black's Law Dictionary* (9th Edition for the iPhone/iPad/iPod touch, ver. 2.12 (B13195), 2013).

[12] Tr. 10 (App. 91).

should have moved documents into evidence, when at trial, the BANK was content with testimony.[13]

Curiously, the BANK responds that "an objection based on the best evidence rule was never triggered as the attorney agreement…was never offered and admitted into evidence; an objection was therefore, never waived."[14] Again, at the risk of belaboring this Court with the obvious, the objection would have been pertinent to the testimony describing the contents of a document. Had the objection been made, the [redacted] would have moved the document into evidence.

B. The BANK's cases are inapplicable.

Because testimony is evidence—particularly when it is not objected to—the BANK's cases, where fees were denied for lack of evidence, are inapposite:

- In *Kranz v. Kranz*, 737 So. 2d 1198, 1203 (Fla. 5th DCA 1999),[15] "[n]o evidence was presented regarding the number of hours expended by the wife's attorney, the rate charged, or the reasonableness of either."
- In *Warner v. Warner*, 692 So. 2d 266 (Fla. 5th DCA 1997),[16] there was no evidence of the number of hours reasonably expended and the hourly rate.

[13] Initial Brief, pp 26-27.

[14] Amended Answer Brief, p. 13, argument repeated at p. 26.

[15] Amended Answer Brief, pp. 5, 15, 21 27.

[16] Amended Answer Brief, pp. 5, 15, 21 27.

- In *Braswell v. Braswell*, 4 So. 3d 4 (Fla. 2d DCA 2009),[17] the court simply held there was "no evidence" to support the fee award, but comments that competent evidence would include information about the services provided "as well as testimony from the attorney." *Id* at 5.
- In *Morton v. Heathcock*, 913 So. 2d 662 (Fla. 3d DCA 2005),[18] the attorneys who rendered services never testified as to the nature and extent of their representation.
- In *Nants v. Griffin*, 783 So. 2d 363 (Fla. 5th DCA 2001)[19] the court held that the attorney performing the work is not required to testify when there is competent evidence filed with the motion or introduced at the hearing.

In contrast to the BANK's cases above, the [redacted] presented testimonial evidence (without objection)[20] as to the number of hours, the rates, and the reasonableness of the fees. Moreover, the attorney who represented the [redacted] did testify and did describe the nature and extent of the services provided.[21]

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[17] Amended Answer Brief, pp. 21.

[18] Amended Answer Brief, p. 4, 16, 20.

[19] Amended Answer Brief, p. 4, 16, 20.

[20] *See*, *Cohen & Cohen, P.A. v. Angrand*, 710 So. 2d 166, 168 (Fla. 3d DCA 1998), which held that any objection to a detailed reconstruction had been waived. Here, the BANK waived any objection to testimony about a detailed reconstruction.

[21] Testimony of Amanda Lundergan, Esq., Tr. 6-37 (App. 90-97).

C. The attorney-witness was substantially involved in the case.

With regard to the testimony of the attorney, the BANK again falsely accuses the [redacted] of misleading this Court as to the attorney-witness's participation in the case. The Initial Brief had said that the attorney was the one who "handled the hearing on the Motion to Dismiss, and all of the hearings since then…."[22] The BANK responded that the hearing took place two years before the attorney began working at the firm:

> [T]he Appendix shows otherwise. Appellants' Motion to Set Aside the Foreclosure [Decree] and Dismiss the Action, etc. was granted in an Order dated July 30, 2008 [App.37-38], i.e. some two years *before* Appellants' fact witness, Ms. Lundergan, was hired by the Appellants' law firm.[23]

The hearing on the Motion to Dismiss, however, was held December 1, 2010.[24] The BANK has (unintentionally or otherwise) confused this hearing with the Agreed Order in July of 2008, which vacated the judgment, but did not dismiss the action.

D. The expert reviewed the Defense Firm's file.

Incredibly, the BANK represents to this Court that "[a]t **no** point does the [expert] witness testify that he actually received and reviewed the Appellants'

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[22] Amended Answer Brief, p. 19, quoting from the Initial Brief, p.

[23] Amended Answer Brief, p. 19.

