In the Third District Court of Appeal, State of Florida

CASE NO. [redacted]
(Circuit Court Case No. [redacted])

[redacted]

Appellant,

vs.

INDYMAC FEDERAL BANK, FSB,

Appellee.

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

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

ICE LEGAL, P.A.
Thomas Erskine Ice, Esq.
Counsel for Appellant
1015 N. State Road 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888
Email: mail@icelegal.com

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The following abbreviations are used in this Brief:

- "R." refers to the Record on Appeal.
- "Supp. R." refers to the Supplement to the Record filed with this brief.
- "T." refers to the Transcript of Non-Jury Trial before the Honorable Spencer Eig, December 19, 2011 (Volume XI of the Index to the Record on Appeal.
- "INDYMAC" refers to the original plaintiff, INDYMAC FEDERAL BANK, FSB.
- "DEUTSCHE" refers to plaintiff substituted shortly before trial DEUTSCHE BANK NATIONAL TRUST COMPANY.
- "The BANK" refers to either of the two Plaintiffs, DEUTSCHE or INDYMAC, as context permits.
- "OneWest" refers to OneWest Bank, FSB, the only entity that appeared at trial.
- "PSA" refers to a Pooling and Servicing Agreement.
- "IndyMac"—not to be confused with INDYMAC— refers to IndyMac Bank FSB, a federally chartered savings bank which was the original lender and servicer. IndyMac was not a party to this action.
- "IndyMac MBS" refers to another entity identified in the PSA as a "Depositor" who transferred loans to the DEUTSCHE trust. IndyMac MBS was not a party to this action.

INTRODUCTION

This is an appeal from a Final Judgment of Foreclosure in a case filed by the now defunct, INDYMAC FEDERAL BANK, FSB, against the homeowner, [redacted] Over a period spanning more than three years of litigation, [redacted] was denied nearly every avenue of discovery to test the veracity of the claims asserted by INDYMAC, and its eleventh-hour substitute, DEUTSCHE BANK NATIONAL TRUST COMPANY. Among the disputed claims was the BANK's allegation that it had mailed a notice of default, as well as whether it even had standing to foreclose—a claim that was continually altered throughout the litigation.

At trial, the handicap of the disallowed discovery became apparent, allowing the BANK to present a single person to testify over objection regarding every aspect of the case, including recordkeeping practices about which he admitted to having no personal knowledge. This case presents the trial equivalent of the systematic execution of summary judgment affidavits by bank employees without personal knowledge of the facts—a practice resoundingly rejected by the courts and known to the public as "robo-signing." It presents the similar question as to whether the systematic testifying at trial by professional testifiers who lack personal knowledge should also be condemned.

STATEMENT OF THE CASE AND FACTS

A. At Trial, the Court Admitted a Wide Range of Documents, and Testimony about Documents, from a Single, Designated Bank Testifier, Despite Objections to Hearsay and Authenticity.

1. [redacted] Motion *in Limine* to exclude unauthenticated hearsay.

At trial, the BANK called only one person to the stand, an "assistant vice president" of the non-party OneWest Bank, FSB ("OneWest"), Marco Flores.[1] According to documents provided to Flores, OneWest is the current servicing agent for the loan, having inherited the rights from two predecessors, the original lender, IndyMac Bank, FSB, and the original plaintiff, INDYMAC.[2] In his role as OneWest's assistant vice president, Flores had testified in approximately 200 trials and hearings in the preceding eleven months,[3] an average of over four times a week.

[redacted] had already deposed Flores and had moved *in limine* to exclude hearsay testimony which amounted to nothing more than the reading of bank-provided documents to the court—documents which themselves were hearsay and

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[1] Transcript of Non-Jury Trial before the Honorable Spencer Eig, December 19, 2011 (Volume XI of the Index to the Record on Appeal, hereinafter "T.") 28.

