

In the District Court of Appeal
Third District of Florida

CASE NO. [REDACTED]

(Circuit Court Case No. [REDACTED])

[REDACTED]

Appellants,

v.

SUNTRUST MORTGAGE, INC.,

Appellees.

ON APPEAL FROM THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

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INTRODUCTION

Appellants [REDACTED] (“the [REDACTED] appeal the entry of final judgment ordering foreclosure on their family home after trial. The primary error was that the trial court entered judgment even though the [REDACTED] had already filed an appeal pertaining to the trial court’s exercise of personal jurisdiction over [REDACTED] an appeal which was, and still is, pending.”¹

Although this Court need not reach any of the other issues, the [REDACTED] raise additional error in the judgment for several reasons. Among them is that raising these secondary issues underscores the [REDACTED] intent to preserve them for a later plenary appeal should the Court resolve this appeal by remanding for re-entry of the same judgment when the trial court has jurisdiction to do so. Additionally, by raising the issues in this appeal, the Court has the option, for purposes of judicial economy, to resolve them sooner rather than later.

¹ Case No. 3D12-2723.

STATEMENT OF THE CASE AND OF THE FACTS

A. The [REDACTED] try to modify their loan with their original lender, SUNTRUST.

The [REDACTED] who in 2007 executed a promissory note to SUNTRUST MORTGAGE, INC. (“SUNTRUST”) with an accompanying mortgage to MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INCORPORATED AS NOMINEE FOR SUNTRUST MORTGAGE, INC.,² had lived in their home for five years at the time of the trial.³ Sometime in 2009, the [REDACTED] missed a mortgage payment.⁴ They sought a loan modification with SUNTRUST in February, 2010, and made several trial payments under the modification.⁵ They had been told that they would qualify for a loan modification after making 3 trial payments.⁶

After the [REDACTED] had made eight trial modification payments to SUNTRUST, they received both a telephone call and a letter informing them that their home loan would now be serviced by NATIONSTAR MORTGAGE, LLC

² R.7 ¶ 2 (Complaint ¶ 2).

³ Tr. at 6:1-3.

⁴ Compare R. 6 (Compl. ¶ 5 alleging payment default date of July 1, 2009) with R. 153-159 (Defendants’ Trial Exhibit B indicating the “Next Due” date of October 1, 2009).

⁵ Tr. 7:5-20 (first payment in March, 2010); Tr. 68:19-69:8.

⁶ Tr. 16:9-22; Tr. 73:12-25.

(“the BANK” or “NATIONSTAR”) rather than SUNTRUST.⁷ NATIONSTAR told the [REDACTED] several times that their request for a loan modification was being processed, but each time NATIONSTAR “would ask me [Mr. [REDACTED]] to rehash all the information that I gave to the previous person,” but never approved the modification.⁸ Eventually, NATIONSTAR refused to acknowledge the modification payments made to SUNTRUST, and advised the [REDACTED] not to make any more payments unless they were for the full payment amount.⁹

Unbeknownst to the [REDACTED] in the same month they were applying for a loan modification and making payments toward that proposed modification in good faith, SUNTRUST filed the instant foreclosure action.¹⁰ The Complaint alleged that the Note was owned by Federal National Mortgage Association (“FANNIE MAE”), while SUNTRUST was the holder of the Note and its servicer.¹¹ The Complaint also alleged that the [REDACTED] owed a balance of

⁷ Tr. 72:7-17; *see also* R. 69-70 (Motion to Substitute Party Plaintiff attaching assignment of mortgage from SUNTRUST MORTGAGE, INC. to NATIONSTAR MORTGAGE LLC, effective December 8, 2010). The [REDACTED] do not concede the validity of the *ex parte* order allowing the substitution and, in fact, moved (unsuccessfully) to set it aside. R. 174-188.

⁸ R. 73:8-74:7.

⁹ R.73:1-5.

¹⁰ R. 1-32 (Complaint filed February 22, 2010).

¹¹ R. 6 ¶ 3 (Complaint).

\$450,499.47 on the Note.¹² Although the Complaint was filed after the effective date of Florida Rule of Civil Procedure 1.110(b)(2)(2010) requiring that complaints for residential foreclosures be verified, the complaint was not verified in any way.¹³

The [REDACTED] who thought they were in negotiations with their lender and had never been served with the lawsuit, did not answer the complaint.¹⁴ The trial court entered a default against the [REDACTED].¹⁵

B. The [REDACTED] learn of the trial and seek to set aside the default.

The [REDACTED] first learned of the foreclosure suit pending against them in mid-September when they received an order setting trial for October 17, 2012 (the “Trial Order”).¹⁶ TERRANCE [REDACTED] attempted to comply with the trial order and, acting *pro se*, filed a witness and exhibit list on behalf of himself.¹⁷ But the

¹² R. 7 ¶ 7.

¹³ R. 1-32; *In re Amendments To The Florida Rules Of Civil Procedure*, 44 So. 3d 555 (Fla. 2010)(requiring residential foreclosure complaints to be verified effective February 11, 2010).

¹⁴ R. 198-200; ¶¶ 3-4.

¹⁵ R. 81-82 (default entered September 19, 2011).

¹⁶ R. 100-105 (Notice of Service for Order Setting Cause for Non-Jury Trial, dated Sept. 12, 2012); R. 198-200 at ¶¶ 3-4. Although the Trial Order was executed in August, the Plaintiff did not serve the order on the [REDACTED] until more than two weeks later. R. 100-105.

¹⁷ R. 106-107.

██████████ also expeditiously sought and retained counsel.¹⁸ The first the ██████████ learned of the default was when their newly-hired counsel reviewed the record.¹⁹ Because the ██████████ were never served with the summons and complaint, ██████████ ██████████ filed a Motion to Quash service of process upon her a week before the trial date—about four weeks after learning of the pending suit—and both ██████████ sought to continue the trial.²⁰ ██████████ ██████████ who had already unwittingly appeared by way of his witness and exhibit list, filed a motion to vacate the default that had been entered against him.²¹ In support of the Motion to Quash, ██████████ ██████████ filed an affidavit in which she swore that she had not been served with the complaint in this matter, either for herself or for her husband.²²

The ██████████ attempted to have their motions for continuance heard prior to the trial date so that the motion to quash and motion to set aside the default

¹⁸ R. 171-173 (Notice of Appearance for ██████████ ██████████ R. 112-115 (Defendant, ██████████ ██████████ Motion to Quash and Motion to Vacate).

¹⁹ R. 198-200 at ¶¶ 3-4.

²⁰ R. 112-15 (Motion to Quash); R. 122-23 (██████████ ██████████ Motion to Continue Trial, dated Oct. 11, 2012).