[24] *See*, Docket Entry 12/22/2010 "TRANSCRIPT OF HEARING HELD 12/01/10 ON DEFTS MDIS" (App. 128); *see also*, transcript of that hearing (Supp. R. 4-17).

counsel's file for *this* case!"[25] In reality, the expert plainly testified that he reviewed the file and that he did so by perusing the electronic images (the Portable Document Format or "PDFs") of the documents, which is how they were kept:

> Q. Now, you said you reviewed the physical file of Ice Legal?
>
> A. PDF, predominantly.
>
> Q. Okay.
>
> A. I don't know that they keep a physical file. It's my understanding that a very limited physical file is kept. So I don't know how you define that. I know that the Ice Firm is highly electronic in its organization, that they scan in. What was shown to me was in electronic form.[26]
>
> * * *
>
> What I was asked to do was look at the file, and that's what I did. And I came up with a number that I believe was correct for the file.[27]

The [redacted] are unfamiliar with any requirement that an expert testifying to the reasonableness of fees must review a paper version of counsel's file.

Nor is there any requirement that the expert review and evaluate each entry of a reconstruction,[28] rather than independently assessing the reasonableness of the fee from the work-product itself.

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[25] Amended Answer Brief, p. 28 (emphasis original); *see also*, Amended Answer Brief, p. 13.

[26] Tr. 56 (App. 102).

[27] Tr. 57 (App. 102) (emphasis added).

[28] Amended Answer Brief, p. 29.

E. The [redacted] did not need to provide a verified statement of costs when they filed their motion.

Citing to §57.041 Fla. Stat. and *W.S.M., Jr. v. Department of Health and Rehabilitative Services*, 692 So. 2d 246, 249 (Fla. 1st DCA 1997), the BANK contends that the [redacted] should be denied their costs because no "verified statement of costs was ever attached to the Appellants' Motion, filed in the record, or apparently served upon the opposing party."[29]

There is no such requirement under §57.041, nor does *W.S.M., Jr.* create one. In fact, the First District's dictum about attaching a "statement, preferably verified" originated in another case where no motion for costs had been made at all. *Burnett v. Burnett*, 197 So. 2d 854, 857 (Fla. 1st DCA 1967) (quoted by *W.S.M, Jr.*, at 249). In that case, the court specifically acknowledged that there exists no rule requiring the submission of a verified statement of costs and that it had "no power to promulgate such a procedural rule." *Id.*, at 857.

Here, the BANK had a year and seven months of notice to conduct discovery, ascertain the specific (and very predictable) costs being assessed, make its objections, and marshal its evidence against them. That it chose to attend the hearing ignorant of those costs should not be held against the [redacted]

[29] Amended Answer Brief, p. 6, 14, 16, 42.

II. The Trial Court Erred in Concluding that the [redacted] Were Not Entitled to Fees for Determining the Amount of its Fees.

A. The language of the note and mortgage is sufficiently broad to encompass fees for fees.

The BANK argues repeatedly that the phrase "any litigation" found in the contract in *Waverly at Las Olas Condo. Ass'n, Inc. v. Waverly Las Olas, LLC*, 88 So. 3d 386, 389 (Fla. 4th DCA 2012) is not found in the language of the Note and Mortgage. Thus, according to the BANK, the two are not "verbatim" or "similarly very broad" so as to encompass fees for determining the amount of fees.[30]

But this Court never suggested in *Waverly* that there are magic words, such as "any litigation," that must be uttered. The language of the Mortgage here entitles Lender to reimbursement of <u>all</u> its expenses incurred in pursuing its remedies, which include attorneys' fees:

> Lender shall be entitled to collect <u>all expenses</u> incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.[31]

Thus the recovery of reasonable attorneys' fees (for pursuing foreclosure) becomes an additional remedy listed in that section. Litigation about those fees then becomes another "expense incurred" in pursuing that expressly mentioned remedy (the fees for the underlying litigation)—an expense which must be

[30] Amended Answer Brief, pp. 33-37

[31] Mortgage, ¶22 (App. 27, 59) (emphasis added).

reimbursed. Under the mirroring section of §57.105(7) Fla. Stat., if the "Lender" is entitled to "fees for fees" when it prevails, then so too are the [redacted] when they have prevailed.

Ironically, since the BANK is still attempting to litigate entitlement even on appeal, this Court could well conclude that it was unnecessary to carve out the fees for determining the amount of fees, since the two issues of entitlement and amount are still intertwined. *Lugassy v. Indep. Fire Ins. Co.*, 636 So. 2d 1332, 1336 (Fla. 1994) (attorney's fees may properly be awarded for litigating the issue of entitlement to attorney's fees, but not for litigating the amount of attorney's fees).

But even if this Court should agree with the trial court's view that the [redacted] are not entitled to fees for fees, it was not too speculative for the trial court to arrive at a reasonable fee, *sans* fees for fees, in this case. Given that the total hours that were expended was in evidence, as were the hourly rates of the attorneys,[32] and given that the court file itself is evidence of the work that was performed both before and after the stipulation to entitlement, the court could have used its experience, discretion, and common sense to arrive at a number. *See D'Alusio v. Gould & Lamb, LLC*, 36 So. 3d 842 (Fla. 2d DCA 2010) (judges are

[32] Tr. 16-17 (App. 92).

not required to abandon what they learned as lawyers or their common sense in evaluating the reasonableness of a fee award).