[2] T. 32, 40. Although Flores had worked at all three incarnations of IndyMac/OneWest, according to his review of documents he was provided, the servicing of [redacted] loan began over a year before he was employed there. *Id*.

[3] Deposition of Marcos Flores, taken November 28, 2011 ("Flores Depo."), p. 7 (Supp. R. 563).

which he had never seen until a few weeks before trial.[4] In the motion, [redacted] pointed out that Flores could not be deemed a records custodian (or otherwise qualified witness) for many, if not all the documents that the BANK hoped to use at trial. [redacted] highlighted the following testimony from the Flores deposition to prove his point:

Notice of Default Letter: Flores admitted that he had no custodial or supervisor duties regarding the breach letter required by the mortgage and that he did not know who prepared the letter. He appeared to be uncertain as to which department was responsible for preparing it:

> Q. Were you responsible for preparing the breach letter?
>
> A. No, sir.
>
> Q. Who is?
>
> A. To be honest with you, I don't know. I think it's somebody in our foreclosure department I believe.
>
> Q. Now, you said you don't know who was responsible for preparing the letter. Do you know who was responsible for sending the letter?
>
> A. No. Typically the sending of the letter I believe it occurs in our Kalamazoo office.
>
> Q. Are you in charge of that office?
>
> A. No, sir.

[4] Defendant, [redacted] Motion *in Limine*, dated December 13, 2011 (R. 1602-1618); Flores Depo., p. 8 (Supp. R. 564).

Q. Do you supervise anybody in that office?

A. No, sir, I do not.

[…]

Q. You said the person preparing the breach letter would be someone in the foreclosure department, right?

A. I believe so.

Q. Do you supervise anybody in that department?

A. No, sir.[5]

Notably, [redacted] had denied the BANK's allegation that it had met all conditions precedent.[6] More specifically, [redacted] raised an affirmative defense alleging with particularity that the BANK had failed to comply with Paragraph 22 of the mortgage which required it to send him a Notice of Default.[7]

Payment Records: Flores admitted that he was not in charge of maintaining the payment records and did not supervise anyone who did.[8]

Promissory Note: Flores admitted that the custodian of the promissory note was the freshly substituted plaintiff,[9] DEUTSCHE.[10] Yet, Mr. Flores was not an

[5] Transcript of Deposition of Marcos Flores, taken November 28, 2011 ("Flores Depo."), p. 45-6 (Supp. R. 601-02).

[6] Defendant, [redacted] Amended Answer to Complaint and Affirmative Defenses, ¶ 9 (R. 167).

[7] Sixth Affirmative Defense, Defendant, [redacted] Amended Answer to Complaint and Affirmative Defenses, p. 5 (R. 170).

[8] *Id*. at 56-7 (Supp. R. 612-613).

employee of DEUTSCHE.[11] He had never seen the original note or mortgage[12] and he did not know where the loan file containing these documents was kept.[13]

2. The testimony of Flores on direct examination.

At trial, the court ruled that the motion *in limine* would remain pending during Flores' testimony and that the evidence would be accepted conditionally, subject to a later decision on admissibility.[14] Flores began his trial testimony by describing his experience in the loan servicing industry which consisted of fifteen years in which he worked at "about six" loan servicing companies.[15] During that time, he held the job of a customer service representative, a collections agent, a loss mitigation specialist, a loss mitigation supervisor manager, and an assistant vice president.[16] He described his current activities with OneWest as "[r]eviewing

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[9] Over objection and without holding an evidentiary hearing, the trial court substituted DEUTSCHE BANK NATIONAL TRUST COMPANY, in its capacity as Trustee for a 2005 trust, as the party plaintiff less than a week from calendar call. Transcript of Hearing Before the Honorable Spencer Eig on November 21, 2011 (R.1677); Order Granting Plaintiff's Motion to Substitute Party Plaintiff, dated November 21, 2011 (R. 1191).

[10] Flores Depo., p. 21 (Supp. R. 577).

[11] *Id*. at 12-13 (R. 568-69).