²¹ R. 174-188 (Defendant, ██████████ ██████████ Motion to Vacate Clerk's Default, and Motion to Dismiss Complaint, and Motion to Vacate *Ex Parte* Substitution Of Party Plaintiff, dated Oct. 16, 2012).

²² R. 195-200 at ¶¶ 3-4 (Defendant, ██████████ ██████████ Affidavit).

could be heard, but the administrative judge refused to hear the motion to continue, instead deferring the motion to the trial judge.²³ The trial judge, in turn, refused the requested continuances,²⁴ and denied the motions to quash without taking evidence on the service issues, relying on the Trial Order’s admonition that all pre-trial motions “shall have been completed” 15 days prior to trial.²⁵ The trial court also precipitously rebuffed any attempts to argue [REDACTED] [REDACTED] motion to vacate the default based on excusable neglect.²⁶ The trial court even refused to grant the [REDACTED] counsel a brief recess to file a Notice of Appeal on the denial of the motion to quash.²⁷ Instead, the case immediately proceeded to trial.

C. The faulty trial.

The plaintiff’s only witness, Lauren Gergeceff (“GERGECEFF”), was employed as a “mediation litigation specialist” by the current servicer, NATIONSTAR.²⁸ GERGECEFF testified that her only knowledge of the [REDACTED] file was from “reviewing the business records they [NATIONSTAR]

²³ R. 116; 117; Tr. at 10:12-22.

²⁴ R. 116; 117.

²⁵ Tr. at 10:1-7; R. 124.

²⁶ *Id.* at 6:9-12; 9:23-12:22. R. 124.

²⁷ Tr. at 19:15-24.

²⁸ Tr. at 8; 20.

have kept in the course of business.”²⁹ She testified that she had seen the Note for the first time on the day of trial, and had only become familiar with the mortgage file when she learned the case was being tried.³⁰ The Note presented at trial bore an endorsement in blank, although the Note attached to the original complaint did not have any endorsement.³¹ GERGECEFF testified that she had no idea how or when the endorsement came to be placed on the Note, and did not even know that the Note contradicted the attachment to the Complaint.³² GERGECEFF had no knowledge of how or where the Note had been stored by SUNTRUST or FANNIE MAE.³³

Despite the [REDACTED] objection that GERGECEFF lacked the foundation to authenticate the original Note and Mortgage, the court accepted the proffered documents into evidence.³⁴ The [REDACTED] also objected that GERGECEFF’s purported knowledge was all based on out-of-court documents that had not been

²⁹ Tr. at 20:13-16.

³⁰ Tr. at 23-24.

³¹ Compare R. 128 to R. 29-31; see also Tr. at 25-26.

³² Tr. 25-27.

³³ Tr. 27-29.

³⁴ Tr. at 20-24; R. 126-128 (Note); Tr. 31-34; R. 129-145 (Mortgage). On a cold reading of the transcript, it is unclear whether the documents are actually admitted into evidence at all. However, the court clerk recorded that the documents were admitted. R. 125 (clerk’s trial exhibit list).

made available for inspection, and was therefore hearsay.³⁵ The Court nonetheless allowed her testimony and admitted the documents.³⁶

GERGECEFF next testified that SUNTRUST—an entity she had never worked for—had sent a letter to the [REDACTED] notifying them of SUNTRUST’s intent to accelerate the Note.³⁷ GERGECEFF had no knowledge of how the letter was prepared, how or whether it had been sent, or whether it was a true copy of what was sent.³⁸ The Court allowed the letter into evidence over objection to these fatal deficiencies.³⁹

As to the amounts due under the Note, GERGECEFF never testified as to any amounts or the bases for such amounts.⁴⁰ Instead, she testified, over objection, that the figures on a proposed final judgment—which is not in the record⁴¹—“accurately reflect the four alleged damages in this case.”⁴² When questioned

³⁵ Tr. at 30.

³⁶ Tr. at 20-24; Tr. 31-34.

³⁷ Tr. 35-44.

³⁸ Tr. 43:16-44:14.

³⁹ *Id.*

⁴⁰ Tr. at 1-91.

⁴¹ As a result, there is nothing in the court record that can be reviewed by this Court to determine whether the proposed judgment and the Final Judgment are the same document, and therefore, whether the figures are the same.

⁴² Tr. 45:6-47:10.

about how the figures in the proposed final judgment were reached, GERGECEFF testified that she did not have the records she used to come up with the figures with her in court, had not reviewed the complaint prior to preparing the figures, and had not reviewed any invoices for taxes and insurance payments.⁴³ On questioning by the [REDACTED] counsel, GERGECEFF admitted the payment history to which she had access only goes back to the moment when NATIONSTAR took over as the servicer, and that her knowledge was solely based upon reviewing summaries for purposes of litigation.⁴⁴ She never actually testified as to the judgment figures, and the proposed judgment was not admitted into evidence.⁴⁵

The [REDACTED] moved for involuntary dismissal, arguing that the BANK failed to put forth sufficient evidence to make its case,⁴⁶ and that the complaint failed to state a claim because the allegations lacked the required verification.⁴⁷

D. The [REDACTED] file their interlocutory appeal prior to the entry of judgment.

Despite the trial court's refusal to allow a continuance so that the [REDACTED] could appeal the denial of the motion to quash, the [REDACTED] were still able to file

⁴³ Tr. 47:11-51:7.

⁴⁴ Tr. 53:4-21; Tr. 49-50.

⁴⁵ Tr. 44-51; See also R. 125 (clerk's list of admitted exhibits).

⁴⁶ Tr. 61-63.

⁴⁷ Tr. 81:25-82:12.

a notice of appeal prior to the entry of the final judgment.⁴⁸ The trial court nonetheless entered final judgment against the [REDACTED] the next day.⁴⁹ That judgment awarded the BANK judgment on the following amounts:⁵⁰

1. Amounts Due and Owing. Plaintiff is due:	
Principal due on the note secured by the mortgage foreclosed:	\$ <u>449,699.28</u>
Interest on the note and mortgage from 6/1/2009 to 10/17/2012	\$ <u>97,976.40</u>
Title Search Expenses	\$ <u>200.00</u>
Escrow Advance:	\$ <u>55,463.05</u>
Taxes for the year(s) of 2011- \$4,140.23	
Taxes for the year(s) of 2010- \$4,256.15	
Flood Insurance for the year(s) of 2012- \$994.00	
Flood Insurance for the year(s) of 2010- \$1,766.00	
Hazard Premiums for the year(s) of 2012- \$2,991.00	
Hazard Premiums for the year(s) of 2011- \$7,363.63	
Hazard Premiums for the year(s) of 2010- \$7,365.94	
Mortgage Insurance for the year(s) of 2012- \$7,748.10	
Mortgage Insurance for the year(s) of 2011- \$4,304.50	
Mortgage Insurance for the year(s) of 2010- \$14,533.50	
<u>Court Costs, Now Taxed:</u>	
Filing Fee	\$ <u>1,960.00</u>
Service of Process	\$ <u>275.00</u>
SUBTOTAL	\$ <u>605,573.73</u>
<u>Additional Cost</u>	
Inspections	\$ <u>51.75</u>
GRAND TOTAL	\$ <u>605,625.48</u>

Not a single one of these figures had ever been uttered by the BANK's only witness, GERGECEFF, nor do they appear in any document in evidence.⁵¹

⁴⁸ R. 232-240. That appeal is pending in this court, captioned [REDACTED] v. *Suntrust Mortgage Inc.*, No. 3D12-2723.