And finally, even if additional evidence were necessary to apportion the fees, because there was competent evidence of the total amount of fees, this Court should remand for another hearing. *Young v. Taubman*, 855 So. 2d 184, 186-87 (Fla. 4th DCA 2003) ("[W]hen the record contains some competent substantial evidence supporting the fee or cost order, yet fails to include some essential evidentiary support…the appellate court will reverse and remand the order for additional findings or an additional hearing, if necessary."), *quoting*, *Rodriguez v. Campbell*, 720 So. 2d 266, 268 (Fla. 4th DCA 1998); *Morton v. Heathcock*, 913 So. 2d 662, 670 (Fla. 3d DCA 2005) (remand for additional hearing where record contains some evidence supporting a fee award).

B. The terms of the Note and Mortgage were before the court in the form of the BANK's own allegations.

The BANK states that the [redacted] Initial Brief never disputed the judge's conclusion that "Ice Legal, P.A., failed to offer any contract between the parties in evidence for the court to examine."[33]

Yet, in reality, the [redacted] did argue that the contract (the Note and Mortgage) were, in fact, available for the judge to examine because they were

[33] Amended Answer Brief, p. 9. Also argued at pp. 37-39.

attached to the Complaint and Amended Complaint.[34] Moreover, because the documents had become incorporated into the BANK's own pleadings, there was no need to adduce evidence against the BANK of their existence or terms.[35] No mere afterthought on appeal, the [redacted] made this very point to the trial judge, who expressed no disagreement at the time.[36]

Nor was it necessary to make a formal request for the trial court to judicially notice the Note and Mortgage.[37] *See Elmore v. Florida Power & Light Co.*, 895 So. 2d 475, 478 (Fla. 4th DCA 2005) ("The comment following [§ 90.202 Fla. Stat.] states, 'The court may take judicial notice of these matters, whether or not it is requested by a party to do so.'"); *McNish v. State*, 36 So. 176 (Fla. 1904) (unnecessary to offer evidence of prior proceedings in a case).

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[34] Initial Brief, p. 31

[35] *Id*. The phrase "against the BANK" is emphasized here because the BANK counters this by citing to cases which hold (not surprisingly) that attachments to pleadings are not evidence when offered against a party other than the pleader. Amended Answer Brief, pp. 37-38. *See, e.g. Pines Children's Fitness Ctr. v. Shoppes at Pembroke, LLC.*, 82 So. 3d 1023 (Fla. 4th DCA 2011).

[36] Tr. 71 (App. 106).

[37] Amended Answer Brief, p. 38.

III. Having Stipulated to Entitlement to Fees, the BANK Cannot Justify a Zero Award On the Grounds That the [redacted] Were Not Entitled to Fees.

The BANK argues (citing to Texas and New York cases) that, because this case was dismissed without prejudice to file a second lawsuit, the [redacted] are not the prevailing party, and therefore, not entitled to award of fees under §57.105(7) Fla. Stat. And while it amended its brief to add a footnote which lists binding contrary authority,[38] it made no effort to distinguish those cases or explain how this panel could overrule previous decisions from this Court without sitting *en banc*.

But because the BANK's trial counsel stipulated to entitlement,[39] this Court need not worry about overturning years of decisions, or for that matter setting up a conflict with the Supreme Court opinion in *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 919 (Fla. 1990) (a determination on the merits is not a prerequisite to an award of attorney's fees) which guided this Court's decisions. *See Alhambra Homeowners Ass'n, Inc. v. Asad*, 943 So. 2d 316, 319 (Fla. 4th DCA 2006) (analyzing *Thornber*).

The BANK does not dispute or address the stipulation in any way. In fact, the word "stipulation" does not appear in its brief.

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[38] Amended Answer Brief, p. 41, fn. 1.

[39] *See*, Introduction, above, and record citations there.

CONCLUSION

The trial court's denial of attorneys' fees to the [redacted] should be reversed, and remanded with instructions to award fees and costs in an amount consistent with the unrebutted testimony of the witnesses (attorneys' fees in the amount of $24,930.00 and costs in the amount of $3,580.00). Additionally, the Court should reverse and remand for the determination of the appropriate contingency fee multiplier.

Dated: September 3, 2013.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief complies with Fla. R. App. P. 9.210(a)(2) and has been typed in Times New Roman, 14 Point.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this September 3, 2013 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.

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