[12] *Id*. at 17-18 (R. 573-74).

[13] *Id*. at 88 (R. 644).

[14] T. 17, 30-31.

[15] T. 27.

[16] T. 27.

of business records, documentation that has been imaged in our system" as well as "[c]ontact with, you know, all parties involved, heavy communication."[17]

Over numerous objections, Flores then became the conduit for information allegedly contained in computer records kept by the three, non-party entities that had serviced the loan. Through Flores, a paper purporting to be a Notice of Default letter (Exhibit 5) was introduced into evidence on the foundation that he had reviewed it before trial.[18] Although he previously testified at deposition he thought it was prepared by the "foreclosure department," he now testified it was the "collection customer service department."[19] Also, he now claimed to know that the letter was actually sent to [redacted] because some "customer activity log" that was not offered in evidence, but which he said he had reviewed, allegedly said so.[20]

Similarly, Flores served as the conduit for the payment information contained in a computer printout summarizing servicing data, apparently on the grounds that he had reviewed it before trial.[21]

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[17] T. 29.

[18] T. 68-72.

[19] T. 68-69.

[20] T. 70.

[21] T. 62.

With respect to the loan documents, Flores identified something (Exhibit 2) that "appears to be a copy of the note or the original note."[22] Even on direct, he admitted to never having seen the document before in person.[23] His claimed familiarity with the document was acquired before trial by looking at a digital image that was not in evidence.[24] Over objection and without foundation, Flores testified that the BANK's imaging system "reliably contain[ed] copies of loan-related document[s]."[25] Although the note attached to the complaint was not endorsed, the trial court then permitted Flores to read into the record an alleged endorsement on the version that was presented at trial, an endorsement about which he did not claim to have any personal knowledge.[26]

Flores was also allowed to testify, over multiple objections, about the contents of a Pooling and Servicing Agreement ("PSA," Exhibit 6), apparently on the basis that he had reviewed it.[27] From reading this document, Flores asserted that the original mortgage note was "supposed to be delivered" to the trustee by December 29, 2005.[28]

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[22] T. 48.

[23] *Id.*

[24] T. 48-49.

[25] T. 50.

[26] T. 56.

[27] T. 74, 80.

[28] T. 78.

In the sixty-one transcript pages of Flores' direct testimony, the trial court overruled 102 objections to hearsay, authenticity and lack of personal knowledge. The court partially sustained only one objection.[29]

3. The testimony of Flores on cross-examination.

On cross, Flores revealed for the first time to the trier of fact that, in addition to the job activities he had voluntarily listed on direct, he had the responsibility of testifying and, in fact, had testified over 200 times in the previous eleven months.[30]

The Notice of Default Letter (Exhibit 5): Flores admitted that he did not prepare the notice of default letter, or supervise the maintenance of the digital version.[31] The digital record of the letter was information that was allegedly "boarded" onto OneWest's computer system on some unknown date by way of some physical process with which Flores was not involved.[32] While contending that the letter was sent, he admitted that he had no personal knowledge of whether it was sent, and no knowledge (personal or otherwise) whether it was sent by first class mail or hand-delivery as required by the note.[33]

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[29] T. 36.

[30] T. 124.

[31] T. 117-18.

[32] T. 119-20.

[33] T. 120.

Payment Records (Exhibit 4): Flores also testified that he was not in charge of maintaining the payment records, nor did he supervise anyone who did.[34] Nor did he input payments or tax transactions into the records or supervise anyone who did.[35] He had no personal knowledge of the escrow transactions or who input them into the payment history.[36] Furthermore, Flores had not seen a single loan payment document until a little more than a month before trial when he looked at them only for purposes of the litigation.[37] He also admitted that the pay history from the prior servicers were never boarded on the OneWest computers, but is simply pulled from archives.[38]

One key aspect of Flores' direct testimony had been that payments are posted to the BANK's computer system within 24 hours (testimony presumably intended to meet the "made at or about the time" element of the business record hearsay exception). He admitted on cross-examination, however, that his testimony about his employer's payment posting policy was actually a parroting of

[34] T. 98.