⁴⁹ R. 245-249.

⁵⁰ R. 245-246 (Final Judgment).

⁵¹ Tr. 1-91.

The [REDACTED] filed an emergency motion to strike the entry of judgment, or in the alternative to stay execution of the judgment pending review.⁵² Stating that the trial court did not have the power to remove the judgment from the docket, the trial court denied the request to strike the entry of judgment, but granted a stay pending resolution of the appeals.⁵³

This timely appeal follows.⁵⁴

⁵² R. 204-213 (Defendants' Emergency Motion to Stay).

⁵³ R. 214-216 (Order on Defendants' Emergency Motion to Stay).

⁵⁴ R. 232-240.

SUMMARY OF THE ARGUMENT

As the trial courts of this state push to bring foreclosure cases to trial whether or not the Plaintiffs have properly readied the case for trial,⁵⁵ the judicial system cannot overlook basic due process rights—such as the right to be served, the right to be heard, and the right not to be held accountable to unsworn hearsay from one’s opponent. This state’s overarching policy of deciding cases on the merits must be held sacrosanct above any perceived outside pressures to clear case backlogs or influence the housing market.

First, the trial court violated the [REDACTED] rights by rendering a final judgment after trial when their interlocutory appeal was pending. This alone requires that the judgment be reversed.

Second, the trial court also trod upon the [REDACTED] due process rights when it refused to hold an evidentiary hearing on their motions to set aside the clerk’s defaults against them prior to trial. The refusal to hold an evidentiary hearing was particularly egregious where, as here, the [REDACTED] had no reason to

⁵⁵ See, e.g., Kevin F. Jursinski, *The Mortgage Foreclosure Crisis in Florida: A 21st Century Solution*, 84 Fla. Bar J. 91 (June 2010)(describing “rocket dockets” where courts attempt to resolve hundreds of foreclosure cases in a single sitting); Gary Blankenship, *Courts get another \$5 million to help move foreclosure cases*, Fla. Bar News (February 15, 2013), available at <http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/RSSFeed/7638452EFBEC C9FA85257B080048E2B3> (noting that courts are setting trials because plaintiffs fail to move the cases forward).

believe they were being sued, as they were working diligently to comply with their lender's requirements for a loan modification, even making more trial payments than the BANK requested, only to be shuffled around by changing servicers.

Third, because the complaint was unverified, it failed to state a claim and cannot support a judgment. The Florida Supreme Court has required that all residential foreclosure claims be verified, and the complaint here made no attempt to meet that requirement.

And finally, even setting aside all of the procedural problems leading up to trial, the plaintiff simply failed to prove its case. NATIONSTAR's only witness, GERGECEFF, had never set eyes on the [REDACTED] file prior to being told she would be testifying in court, and did not meet the requirements of a business records custodian or otherwise qualified witness. Trial Exhibits 1, 2 and 3 and her surrounding testimony therefore must be stricken, leaving no evidence to support judgment. Finally, even taking her testimony at face value, GERGECEFF simply did not testify as to the amounts due, and there is no basis in the record to support the final judgment. For all of these reasons, this Court must reverse.

STANDARDS OF REVIEW

“[A]ppellate courts apply a *de novo* standard of review when the construction of a procedural rule...is at issue.” *Barco v. Sch. Bd. of Pinellas County*, 975 So. 2d 1116, 1121 (Fla. 2008). This Court also reviews *de novo* the denial of the [REDACTED] motion to dismiss the complaint. *Romo v. Amedex Ins. Co.*, 930 So. 2d 643, 647 (Fla. 3d DCA 2006).

The trial court’s denial of the [REDACTED] motion to vacate the clerk’s default is reviewed for an abuse of discretion. *B. C. Builders Supply Co., Inc. v. Maldonado*, 405 So. 2d 1345, 1348 (Fla. 3d DCA 1981).

Finally, in reviewing a bench trial, this Court reviews the trial court’s conclusions of law *de novo*, while the factual findings must be supported by substantial and competent evidence. *Coral Gables Fed. Sav. & Loan Ass’n v. City of Opa-Locka*, 516 So. 2d 989, 991 (Fla. 3d DCA 1987). “When the appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts, then the decision is ‘clearly erroneous’ and the appellate court will reverse because the trial court has ‘failed to give legal effect to the evidence’ in its entirety.” *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956).

ARGUMENT

I. The Judgment Must Be Reversed as a Nullity Because the Trial Court Lacked Jurisdiction to Enter Final Judgment While the [REDACTED] Interlocutory Appeal Was Pending.

The [REDACTED] Notice of Appeal of the order denying their motion to quash service was filed and recorded prior to the rendition of judgment.⁵⁶ The pendency of this interlocutory appeal precluded the entry of final judgment pursuant to Florida Rule of Appellate Procedure 9.130(f).

Rule 9.130(f) provides that “the lower tribunal may not render a final order disposing of the cause pending [non-final appellate] review.” Fla. R. App. P. 9.130(f). “Florida Rule of Appellate Procedure 9.130(f) clearly states, and the case law holds, that a trial court may proceed in a cause pending a non-final appeal and dispose of any matter not in form or effect interfering with the power and authority of the appellate court to make its jurisdiction effective, but the trial court may do so only short of final disposition.” *Connor Realty, Inc. v. Ocean Terrace N. Condo. Ass’n*, 572 So. 2d 4 (Fla. 4th DCA 1990).

A final judgment entered while an interlocutory appeal is pending is a nullity and must be reversed. *Id.*; see also *Sammons v. Sammons*, 479 So. 2d 223, 225 (Fla. 3d DCA 1985) (reversing judgment entered while non-final appeal pending

⁵⁶ R. 209-213 (Notice of Appeal for Interlocutory Order filed October 17, 2012); R. 245-249 (Final Judgment docketed and rendered October 18, 2012).

due to lack of jurisdiction); *De La Portilla v. De La Portilla*, 304 So. 2d 116, 118 (Fla. 1974) (“It has long been held that where an appeal is duly taken, whether with or without supersedeas, jurisdiction of the cause is transferred to the appellate court, thereby depriving the trial court of the power to finally dispose of the cause by dismissal or otherwise”). Moreover, the [REDACTED] brought this issue to the trial court’s attention prior to the rendition of the final judgment.⁵⁷

Reviewing the interpretation of Rule 9.130(f) *de novo*, this Court should reverse the final judgment for this reason alone. *Barco v. Sch. Bd. of Pinellas County*, 975 So. 2d 1116, 1121 (Fla. 2008) (requiring *de novo* review).

