In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

HSBC BANK, USA AS INDENTURE TRUSTEE FOR FRIEDMAN, BILLINGS, RAMSEY GROUP, INC. (FBR) SECURITIZATION NAME – FBRSI 2005-2, et al.,

Appellees.

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

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUMMARY OF REPLY ARGUMENT 1

ARGUMENT 2

I. There is no competent, substantial evidence to support the judgment. 2

A. There is no competent, substantial evidence to support the Bank's standing at inception. 2

B. The Homeowners did not waive their right to an evidentiary hearing on the issue of attorneys' fees. 6

II. The Bank's exhibits should have been excluded from evidence. 8

CONCLUSION 14

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD 15

CERTIFICATE OF SERVICE AND FILING 16

SERVICE LIST 17

TABLE OF AUTHORITIES

Page

Cases

Alexander v. Allstate Ins. Co.,
388 So. 2d 592 (Fla. 5th DCA 1980) 11

Bank of New York v. Calloway,
157 So. 3d 1064 (Fla. 4th DCA 2015) 8, 9, 11

Bankers Trust (Delaware) v. 236 Beltway Inv.,
865 F. Supp. 1186, 1195 (E.D. Va. 1994).....5

Colson v. State Farm Bank, F.S.B.,
__ So. 3d __,
2015 WL 1650300 (Fla. 2d DCA April 15, 2015).....2

Diwakar v. Montecito Palm Beach Condo. Ass'n,
143 So. 3d 958 (Fla. 4th DCA 2014) 8

Ernest v. Carter,
368 So. 2d 428 (Fla. 2d DCA 1979).....7

Hartford Acc. & Indem. Co. v. Ocha,
472 So. 2d 1338 (Fla. 4th DCA 1985) 12

Hillsborough, etc. v. Pub. Emp. Rel. Com'n,
424 So. 2d 132 (Fla. 1st DCA 1982).....10

In re Phillips,
491 B.R. 255 (Bankr. D. Nev. 2013).....5

Kumar Corp. v. Nopal Lines, Ltd.,
462 So. 2d 1178 (Fla. 3d DCA 1985).....6

Landmark American Insurance Company v. Pin-Pon Corp.,
155 So. 3d 432 (Fla. 4th DCA 2015) 10, 11

Le v. U.S. Bank,
__ So.3d __,
2015 WL 2414456 (Fla. 5th DCA May 22, 2015).....9

TABLE OF AUTHORITIES
(continued)

Leon Shaffer Golnick Advertising, Inc. v. Cedar,
423 So. 2d 1015 (Fla. 4th DCA 1982) 7

Mastan Co. v. Am. Custom Homes, Inc.,
214 So. 2d 103 (Fla. 2d DCA 1968).....11

Matthews v. Federal National Mortgage Association,
160 So. 3d 131 (Fla. 4th DCA 2015) 6

Nationwide Mut. Ins. Co. v. Jones,
414 So. 2d 1169 (Fla. 5th DCA 1982) 12

Sas v. Federal Nat. Mortg. Ass'n,
112 So. 3d 778 (Fla. 2d DCA 2013).....12

Shands Teaching Hosp. & Clinics, Inc. v. Dunn,
977 So. 2d 594 (Fla. 1st DCA 2007).....12

Tremblay v. U.S. Bank, N.A.,
__ So. 3d __,
2015 WL 2089069 (Fla. 4th DCA May 6, 2015).....4

U.S. v. Grace,
367 F.3d 29 (1st Cir. 2004) 3

WAMCO XXVIII, Ltd. v. Integrated Electronic Environments, Inc.,
903 So. 2d 230 (Fla. 2d DCA 2005).....9

Webster v. Chase Home Finance, LLC,
155 So. 3d 1219 (Fla. 5th DCA 2015) 12

Wells Fargo Bank, N.A. v. Reeves,
92 So. 3d 249 (Fla. 1st DCA 2012).....4

Wolkoff v. American Home Mortg. Servicing,
153 So. 3d 280 (Fla. 2d DCA 2014).....7

Statutes

§ 673.2011, Fla. Stat. Ann., cmt. 5

§ 90.202, Fla. Stat. 10

TABLE OF AUTHORITIES
(continued)

Rules

Fla. R. Civ.P. 1.530(e) 2, 4

Key:

- The Plaintiff/Appellee, HSBC Bank, USA as Indenture Trustee for Freidman, Billings, Ramsey Group, Inc. (FBR) Securitization Name – FBRSI 2005-2, will be referred to as "the Bank."
- The Defendants/Appellants, [redacted] and [redacted] will be referred to as "the Homeowners."
- JPMorgan Chase, the entity which employed the Bank's trial witness, will be referred to as "the Servicer."
- The Servicer's subsidiary, Chase Manhattan Mortgage Corporation, will be referred to as "CMMC."
- Jason George, the Bank's witness at trial, will be referred to as "George."
- The Transcript of the Non Jury Trial held on April 9, 2014 through April 10, 2014 will be referred to as "T. ___" followed by the transcript page number.