[35] T. 98.

[36] T. 99.

[37] T. 101.

[38] T. 116.

statements allegedly told to him the night before trial by a vice president of cashiering.[39]

As for the computation of the amount due, Flores testified that the payoff amount he calculated accounts for the variation in the interest rate as required by the note, although "the interest rate never changed in the system."[40] He had not reviewed any notice that he said would have been sent 45 days before the date of the rate change and did nothing to confirm that the rate changes were correctly applied and computed in the amount due and owing.[41] The verification of the fluctuating rates would be done by someone in the special loans department.[42] Flores does not supervise the department and could not name anyone there.[43]

The Promissory Note (Exhibit 2): Flores admitted again that DEUTSCHE BANK was the custodian of the original note and that he had never seen the original note before trial, did not know where it was before the lawsuit commenced, and never even knew that the note presented at trial, in contrast to the unendorsed copy attached to the complaint, now purports to be endorsed…twice.[44]

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[39] T. 99.

[40] T. 114.

[41] T. 115.

[42] T. 115.

[43] T. 115.

[44] T. 89, 94.

Most importantly, he did not know when the alleged endorsements were placed on the note.[45]

The Pooling and Servicing Agreement (Exhibit 6): Flores confessed that he did not draft the PSA and did not know who did.[46] He was not involved in the transaction and had never even seen a signed copy.[47] And although the document itself describes a transaction involving "IndyMac MBS," Flores never worked for that entity and never spoke with anyone there.[48] Flores did not "know anything at all" about that entity apart from the fact that its name appears on the unsigned PSA as the transferee of loan documents from the original lender.[49] As with the other documents he ushered into evidence, his only contact with the PSA was that he read it in preparation for trial.[50]

Additionally, Flores admitted that his "knowledge" of whether this loan was actually pooled in the DEUTSCHE trust (as it had alleged to justify substitution as the plaintiff) came from reading a mortgage loan schedule. The schedule,

[45] T. 94.

[46] T. 102.

[47] T. 102.

[48] T. 106.

[49] T. 106-07.

[50] T. 103.

however, was not attached to the unsigned version of the PSA admitted into evidence.[51] Nor was it ever offered into evidence.

Ultimately, his knowledge as to whether the original note was ever transferred from the lender to the Plaintiff DEUTSCHE was but a "contention," something he "would assume" because he would have "no reason to believe otherwise."[52]

The Loan Transfer History (Exhibit 7): The loan transfer history was an alleged computer record that purports to record a transfer of the loan in 2005, before Flores even worked for IndyMac Bank FSB.[53] Flores admitted he did not know the policies and procedures regarding the creation of such loan transfer histories, and did not know when it was drafted or updated in the computer system.[54] Again, Flores' knowledge (or lack thereof) stemmed from an out-of-court discussion with another individual at the company, this time the vice president of the investor accounting department.[55]

On redirect, Flores reiterated that testimony concerning whether the note and mortgage were in the DEUTSCHE trust was entirely "based on business record

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[51] T. 107.

[52] T. 92.

[53] T. 103-04.

[54] T. 104-05.

[55] T. 104-05.

review."[56] At the end of the testimony, the trial court officially admitted all the BANK's exhibits by denying [redacted] motion *in limine* and motion to strike the exhibits.[57]

B. [redacted] Motions for Involuntary Dismissal Were Denied.

At the close of the BANK's evidence, [redacted] moved for an involuntary dismissal on the grounds that the BANK had failed to adduce evidence of the essential elements of a *prima facie* foreclosure case.[58] One of the reasons argued by [redacted] was that the BANK had failed to show that the required Notice of Default letter had been sent by first class mail (as required by ¶15 of the mortgage)—or for that matter, that it was sent at all.[59] [redacted] also pointed out that there had been no evidence that the note was endorsed on the day that the complaint was filed.[60] The court denied [redacted] motion.[61] [redacted] renewed the motion at the end of his own case, which the trial court also denied.[62]

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[56] T. 128-29.