II. The Trial Court Abused Its Discretion in Denying the Motion to Vacate the Clerk’s Default Without an Evidentiary Hearing.

“Florida has a long-standing policy in favor of deciding lawsuits on their merits and if there is any reasonable doubt as to whether a default should be vacated, it should be resolved in favor of vacating the default and allowing a trial on the merits.” *205 Jacksonville, LLC v. A-Affordable Air, LLC*, 16 So. 3d 974, 977 (Fla. 3d DCA 2009), citing *Edwards v. Najjar*, 748 So. 2d 1101, 1103 (Fla. 3d DCA 2000). This policy is even stronger where, as here, a party seeks to set aside a clerk’s default prior to the entry of final judgment. “In the case of an

⁵⁷ R. 204-213 (Defendants’ Emergency Motion to Stay Rendering the Final Judgment on Appeal); R. 214-216 (Order denying Motion).

interlocutory order of default, any reasonable doubt should be resolved in favor of vacating it.” *Gibson Trust, Inc. v. Office of the Atty. Gen.*, 883 So. 2d 379, 382 (Fla. 4th DCA 2004), *citing N. Shore Hosp., Inc. v. Barber*, 143 So. 2d 849, 853 (Fla. 1962).

A. An evidentiary hearing is required when a party challenges service of process.

Where a party seeks to set aside entry of default based upon the validity of service of process, the court is required to hold an evidentiary hearing. *Koniver Stern Group v. Layfield*, 811 So. 2d 812 (Fla. 3d DCA 2002). As this court has consistently held, it is an abuse of discretion for a trial court to deny a motion to set aside a default without first holding an evidentiary hearing. *Hernandez v. Nat’l Bank of Florida*, 423 So. 2d 920 (Fla. 3d DCA 1982)(reversing denial of motion to vacate because it was decided without evidentiary hearing).

Here, the court refused to hold an evidentiary hearing or to hear detailed argument on either [REDACTED] or TERRANCE’s motion to set aside the defaults, instead denying them without taking evidence and proceeding directly to trial.⁵⁸ Moreover, it would be error to rely solely on affidavits rather than holding a full evidentiary hearing to decide such a motion. An evidentiary hearing requires the court to allow the parties the opportunity to proffer admissible evidence, and

⁵⁸ R. 124 (order denying motions to vacate clerk’s default).

“neither the submission of affidavits nor argument of counsel is sufficient to constitute an evidentiary hearing.” *Linville v. Home Sav. of Am., FSB*, 629 So. 2d 295, 296 (Fla. 4th DCA 1993). This failure to first hold the evidentiary hearing was an abuse of discretion.

The trial court appeared to base its ruling, in part, on the Trial Order’s admonishment that “all pre-trial motions...shall have been completed” fifteen days prior to the noticed trial date.⁵⁹ This pretrial scheduling order cannot, however, trump the ordinary procedures of a motion to set aside a default, which merely require that they be brought within a reasonable time of learning of the default. Here, [REDACTED] tried to comply with the trial order he received and also expeditiously hired counsel who learned of, and promptly took steps to set aside, the default.⁶⁰

Moreover, the trial court at all times has the “inherent authority to reconsider and modify its interlocutory orders.” *AC Holdings 2006, Inc. v. McCarty*, 985 So. 2d 1123, 1125 (Fla. 3d DCA 2008). Given this state’s strong policy in favor of resolving cases on the merits rather than default, *see, e.g., 205 Jacksonville, LLC v. A-Affordable Air, LLC*, 16 So. 3d 974, 977 (Fla. 3d DCA 2009), the trial court

⁵⁹ Tr. at 10:1-7

⁶⁰ R. 195.200 at ¶¶ 3-4.

erred in denying the motion to set aside the default without at least holding the required evidentiary hearing. Instead, the court should have set aside the pretrial motion deadline in the Trial Order and considered the motion to set aside the default on its merits, using the proper procedure.

Indeed, had the [REDACTED] waited until after the entry of judgment to move to set aside a default judgment, the rules would have allowed him to do so after the entry of judgment notwithstanding the admonition of the Trial Order. *See* Rule 1.540, Fla. R. Civ. P. Here, the [REDACTED] brought their motion prior to the entry of default judgment, when the standard to set aside the default is more liberal. The trial court had the opportunity to properly apply this state’s policy of hearing cases on the merits. It is an abuse of discretion to refuse to hear the motion even on the eve of trial, and even in the face of the trial order’s deadline.

B. The [REDACTED] met the requirements for setting aside a clerk’s default.

Moreover, this error is not harmless because the [REDACTED] met the requirements for setting aside a clerk’s default.⁶¹ “A party seeking to set aside [] either a clerk’s default or a default judgment must show that: (1) the failure to file

⁶¹ As to [REDACTED] [REDACTED] the trial court erred first in refusing to quash service of process, as raised in Case No. 3D12-2723. Even if service of process on [REDACTED] is not quashed—a point the [REDACTED] do not concede—the court should still have held an evidentiary hearing and set aside the entry of default for both [REDACTED]

a timely responsive pleading or paper was the result of excusable neglect; (2) the defaulting party has a meritorious defense; and, (3) the defaulted party has been reasonably diligent in seeking to vacate the default after it was discovered.” 205 *Jacksonville, LLC v. A-Affordable Air, LLC*, 16 So. 3d 974, 975 (Fla. 3d DCA 2009). The [REDACTED] motion on its face demonstrated all of these factors.

First, the [REDACTED] demonstrated excusable neglect. They alleged (and swore) they had not been served with the complaint, and despite being in the midst of trying to negotiate a loan modification with their lender, the lender never mentioned the litigation to them.⁶² They learned of the litigation when served with a copy of the trial order barely a month before trial, and only learned of the clerk’s default upon retaining counsel soon after.⁶³

Moreover, even if they had been aware of the litigation, a “reasonable misunderstanding” regarding settlement negotiations constitutes excusable neglect. *Gables Club Marina, LLC v. Gables Condo. & Club Ass’n, Inc.*, 948 So. 2d 21, 24 (Fla. 3d DCA 2006). In *Gables Club*, the defendant’s attorney failed to serve an answer because the parties were in settlement negotiations, and the court upheld an

⁶² R.195-96 ([REDACTED] Affidavit) at ¶¶10-11; R. 175-76 (Motion to Vacate Clerk’s Default).