SUMMARY OF REPLY ARGUMENT

The Bank argues that the Homeowners waived the issue of whether the allonge was affixed to the note on the day the lawsuit was filed—but fails to appreciate that the sufficiency of the evidence to support its standing is simply not something the Homeowners can waive. And not only is this issue not waived, but the scanned image of the allonge is insufficient evidence to support the judgment since it is actually evidence that someone other than the Bank had standing on the day the lawsuit was filed.

Moreover, the Homeowners did not "waive" their right to an evidentiary hearing on attorneys' fees. The Bank's fee affidavits were never identified by its witness at trial or moved into evidence. Thus, the Homeowners did not even have the opportunity to object to their admission.

And finally, the Bank fares no better when it argues that its documents were admissible under the business records exception. In fact, the very authorities it relies upon supports the Homeowners' position that the payment history was merely a document "found" amongst the prior servicer's records. Further, established law refutes its proposition that merely reading policy and procedural manuals makes a witness "qualified" to lay the exception.

The judgment should therefore be reversed and the case dismissed.

ARGUMENT

I. There is no competent, substantial evidence to support the judgment.

A. There is no competent, substantial evidence to support the Bank's standing at inception.

The sufficiency of the allonge to support a finding of standing is not an issue the Homeowners can waive.

The Bank's foundation argument—that the Homeowners waived the issue of whether the allonge was affixed to the note[1]—fails as a matter of law because 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, Fla. R. Civ. P. 1.530(e) is the functional equivalent of a motion for judgment notwithstanding the verdict—except that the trial court plays the role of a jury and the appellate court plays the role of the trial judge testing the sufficiency of the evidence for that jury's verdict. This distribution of roles appears to codify a commonsense recognition that it would simply be redundant to argue to a trial court that the evidence is insufficient. If the trial judge, after having seen the evidence, believes that a party has proven its

[1] Answer Brief, pp. 14-15.

case, then that judge, acting in his or her factfinding capacity, has already found it sufficient. The oversight role, therefore, naturally goes to the appellate court. *Cf. e.g. U.S. v. Grace*, 367 F.3d 29 (1st Cir. 2004) (in federal criminal context, 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).

But even more fundamentally, the Bank's argument misses the mark because issues are what must be preserved for appellate review, not arguments about why the evidence is insufficient. And it is uncontroverted that the Homeowners preserved the issue of standing by denying the Bank's allegation that it was the holder "and/or" entitled to enforce the note in their answer;[2] raising standing as an affirmative defense;[3] reiterating this point during their opening statement;[4] and then specifically arguing in their motion for involuntary dismissal that the case should be dismissed because the Bank failed to prove its standing.[5] Notably, once standing is preserved by an affirmative defense, "the issue is then determined upon evidence presented or the party's inability to produce sufficient evidence of its standing." *Wells Fargo Bank, N.A. v. Reeves*, 92 So. 3d 249, 253 (Fla. 1st DCA

[2] Answer, October 8, 2013, ¶ 7 (R. 618).

[3] Affirmative Defenses, October 8, 2013, ¶ 3 (R. 622-623).

[4] T. 11-12.

[5] T. 187-189.

2012) (emphasis added). Here, the Bank was unable to produce sufficient evidence of its standing.

In short, it defies logic that a litigant could be put on notice of an issue, bring to trial what it claims to be evidence on that issue, and then act on appeal as if the issue does not exist. The no-waiver provision incorporated into Rule 1.530(e) means the Bank, as the party bearing the burden of proof and persuasion, must be sure to adduce competent evidence of the allegations the Homeowners denied. If, as in this case, it fails to do so, it bears the risk of reversal on appeal.

Even if admissible, the scanned image of the allonge proves a party other than the Bank had standing to sue.