[57] T. 144-45.

[58] T. 145.

[59] T. 146-47.

[60] T. 159.

[61] T. 159-60.

[62] T. 181.

C. Before Trial, the Court Had Hobbled [redacted] Discovery Efforts.

1. [redacted] was denied a deposition of MERS.

The failed odyssey for a single deposition of a representative of the original mortgagee, Mortgage Electronic Registrations Systems, Inc. ("MERS") spanned over twenty months and eight hearings with four different judges.[63] The attorneys for INDYMAC had recorded a MERS assignment of mortgage in the public records approximately two weeks after the complaint was filed.[64] That assignment purported to transfer both the note and the mortgage from MERS to INDYMAC. Because the handwritten dates are unclear, the MERS assignment purports to have been executed either one day before the Complaint was filed, or two days after.[65]

After fruitlessly ordering MERS to produce a representative for deposition no less than three times, the trial court ultimately reversed itself on the basis of a recent Fourth District opinion,[66] which had declared that assignments of mortgage (even fraudulent ones) were completely irrelevant to foreclosure proceedings.[67]

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[63] The motions and hearings surrounding this single deposition request are summarized in "Table 1" at the end of this Brief.

[64] Assignment of Mortgage from MERS to INDYMAC, dated either September 24 or September 27, 2008, recorded in the public records at Bk 26597 Pg 4954 on October 6, 2008, [redacted] Trial Exhibit B, admitted at T. 172 (Supp. R. 1377).

[65] *Id*.

[66] *Harvey v. Deutsche Bank Nat. Trust Co*., 69 So. 3d 300 (Fla. 4th DCA 2011).

[67] Mortgage Electronic Registration Systems, Inc.'s Motion for Reconsideration of Order Denying Motion for Protective Order, dated August 25, 2011 (R. 644); Order Granting Mortgage Electronic Registration System, Inc.'s Motion for

Later, however, the Fourth District decided another case which found that an assignment would be relevant where, as here, undated endorsements suddenly appeared on the note after the case was filed.[68] The Fourth District found that, in that instance, the assignment is relevant to establishing whether the plaintiff acquired standing before the suit was initiated. [redacted] final attempt to force MERS to the deposition table based on the latter Fourth District decision was denied the morning of trial.[69]

2. [redacted] was denied a meaningful deposition of Plaintiff.

a. Deposition of Plaintiff by way of corporate representatives identified by Plaintiff.

Aside from the MERS deposition, [redacted] sought to depose a representative of Plaintiff under 1.310(b)(6) Fla. R. Civ. P.[70] The areas of inquiry included among other things: 1) the INDYMAC's standing to bring the suit; 2) conditions precedent; and 3) the payment history of the loan.[71] Plaintiff INDYMAC moved for a protective order principally on the grounds that discovery concerning its

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Reconsideration of Order Denying Motion for Protective Order, dated September 8, 2011 (R. 710-11).

[68] *McLean v. JP Morgan Chase Bank Nat. Ass'n*, 79 So. 3d 170 (Fla. 4th DCA 2012).

[69] T. 12.

[70] Notice of Deposition of One or More Employees of IndyMac Federal Bank FSB, With The Most Knowledge of Each of The Areas on the Attached List, Exhibit A, dated November 10, 2011 (R. 1068).