⁶³ R.195-96 ([REDACTED] Affidavit) at ¶¶ 4-5; R. 175-76 (Motion to Vacate Clerk’s Default).

order setting aside the default as a result of this misunderstanding. Where, as here, the [REDACTED] (acting *pro se*) were in the process of applying for a loan modification and were otherwise in negotiations with the lender, their failure to file an answer would constitute excusable neglect even if they had known about the pending lawsuit.

Second, the [REDACTED] demonstrated a meritorious defense. Where, as here, the defendant seeks to set aside a clerk's entry of default prior to final judgment, the showing the defendant must make is relaxed. "Where a clerk's default is at issue, a general denial is sufficient to demonstrate a meritorious defense." 205 *Jacksonville, LLC v. A-Affordable Air, LLC*, 16 So. 3d 974, 976 (Fla. 3d DCA 2009), citing *N. Shore Hosp., Inc. v. Barber*, 143 So. 2d 849, 852 (Fla. 1962).

Here, the [REDACTED] provided much more than just a general denial of the claims against them. They identified several valid defenses, including: failure to state a cause of action (*see* Part III, *infra*), plaintiff's lack of standing to sue, noncompliance with conditions precedent, erroneous accounting of the amounts due and owing, estoppel and unclean hands.⁶⁴ Notably, SUNTRUST repeatedly objected to the [REDACTED] counsel questioning GERGECEFF on the condition precedent of proper pre-suit notice of acceleration or arguing the issue—expressly

⁶⁴ R. 176-77.

relying on the default.⁶⁵ This tacit concession that the defense was sufficiently meritorious to threaten the BANK's case demonstrates that the error in refusing to vacate the default was not harmless.

Third, the [REDACTED] acted with due diligence in seeking to set aside the defaults. Even though they were ignorant of the entry of default, they sought counsel as soon as they learned of the pending trial, and counsel expeditiously moved to set aside the defaults (and to quash service on [REDACTED] upon researching the file and learning of it.⁶⁶ "It is well-established that issues of 'due diligence' ... in common with all questions relating to the issue of whether defaults and default judgments should stand, must be evaluated in terms of the particular facts of the case under consideration." *Gables Club Marina, LLC v. Gables Condo. & Club Ass'n, Inc.*, 948 So. 2d 21, 24 (Fla. 3d DCA 2006), citing *Franklin v. Franklin*, 573 So. 2d 401, 403 (Fla. 3d DCA 1991).

⁶⁵ R. 22 ("I would like to object to permitting opposing counsel any objection that its client had not defaulted in this case"); R. 23 (plaintiff's counsel objecting to questioning of its witness due to the default); R. 52 (plaintiff's counsel objecting to defendants' participation in the trial absent an order setting aside the default); R. 62 (plaintiff's counsel arguing that all defenses were waived due to entry of default).

⁶⁶ R. R.195-96 ([REDACTED] Affidavit) at ¶¶ 4-5; R. 176-77 (Motion to Vacate Clerk's Default).

In *Franklin*, the party against whom a default judgment had been entered initially did not know a default could be set aside, but as soon as a co-worker told him he might be able to do so, he sought counsel within days and retained a lawyer, who in turn, moved to set aside the default a total of nine months after the entry of judgment. The court, finding that Franklin had good reason not to act sooner and taking into account the fact that the judgment affected ownership of his primary asset and marital home, found he had acted diligently. *Id.* at 404.

If, under the totality of the circumstances, Franklin's motion to set aside a default judgment was timely, than surely the [REDACTED] motion, which was brought even more diligently and promptly, was also timely. *See, e.g., Apolaro v. Falcon*, 566 So. 2d 815, 817 (Fla. 3d DCA 1990) (delay of forty days in filing motion to set aside default did not preclude relief from default where party first sought to obtain agreed order setting aside default); *Atl. Asphalt & Equip. Co. v. Mairena*, 578 So. 2d 292 (Fla. 3d DCA 1991) (reversing denial of motion to set aside default where defendant waited approximately fifty-five days to file motion); *Roberts v. Safeway Ins. Co.*, 610 So. 2d 700 (Fla. 3d DCA 1992) (reversing denial of motion to set aside default where defendant waited sixty-six days or longer to file motion).

III. The Unverified Complaint Should Have Been Dismissed Without Prejudice.

The judgment also must be reversed because the unverified complaint failed to state a cause of action. Florida Rule of Civil Procedure 1.110(b) requires that a complaint “must state a cause of action.” To state a cause of action, the complaint must contain a statement of the grounds for jurisdiction, set forth ultimate facts entitling the pleader to relief, and a make demand for judgment. Fla. R. Civ. P. 1.110(b). The rule further expressly requires that, when the complaint seeks foreclosure of a residential mortgage, it also must be verified to state a cause of action:

When filing an action for foreclosure of a mortgage on residential real property the complaint shall be verified. When verification of a document is required, the document filed shall include an oath, affirmation, or the following statement: “Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.”

Fla. R. Civ. P. 1.110(b)(emphasis added). The Florida Supreme Court adopted this mandatory verification requirement on February 11, 2010 to ensure that plaintiffs in residential foreclosure actions properly investigate their claims prior to filing suit. The Florida Supreme Court has long recognized that when a statute or rule uses the term “shall,” the requirement is mandatory. *S. R. v. State*, 346 So. 2d 1018, 1019 (Fla. 1977) (“shall” is “normally meant to be mandatory in nature”).

The requirement went into effect immediately upon release of the opinion, and its effect was not stayed by the filing of a motion for rehearing on February 26, 2010. *In re Amendments to the Florida Rules of Civil Procedure*, 44 So. 3d 555, 559 (Fla. 2010); *JP Morgan Chase Bank v. Journey*, 86 So. 3d 1182, 1184 (Fla. 2d DCA 2012) (“the supreme court intends rules to become effective on the issuance of the original opinion and to remain effective during any period in which a motion for rehearing can be filed or is pending”). Because the complaint in this matter was filed on February 22, 2010, Rule 1.110(b) required that it be verified. *In re Amendments to the Florida Rules of Civil Procedure*, 44 So. 3d 555, 556 (Fla. 2010). And this infirmity was promptly brought to the trial court’s attention.

Allowing a residential foreclosure case to proceed to judgment when the complaint is not properly verified would eviscerate the Florida Supreme Court’s twice-stated intent to ensure that trial courts have the means to sanction plaintiffs who make false allegations, and would otherwise destroy the incentives for proper pleading of foreclosure claims that the Supreme Court intended to create. *See id.*; *see also Pino v. Bank of New York*, ___ So.3d ___, 38 Fla. L. Weekly S78 No. SC11-697 (Fla. 2013) (reiterating purpose of enacting 1.110(b)).