Even if it had been admissible, the scanned image of the allonge (Exhibit 5) cannot be considered competent, substantial evidence of the Bank's standing because it proves that the Servicer (or the Servicer's subsidiary CMMC) was in possession of the note on the day the lawsuit was filed. And since the Servicer (rather than the Bank) was in possession of the note on the day the lawsuit was filed, it was the party who had standing to sue. *Tremblay v. U.S. Bank, N.A.*, __ So. 3d __, 2015 WL 2089069, at * 1 (Fla. 4th DCA May 6, 2015) ("Further, Bank's attachment of a copy of the note with a blank indorsement was insufficient to establish standing because Bank's only witness testified that his employer—the

servicer—had been the holder of the note since August of 2005. Based on this testimony, the servicer was the proper party to initiate the action, not Bank.").

The Bank also did not prove (or even try to prove) that the Servicer (or CMMC) was its agent on the day the lawsuit was filed so that the Bank would have been in constructive possession of the note at the inception of the action. *See*, § 673.2011, Fla. Stat. Ann., cmt. ("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.) (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.")

But the only evidence that the Servicer was the Bank's agent was the Limited Power of Attorney—a document which was signed more than four years after the complaint was filed. Critically, this document does not purport to retroactively ratify the Servicer as the Bank's agent on the day the lawsuit was

filed. *See Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1185 (Fla. 3d DCA 1985) ("It is a fundamental proposition of the law of agency that a principal may subsequently ratify its agent's act, even if originally unauthorized, and such ratification relates back and supplies the original authority."). Thus, there was insufficient evidence to support a finding that the Bank possessed the original note on the day the lawsuit was filed.[6]

B. The Homeowners did not waive their right to an evidentiary hearing on the issue of attorneys' fees.

The Bank is also wrong when it argues that the Homeowners "waived" their right to an evidentiary hearing on the issue of attorneys' fees.[7] In fact, the Bank goes so far as to declare that because it dropped attorneys' fees affidavits in the court file a month before the trial and generally asserted in its exhibit list that it might place into evidence anything and everything contained in the court file, the Homeowners "should have arranged to call [the Bank's] affiants for the purpose of

[6] The Bank is also incorrect when it asserts that the standard of review of whether it had standing is not *de novo*. (Answer Brief, p. 11, n. 4). As this Court has consistently held, the *de novo* standard of review applies when reviewing a trial court's determination of a party's standing—even if that determination comes during trial. *See e.g. Matthews v. Federal National Mortgage Association*, 160 So. 3d 131, 132 (Fla. 4th DCA 2015) and cases cited therein.

[7] Answer Brief, pp. 26-28.

cross-examination at trial…"[8] Putting aside the fact that it is counterintuitive to "call" a witness "for the purpose of cross-examination," the Bank's argument miscomprehends that its measure of damages was its burden to prove. *Ernest v. Carter*, 368 So. 2d 428, 429 (Fla. 2d DCA 1979).

And while the Bank is correct that the Homeowners objected to the attorneys' fee award after the trial court incorrectly ruled that the "evidence" supports the judgment,[9] there was no "evidence" before the trial court which supported the attorneys' fee award. At best, there was an off-hand and unsworn remark by the Bank's attorney that the fee affidavits had been filed.[10] But such unsworn allegations do not constitute evidence which the trial court could have relied on. *Leon Shaffer Golnick Advertising, Inc. v. Cedar*, 423 So. 2d 1015, 1016-1017 (Fla. 4th DCA 1982).

And even if George had identified the affidavits (which he did not), "[a] document that was identified but never admitted into evidence as an exhibit is not competent evidence to support a judgment." *Wolkoff v. American Home Mortg. Servicing*, 153 So. 3d 280, 281-282 (Fla. 2d DCA 2014). In short, because the

[8] Answer Brief, pp. 27-28.

[9] T. 223.

[10] T. 76.

Bank never gave the Homeowners the opportunity to object to admission of the fee affidavits (since it never sought to admit them at evidence), there was no objection the Homeowners could have "waived."

The fact that there was no competent, substantial evidence to support the fee award is also an issue that the Homeowners can make for the first time on appeal. *Diwakar v. Montecito Palm Beach Condo. Ass'n*, 143 So. 3d 958, 961 (Fla. 4th DCA 2014). Thus, even if the Bank's argument was somehow well-taken, the fact that the affidavits were never admitted into evidence (and generally are inadmissible at trial in any event) means that there was no competent, substantial evidence to support the judgment.

II. The Bank's exhibits should have been excluded from evidence.

The Bank's reliance on Calloway supports the Homeowners' position.

The Bank relies heavily on this Court's decision in *Bank of New York v. Calloway*, 157 So. 3d 1064 (Fla. 4th DCA 2015) for the proposition that the payment history and default notice were admissible documents—but this decision actually supports the Homeowners' argument that these documents should have been excluded from evidence.