[71] *Id*. at 4-6 (R. 1071-73).

standing was irrelevant.[72] The court denied INDYMAC's motion[73] and INDYMAC produced a single witness (the same Marcos Flores who would later testify at trial) as the person with the most knowledge of 27 different topics. Because Flores stated at the deposition he had no knowledge of many of these topics, [redacted] moved to compel and for sanctions arguing that INDYMAC had, in effect, failed to appear for deposition on those topics.[74]

Specifically, [redacted] pointed out that Flores had no knowledge about, among other identified subject matters, the conditions precedent (the Notice of Default letter), the payment history for the loan, where the lost note had been found (despite an earlier unsuccessful "due and diligent search"), where the note was kept before the foreclosure, the authority of the persons endorsing the note, and Plaintiff's standing (including the documents showing Plaintiff's purchase of the loan and the PSA).[75] In some cases, Flores identified others who would have more knowledge of the identified topic.[76]

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[72] IndyMac Federal Bank, FSB's Motion for Protective Order, dated November 15, 2011 (R. 1121-27).

[73] Order Denying Defendant's Motion for Failure to Attend Deposition and Plaintiff's Motion for Protective Order, dated November 21, 2011 (R. 1179).

[74] Defendant, [redacted] Motion to Compel Attendance at Deposition and Motion for Sanction of Dismissal, dated December 9, 2011 (R. 1509).

[75] *Id*.

[76] Id. at 4 (citing Flores Depo., p. 74), 5 (citing Flores Depo., p. 88), 8 (citing Flores Depo., p. 85)

Although the trial court had already denied the BANK's motion for protective order which had argued that the topics were irrelevant, the BANK resurrected the relevancy argument to excuse its failure to provide witnesses with knowledge of the identified topics.[77] Without explanation, the court denied [redacted] motions.[78]

b. Deposition of Plaintiff by way of corporate representatives identified by [redacted]

[redacted] also asked for the deposition of INDYMAC's representative by specifically naming, Erica A. Johnson-Seck,[79] the bank's Vice President who executed the original summary judgment affidavit saying she had personal knowledge of the books and records of IndyMac.[80] INDYMAC objected on the grounds that "Johnson-Seck is a non-party" and, therefore, could not be compelled

[77] Transcript of Hearing before the Honorable Spencer Eig, December 12, 2011, pp. 17-19 (R. 1638-40).

[78] *Id*. at 21.

[79] Notice of Taking Deposition (Duces Tecum), dated October, 7, 2011 (R. 769).

[80] Affidavit as to Amounts Due and Owing dated November 17, 2008 (R. 87-90). Ms. Johnson-Seck has been the subject of several uncomplimentary judicial opinions. *In re Kang Jin Hwang*, 396 B.R. 757 (Bankr. C.D. Cal. 2008) (expressing disbelief regarding her testimony that IndyMac was the duly authorized servicing agent for the note owner); *Deutsche Bank National Trust Company v. Maraj*, 18 Misc 3d 1123, at 2 (A) (Sup Ct, Kings County 2008) (expressing concern whether she was engaged in "self-dealing"); *Onewest Bank, F.S.B. v. Drayton*, 29 Misc. 3d 1021, 1022 (N.Y. Sup. Ct. 2010) (labeling her a "robo-signer").

to sit for deposition without a subpoena.[81] INDYMAC also argued that Johnson-Seck's testimony would be irrelevant, because INDYMAC had withdrawn the affidavit.[82] The trial court granted INDYMAC's motion for protective order.[83]

* * *

At trial, [redacted] proffered the testimony of the witnesses he was precluded from deposing.[84] At the close of all the evidence, the trial court ruled in favor of the BANK and entered judgment from which this appeal was timely taken.[85]

[81] Plaintiff's Motion for Protective Order and to Strike Deposition Notice, dated November 4, 2011, p. 1 (R. 994).

[82] *Id.*

[83] Order Granting Plaintiff's Motion for Protective Order and to Strike Deposition Notice, dated November 17, 2011 (R. 1179).

[84] T. 172-76.

[85] T. 200; Final Judgment of Foreclosure, dated December 19, 2011 (R. 1932).

SUMMARY OF ARGUMENT

A professional testifier who has no responsibility for the creation or preservation of company records and whose only contact with those records is to review them in preparation for funneling them (or sometimes merely reading them) to the fact finder at trial is singularly unqualified to overcome hearsay and authenticity objections to those records. The rules provide an easy alternative for admissibility—a sworn certification or declaration by an actual records custodian—which the BANK here eschewed.