Once the rule was enacted, verification of a foreclosure complaint became an essential aspect of stating a claim of foreclosure. Such defects can be raised at

any time, even at trial. See *Florida Med. Malpractice Joint Underwriting Ass'n v. Indem. Ins. Co. of N. Am.*, 689 So. 2d 1040, 1041 (Fla. 1996) (failure to state a claim may be raised at trial). Rule 1.140(h)(2) Fla. R. Civ. P. “expressly permits the opponent of a claim to wait until trial to move for dismissal on the grounds that the claim has been defectively pleaded.” *Schopler v. Smilovits*, 689 So. 2d 1189 (Fla. 4th DCA 1997), *citing* Fla. R. Civ. P. 1.140(h)(2).

In *Schopler*, the defendant moved to dismiss the complaint for failure to state a claim at the close of plaintiff’s case, and the appellate court held that motion should have been granted. Explaining that “[a]ll parties are equally charged with knowing the law in Florida and recognizing whether a claim has been properly pleaded,” the court concluded that the defendant had the right to move to dismiss at trial even after a plaintiff’s presentation of evidence.

Nor does the entry of default waive the defect in the Complaint. A “defaulting party admits only the well-pleaded factual allegations of the complaint against it.” *Days Inns Acquisition Corp. v. Hutchinson*, 707 So. 2d 747, 749 (Fla. 4th DCA 1997) (emphasis added). Where the allegations of the complaint are not well-pleaded—that is, where they fail to meet the basic pleading requirements of Rule 1.110(b)—entry of judgment is not appropriate. This is because a default simply does not admit “facts not pleaded, not properly pleaded or conclusions of

law.” *Becerra v. Equity Imports, Inc.*, 551 So. 2d 486, 488 (Fla. 3d DCA 1989) (emphasis added).

Even if verification were not required to “properly plead,” the failure to comply with such a procedural rule is sufficient by itself to justify dismissal. Rule 1.420(b) allows a party to move for involuntary dismissal after the presentation of evidence for, amongst other reasons, “failure of an adverse party to comply with these rules...” Fla. R. Civ. P. 1.420(b).

In at least one other context, the courts have held that a party that dodges a verification requirement should be denied the relief requested. *See, e.g., Barton v. Circuit Court of Nineteenth Judicial Circuit*, 659 So. 2d 1262, 1263 (Fla. 4th DCA 1995) (name change complaint that fails to meet statutory verification requirement must be dismissed without prejudice to refile); *Milton v. Fifteenth Judicial Circuit*, 599 So. 2d 1056, 1056 (Fla. 4th DCA 1992)(name change petition that fails to meet statutory verification requirement is “facially insufficient”). Just as with the name change cases, here there is a legal requirement that the complaint be verified. Just as with the name change cases, the complaint must be dismissed if the verification is absent.

IV. The BANK Did Not Present Competent Documentary or Testimonial Evidence to Support Judgment of Foreclosure in its Favor.

The BANK failed to establish by competent evidence any of the four elements of a foreclosure action. “To establish their entitlement to foreclose it was incumbent upon the plaintiffs to prove [1] their agreement, [2] a default by the defendants, that [3] plaintiffs properly accelerated the debt to maturity, and [4] the amount due.” *Ernest v. Carter*, 368 So. 2d 428, 429 (Fla. 2d DCA 1979).

The documents intended to prove the agreement were Trial Exhibits 1 (Note) and 2 (Mortgage). The document intended to show a default and acceleration was Trial Exhibit 3 (an alleged acceleration letter). Each of the documents was a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted,” and thus hearsay.⁶⁷ §90.803, Fla. Stat. The BANK therefore was required to establish an exception to the hearsay rule in order to admit and rely on those documents. *Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008) (the proponent of evidence bears “the burden of supplying a proper predicate to admit this evidence under an exception to the rule against hearsay”). Because GERGECEFF did not meet the requirements of a records custodian or otherwise qualified witness as defined by

⁶⁷ R. 125-147 (trial exhibit list and plaintiff’s exhibits).

the Florida Evidence Code and case law, the trial court erred in admitting Plaintiff's Exhibits 1, 2 and 3.

As to the amount due, Plaintiff did not even attempt to admit any documents to support its claim. Moreover, GERGECEFF never actually testified that any amount was due, instead merely testifying, without any foundation, that the amounts listed on a document that was not admitted into evidence were correct. Such testimony simply does not support the entry of judgment.

A. The plaintiff's documentary evidence was all hearsay, and the testimony of robo-testifier GERGECEFF did not meet the requirements of the business records exception to the hearsay rule.

For alleged business records to be admissible evidence, the custodian of those records must "take the stand and testify under oath" as to all four predicate requirements of the business records exception:

(1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record.

Yisrael v. State, 993 So. 2d 952, 956 (Fla. 2008), *citing* § 90.803(6)(a), Fla. Stat.

GERGECEFF's testimony, however, demonstrated that she was not competent to meet those predicates. First, GERGECEFF did not testify as to each of these elements. She never gave any testimony indicating that it was the businesses'

regular practice to keep such records.⁶⁸ The failure to meet any one of the statutory predicates renders the evidence inadmissible hearsay. *See, e.g., Forester v. Norman Roger Jewell & Brooks Intern., Inc.*, 610 So. 2d 1369, 1373 (Fla. 1st DCA 1992) (error to admit business record where custodian only testified as to three of the elements); *Holt v. Grimes*, 261 So. 2d 528 (Fla. 3d DCA 1972) (same).

Second, GERGECEFF's conclusory testimony as to the remaining elements was insufficient to satisfy the burden of proving the business records exception where, as here, the remaining testimony indicated she entirely lacked the requisite knowledge to serve as the custodian of the records. To be deemed a qualified witness capable of authenticating the documents or laying the foundation for the business records exception to hearsay, the person testifying must be in charge of the activity constituting the business practice or well enough acquainted with the activity to give the testimony. *Specialty Linings, Inc. v. B.F. Goodrich Company*, 532 So. 2d 1121 (Fla. 2d DCA 1988) *citing Alexander v. Allstate Insurance Company*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980). Furthermore, those records must be in GERGECEFF's custody as a regular part of her work or she must supervise the creation of the records. *See Mastan Co. v. American Custom Homes, Inc.*, 214 So. 2d 103 (Fla. 2d DCA 1968).

⁶⁸ R. 20-34 (testimony regarding Note);

Here, GERGECEFF’s testimony plainly illustrated that she had no pre-suit familiarity with the documentary evidence in this case, and instead she was what in foreclosure parlance is called a “robo-testifier” or “robo-witness”—a fungible professional witness provided by the BANK for the sole purpose of reading bank records to the court despite a total lack of pre-suit contact with those records.⁶⁹ Robo-testifiers fulfill at trial, the same role that robo-signers fulfilled at summary judgment before that practice sparked a nationwide scandal.