Indeed, as this Court 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. *Calloway* goes on to say that mere reliance by the business adopting the records is insufficient by itself to establish trustworthiness. *Id*. There must be evidence of a continuing business relationship between the two entities (*Id*.)—which is not present here.

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, George failed to provide any specific testimony that the Servicer verified the payment history for accuracy after receiving it from the prior servicer. *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*, __ So.3d __, 2015 WL 2414456 * 1 (Fla. 5th DCA May 22, 2015) (<u>specific</u> testimony regarding current servicer's verification process sufficient evidence of the trustworthiness of the prior servicer's records.). In fact, George did not provide any testimony about how this document was (in servicer parlance)

"boarded" onto his employer's recordkeeping system. As such, the new loan startup figure was simply a number uploaded (or "incorporated") into the Servicer's records. *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). They should have been excluded from evidence.

Even more telling than this is the Bank's own math on appeal.[11] Specifically, the Bank attempts to back into the loan start up number by deducting two payments from the principal amount—and then requesting that this Court take judicial notice of its self-made amortization table.[12] But even if this Court wanted to take judicial notice of the Bank's self-serving document, this amortization table proves the Homeowners' point since it shows a clear discrepancy between the principal startup number and the loan's amortization. The payment history was, therefore, untrustworthy and should have been excluded. [13]

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[11] Answer Brief, pp. 23-24.

[12] It is axiomatic that the Florida Evidence Code does not apply to appellate proceedings and that this Court is not bound by § 90.202, Fla. Stat. *Hillsborough, etc. v. Pub. Emp. Rel. Com'n*, 424 So. 2d 132 (Fla. 1st DCA 1982). This Court is therefore free to disregard or even strike the Bank's appendix.

[13] The Bank is also wrong when it asserts that the standard of review for this issue is abuse of discretion. (Answer Brief, p. 12, n. 5). The issue of whether the Bank's exhibits were admissible under the business records exception to the

George was not an "other qualified witness."

The Bank contends that to be "well enough acquainted" with the activity documented in a business record, a witness need do nothing more than "review" a few policy and procedure manuals and "loan himself out" to those departments.[14] 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 Bank claims here, that a witness may meet the "well enough acquainted" standard simply by reviewing policies and procedures. In fact, it suggests just the opposite.

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hearsay rule is a pure question of law subject to the *de novo* standard. *Pin-Pon*, 155 So. 3d at 441. Curiously, the Bank makes no mention of *Pin-Pon* in its brief despite its liberal use of this Court's decision in *Calloway* which this Court decided the same day.

[14] Answer Brief, pp. 19-20.

But even if George's parroted testimony regarding the policy and procedure manuals was sufficient to qualify George as an "other qualified witness," the mere existence of "policy and procedure" manuals is not evidence of a "routine practice." There must be evidence that the intent expressed in a "policy and procedure" is actually implemented and enforced such that it has become an established custom or habit. *See Shands Teaching Hosp. & Clinics, Inc. v. Dunn*, 977 So. 2d 594, 597 (Fla. 1st DCA 2007); *Hartford Acc. & Indem. Co. v. Ocha*, 472 So. 2d 1338, 1340 (Fla. 4th DCA 1985); *Nationwide Mut. Ins. Co. v. Jones*, 414 So. 2d 1169, 1171 (Fla. 5th DCA 1982). Nor was it permissible for George—even if he were a qualified witness—to convey the contents of these manuals when they were not in evidence. *See Webster v. Chase Home Finance, LLC*, 155 So. 3d 1219 (Fla. 5th DCA 2015); *Sas v. Federal Nat. Mortg. Ass'n*, 112 So. 3d 778 (Fla. 2d DCA 2013).

Finally, the Bank mischaracterizes the Homeowners' argument into an assertion that the witness must be the person who created the document.[15] The Homeowners do not assert, nor have they ever asserted, that the witness must be the person who created the document. Rather, the Homeowners merely contend that in order to be an "other qualified witness" the witness must have operational

[15] Answer Brief, p. 21.

expertise rather than litigation expertise. In other words, the witness should be someone who actually understands the "usual business practice" because the witness actually worked in the department responsible for creation and maintenance of the document the proponent seeks to introduce—rather than someone who was "told" through their "training" what the document is.

And since George was not someone who had operational experience with the documents, he was uniquely unqualified to testify. The Bank's exhibits should have been excluded from evidence.

CONCLUSION

The Court should reverse the judgment with instructions that the trial court enter an involuntary dismissal of the action on remand.

Dated: June 8, 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 June 8, 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 June 8, 2015.

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