Because the BANK's designated testifier, Flores, could not lay the necessary predicate for the business records exception to hearsay, admission of the BANK's documents into evidence was error and [redacted] was entitled to an involuntary dismissal. Among other hearsay documents was the alleged Notice of Default necessary to accelerate the loan such that: 1) additional payments made would not count towards a cure; and 2) the BANK could file suit.

The erroneous admission of hearsay evidence was exacerbated by the pre-trial denial of depositions of BANK officers who had actual knowledge of the documents proffered at trial. This ruling denied [redacted] the due process right to cross-examine the hearsay testimony offered against him. The trial court also misinterpreted case law to deny [redacted] a deposition of a MERS representative needed to determine whether the BANK acquired standing before filing suit.

STANDARD OF REVIEW

Although a trial court's decision to admit evidence is generally reviewed for abuse of discretion, the *de novo* standard applies when the issue is whether the trial court erred in applying a provision of the Florida Evidence Code. *See Shands Teaching Hosp. and Clinics, Inc. v. Dunn*, 977 So. 2d 594, 598 (Fla. 2d DCA 2007) *Lucas v. State*, 67 So. 3d 332, 335 (Fla. 4th DCA 2011). Because [redacted] challenges the trial court's application of the Florida Evidence Code, §90.803(6), the *de novo* standard of review applies. *See Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006) (question of whether evidence falls within the statutory definition of hearsay is a matter of law subject to *de novo* review).

The standard of review for a trial court's ruling on a motion for involuntary dismissal is also *de novo*. *Lizio v. McCullom,* 36 So. 3d 927 (Fla. 4th DCA 2010) (citing *Brundage v. Bank of Am.,* 996 So. 2d 877, 881 (Fla. 4th DCA 2008)). The burden is on the plaintiff to establish a *prima facie* case. *Tillman v. Baskin*, 260 So. 2d 509, 512 (Fla. 1972).

Normally, a trial court's denial of relevant discovery is reviewed for abuse of discretion, *Alvarez v. Cooper Tire & Rubber Co.*, 75 So. 3d 789, 793 (Fla. 4th DCA 2011), but here, discoverability turned on an issue of law—whether assignments can be relevant to a foreclosure case. Matters of pure law are reviewed *de novo*. *Gilliam v. Smart*, 809 So. 2d 905, 907 (Fla. 1st DCA 2002).

ARGUMENT

A. The Trial Court Erred in Considering Information in Documents Merely Because They Were Read by a Professional Testifier Who Was Neither a Qualified Witness nor a Records Custodian.

The BANK's only witness, Flores, was a professional testifier whose schedule of testifying an average of four times a week for the past eleven months would have left time for little else. His only connection with the documents admitted into evidence over objection was that he had read them a few weeks before. The only competence he offered the trier of fact was that he was sufficiently literate in the English language to read the documents to the court.

To authenticate the documents, he would have to be sufficiently familiar with them to testify that they are what the BANK claims them to be. §90.901 Fla. Stat. (2012). Moreover, to overcome the hearsay objections made to each and every exhibit, Flores would have to first lay the predicate for the "business records" exception. There are four requirements for such an 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). But to even be permitted to testify to these thresholds facts, Flores needed to be a qualified witness—one who is in charge of the activity constituting the usual business practice or well enough acquainted with the activity to give the testimony. *Mazine v. M & I Bank*, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011) (judgment of foreclosure after bench trial reversed where bank's only witness "had no knowledge as to the preparation or maintenance of the documents offered by the bank"); *Snelling & Snelling, Inc. v. Kaplan*, 614 So. 2d 665, 666 (Fla. 2d DCA 1993) (witness who relied on ledger sheets prepared by someone else was neither the custodian nor sufficiently familiar with the underlying transactions to testify about them or to qualify the ledger as a business record); *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980) (adjuster not qualified to testify about the usual business practices of sales agents at other offices). *See also Thomasson v. Money Store/Florida, Inc.*, 464 So. 2d 1309, 1310 (Fla. 4th DCA 1985) (statement that demonstrates no more than that the documents in question appear in the company's files and records is insufficient to meet the requirements of the business record hearsay exception); *Holt v. Grimes*, 261 So. 2d 528, 528 (Fla. 3d DCA 1972) (records properly excluded where there was "no testimony as to the mode of preparation of these records nor was the witness testifying in regard to the records in the relationship of 'custodian or other qualified witness'").