The presumption that GERGECEFF would have knowledge about the reliability of business records for the purpose of overcoming hearsay objections is rebutted by the mere fact that GERGECEFF only recently became familiar with this case and the documents and records involved—and did so solely for the purposes of litigation.⁷⁰ As the Florida Supreme Court stated in *Yisrael v. State*, 993 So. 2d 952, 957 (Fla. 2008):

⁶⁹ See, e.g., J. Silver-Greenberg, *Problems Riddle Moves to Collect Credit Card Debt*, N.Y. Times (Aug. 12, 2012) available at <http://dealbook.nytimes.com/2012/08/12/problems-riddle-moves-to-collect-credit-card-debt/> (visited 04/27/2013) (referring to testimony by corporate representatives of debt collectors having no familiarity with the debt or underlying records as “robo-testimony”); *Am. Express Bank, FSB v. Zweigenhaft*, 38 Misc. 3d 1218(A) (N.Y. Civ. Ct. 2013) (excluding all documentary evidence of debt offered by corporate representative who could not meet the business records exception).

⁷⁰ Tr. at 22.

“[w]henver a record is made for the purpose of preparing for litigation, its trustworthiness is suspect and should be closely scrutinized.” Charles W. Ehrhardt, Florida Evidence § 803.6, at 876 n. 3, 877 (2007 ed.).

Similarly, when professed personal knowledge about a record is acquired strictly for the purpose of preparing for litigation (or in this case, trial itself), the trustworthiness of that personal knowledge is inherently suspect and should be closely scrutinized. It is apparent from GERGECEFF’s recent appointment to testify that she does not view or maintain the documents relied upon by Plaintiff in her regular course of business. She admitted as much, testifying that she only reviewed the records for the first time when she was told the case would be tried.⁷¹

1. GERGECEFF did not lay the foundation for admission of the Note and Mortgage.

Although she admitted that her only knowledge of the [REDACTED] file was from “reviewing the business records they [NATIONSTAR] have kept in the course of business,”⁷² GERGECEFF went on to testify that she had never seen the so-called original note or mortgage prior to the date of trial,⁷³ and had no knowledge regarding how the purported original had been stored prior to the date

⁷¹ Tr. 23-244.

⁷² Tr. at 20:13-16.

⁷³ Tr. at 24.

of trial.⁷⁴ Nor did she have any training or expertise in identifying original documents.⁷⁵ Given these facts, GERGECEFF's conclusory testimony regarding the elements of the hearsay exception are insufficient to overcome the [REDACTED] hearsay objection to admission of the note and mortgage.⁷⁶

2. GERGECEFF's connection to the default letter was even more tenuous, and failed to lay the requisite foundation for the business records exception.

As to the default letter admitted over objection as Trial Exhibit 3, GERGECEFF's testimony strayed even further from the basic requirements of the business records exception, because the letter was purportedly sent by an entity with which she has had no relationship, SUNTRUST.⁷⁷ Thus, even if there remained some doubt whether GERGECEFF was qualified to testify to the authenticity of her own company's records, there can be absolutely no doubt that she was eminently unqualified to testify regarding SUNTRUST's records. She has never worked for SUNTRUST, and has no knowledge of its policies and procedures.⁷⁸ She did not know where, from within either SUNTRUST's or

⁷⁴ Tr. at 23; 32.

⁷⁵ Tr. at 33.

⁷⁶ Tr. at 30-31 (Note); Tr. at 34 (mortgage).

⁷⁷ Tr. at 37-38.

⁷⁸ Tr. at 37-40.

NATIONSTAR's files, the copy of the letter came from.⁷⁹ Although she testified that the amount due in the letter was accurate, she had no idea how it had been calculated or how it had been verified.⁸⁰ The [REDACTED] raised these objections with the trial court, and the court therefore erred in admitting Trial Exhibit 3.⁸¹

B. GERGECEFF's oral testimony regarding the amounts due was both inadmissible and, even if admitted, insufficient as a matter of law.

Finally, there was simply no proof of the amounts due under the (inadmissible) Note, precluding entry of the foreclosure judgment. The BANK's counsel, over objection, asked GERGECEFF to "review the Proposed Final Judgment."⁸² GERGECEFF testified that the figures on the proposed final judgment—which was neither offered nor admitted into evidence—"were extrapolated from [her] personal review of the records," and therefore "accurately reflect the four alleged damages in this case," without identifying from which records they were "extrapolated."⁸³ She also never testified as to the actual

⁷⁹ Tr. at 40.

⁸⁰ Tr. at 41-42.

⁸¹ Tr. 35-36; 43-44.

⁸² Tr. 44.

⁸³ Tr. 45.

amounts the BANK claimed it was owed.⁸⁴ Instead, she merely testified (over objection) that the BANK expected to be reimbursed for taxes, flood insurance, hazard insurance and mortgage insurance for three years, without reference to the amounts sought or to any records showing that those amounts had been paid to third parties.⁸⁵ When asked what records were used to arrive at the number, she testified “I don’t have that with me.”⁸⁶

1. GERGECEFF’s testimony about the proposed final judgment was hearsay.

GERGECEFF testified that the contents of a document were accurate, without laying the foundation for the admissibility of the underlying document. “[T]he business-records exception to the hearsay rule ... does not authorize hearsay testimony concerning the contents of business records which have not been admitted into evidence.” *Yisrael v. State*, 993 So. 2d 952, 957 (Fla. 2008), *quoting Thompson v. State*, 705 So. 2d 1046, 1048 (Fla. 4th DCA 1998).

Here, the proposed judgment is not even in the record, much less in evidence. However, it is clear from the testimony that the proposed judgment “fails to identify the official records on which it relied, if any, does not state that it

⁸⁴ Tr. 44-51.

⁸⁵ Tr. 46.

⁸⁶ Tr. 47.

is a true and correct representation of any record, and does not say where or in whose custody any original official or business records are kept.” *Yisrael v. State*, 993 So. 2d 952, 958 (Fla. 2008), quoting *Gray v. State*, 910 So. 2d 867, 869-70 (Fla. 1st DCA 2005). Instead, it is essentially “a (defective) affidavit devoid of any reference to records.” *Id* at 960, citing *Gray* at 869-70. Because GERGECEFF testified about the contents of a document without that document being admitted into evidence, the judgment must be reversed.

2. The proposed final judgment was, in any event, inadmissible.

Even if the BANK had thought to try to move the document into evidence, the proposed final judgment was clearly prepared solely for the purposes of litigation and could not have met the business records exception to the hearsay rule. A document prepared for the purposes of litigation is inherently untrustworthy, and cannot meet the “at or near the time of the occurrence” prong of the business records exception. *Yisrael v. State*, 993 So. 2d 952, 957 (Fla. 2008).

Nor did the proposed final judgment qualify as a summary pursuant to §90.956, Fla. Stat. That section requires that “[t]he party intending to use such a summary must give timely written notice of his or her intention to use the summary, proof of which shall be filed with the court, and shall make the summary and the originals or duplicates of the data from which the summary is compiled

available for examination or copying, or both, by other parties at a reasonable time and place.” *Id.* Here, the proposed judgment was not listed on the BANK’s exhibit list, nor was there any other notice of the intent to rely upon a summary.⁸⁷ The testimony revealed that the figures were based upon summarizing out of court documents.⁸⁸ Yet the BANK failed to follow this statutorily required procedure, and therefore the document was not admissible into evidence. *Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234, 240 (Fla. 5th DCA 1991).

3. GERGECEFF’s testimony, even if admissible, failed to establish the amount due.

Moreover, GERGECEFF failed to provide the court with any actual figures or calculations upon which to base a judgment of foreclosure. The final judgment awarded the BANK the following:⁸⁹

⁸⁷ R. 96-97 (Plaintiff’s trial exhibit list).

⁸⁸ Tr. 48-51.

⁸⁹ R. 245-246 (Final Judgment).

1. Amounts Due and Owing. Plaintiff is due:	
Principal due on the note secured by the mortgage foreclosed:	\$ <u>449,699.28</u>
Interest on the note and mortgage from 6/1/2009 to 10/17/2012	\$ <u>97,976.40</u>
Title Search Expenses	\$ <u>200.00</u>
Escrow Advance:	\$ <u>55,463.05</u>
Taxes for the year(s) of 2011- \$4,140.23	
Taxes for the year(s) of 2010- \$4,256.15	
Flood Insurance for the year(s) of 2012- \$994.00	
Flood Insurance for the year(s) of 2010- \$1,766.00	
Hazard Premiums for the year(s) of 2012- \$2,991.00	
Hazard Premiums for the year(s) of 2011- \$7,363.63	
Hazard Premiums for the year(s) of 2010- \$7,365.94	
Mortgage Insurance for the year(s) of 2012- \$7,748.10	
Mortgage Insurance for the year(s) of 2011- \$4,304.50	
Mortgage Insurance for the year(s) of 2010- \$14,533.50	
<u>Court Costs, Now Taxed:</u>	
Filing Fee	\$ <u>1,960.00</u>
Service of Process	\$ <u>275.00</u>
SUBTOTAL	\$ <u>605,573.73</u>
 <u>Additional Cost</u>	
Inspections	\$ <u>51.75</u>
GRAND TOTAL	\$ <u>605,625.48</u>

Not a single one of these numbers appears in the trial transcript or in documents in evidence.⁹⁰ Stuningly, GERGECEFF merely testified (without foundational basis) that the numbers on an inadmissible document that was never admitted into evidence⁹¹ were accurate.

Indeed, the trial court appeared to at least partially recognize this glaring omission, stating that he “heard no testimony referable to filing fees and costs” but

⁹⁰ Compare *Id.* to Tr. 1-91.

⁹¹ R. 125 (clerk’s exhibit list).

stated he would take judicial notice of the fact that such costs were incurred in order to award them anyway.⁹²

Such judicial notice is also error, for two reasons. First, the court announced its intent to take notice as part of its ruling, and thus did not provide the parties with the requisite notice and opportunity to present information regarding the propriety of judicial notice. § 90.204(a), Fla. Stat. Second, as a matter of law, the amounts of filing fees and costs do not qualify as the kinds of facts that are amenable to judicial notice. § 90.202, Fla. Stat. (court may take judicial notice of facts if they are “not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned”). Here, each line item of the proposed judgment was clearly disputed and the BANK provided no evidence to support the figures.

Moreover, because the document was not admitted as an exhibit or even marked for identification, the record is now devoid of anything by which this Court can determine if the witness voiced approval of the same numbers that are now in the judgment. Thus, the judgment must be reversed.

⁹² Tr. 89.

4. The only actual evidence in the record contradicted the judgment entered, and the default did not support the judgment amount.

Moreover, the only evidence in the record regarding payments on the principal balance of the note—proffered by the Defendants—indicated that the [REDACTED] had made payments after the alleged default date as part of the trial modification they sought.⁹³ There is no indication in the record of how or whether these payments were properly applied. Because there is no actual evidence in the record to support any of the figures set forth in the final judgment, the judgment must be reversed. There is simply not a scintilla of evidence as to the amounts due, and the trial court's decision is therefore not supported by substantial evidence. *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956).

Finally, the default—which should have been set aside—did not relieve the BANK of its duty to prove the damages sought. A default admits only the facts set out in the complaint, and the complaint does not seek the judgment amount entered here.⁹⁴

Even in the face of a default, the [REDACTED] cannot be deemed to have admitted amounts due and owing that exceed the \$450,499.47 alleged in the Complaint, and this Court should reverse and remand for a new trial. *State Farm*

⁹³ R. 148-152 (copies of checks admitted as Defense Exhibit A).

⁹⁴ R. 8-32.

Mut. Auto. Ins. Co. v. Horkheimer, 814 So. 2d 1069, 1073 (Fla. 4th DCA 2001) (“clearly a ‘mistake’” to enter judgment against a defaulted defendant for an amount in excess of that alleged in the complaint); *Garcia v. M & T Mortg. Corp.*, 980 So. 2d 538, 542 (Fla. 4th DCA 2008) (a defendant may not be held liable for amounts in excess of those allowed by the pleadings); *Hooters of Am., Inc. v. Carolina Wings, Inc.*, 655 So. 2d 1231, 1233 (Fla. 1st DCA 1995) (damages will be awarded only to the extent supported by the well-pleaded allegations of the complaint).

CONCLUSION

The trial Court lacked jurisdiction to enter final judgment after the [REDACTED] initiated their interlocutory appeal. The final judgment, therefore, should be reversed so that the judgment may be entered after the jurisdictional issues have been resolved. If the Court opts to address the remaining issues now, it should do so in reverse order of their presentation in the brief:

- The Court should find that, leaving aside all the reasons that the trial should never have gone forward, the BANK nevertheless had its day in court. It had every evidentiary objection ruled in its favor and still utterly failed to adduce a scintilla of evidence on the amounts due and owing. Nor did it adduce evidence of default and acceleration that was not unauthenticated hearsay. Accordingly, this Court should reverse the final judgment and remand for entry of judgment in favor of the [REDACTED]
- If this Court does find that the verdict and judgment were supported by admissible evidence, it should nevertheless reverse and instruct the trial court to dismiss the Complaint on the grounds that it was never verified.
- Lastly, if the Court does not rule that the unverified Complaint should have been dismissed, it should reverse and remand for an evidentiary hearing on the motion to set aside the defaults against the [REDACTED]

Dated: May 13, 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 May 13, 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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