In *Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121 (Fla. 2d DCA 1988) the court addressed the admissibility of computerized records virtually identical to those in this case. There, the court held that the testimony of a general manager of one department of the business did not lay the proper predicate for admission of monthly billing statements prepared in another department. The testimony was insufficient under the business records exception to hearsay because the manager, like Flores in this case, admitted that he was not the custodian and did not prepare the statements, nor supervise anyone who did:

> [The manager] Darby was not the custodian of the statement. He was not an otherwise qualified witness. Darby was not "in charge of the activity constituting the usual business practice." He admitted that neither he nor anyone under his supervision prepared such statements. Darby was not "well enough acquainted with the activity to give the testimony." He admitted that he was not familiar with any of the transactions represented by the computerized statement.

Id. at 1122. (internal citations omitted). The court held that the trial court had abused its discretion in admitting the evidence because the manager was not a qualified witness to lay the necessary predicate. It reversed and remanded the case for a new trial. *Id*.

Strict compliance with the hearsay exception rules is required. *Johnson v. Dep't of Health & Rehabilitative Services*, 546 So. 2d 741, 743 (Fla. 1st DCA

1989).[86] Nevertheless, this does not mean the BANK was burdened with having to transport witnesses from various distant departments to the courthouse so they could give this foundational testimony for each proposed exhibit. The BANK had the option of establishing this predicate through a certification or declaration by a records custodian or other qualified witness under penalty of perjury. §90.902(11); *Yisrael v. State*, 993 So. 2d at 957. Indeed, the courts have already suggested that foreclosing banks can meet the hearsay exception requirements in exactly this manner. *Mazine v. M & I Bank*, 67 So. 3d at 1132.

The BANK in this case, however, chose not to avail itself of this rule—one which seems specifically designed to simplify the procedure by which the records of modern, highly departmentalized and geographically dispersed corporations may be admitted into evidence. It is telling that the BANK chose not to supply certifications or declarations from OneWest employees actually creating or keeping the records, despite the relative ease of doing so.

[86] It is at least footnote-worthy to mention that the business records exception to hearsay is not available if "the sources of information or other circumstances show lack of trustworthiness." §90.803(6)(a) Fla. Statutes (2012). [redacted] submits that it has become common knowledge following the robo-signing scandal that the purported business records of banks servicing and foreclosing on loans are highly unreliable and untrustworthy. *See Pino v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011) ("many, many mortgage foreclosures appear tainted with suspect documents").

1. The alleged Notice of Default letter and testimony related to it was inadmissible.

Flores did not create the Notice of Default, nor supervise anyone who did. He had no custodial responsibility over the maintenance of the digitally imaged version offered at trial, nor supervise anyone who did. The digital record from the previous servicer was allegedly "boarded" onto OneWest's computer system on some unknown date by way of some physical process with which Flores was not involved. The only time he had even seen the document was in his preparation to testify about it.[87]

In the three weeks between his deposition and trial, he learned (apparently from hearsay conversations in the interim) that such notices are prepared by the collection customer service department, rather than the foreclosure department as he originally thought.[88] But he still did not know who was responsible for sending the letter.[89]

Nor did he have personal knowledge that the imaged document was ever sent. He had never seen an envelope in which the letter was allegedly mailed.[90] The only information he could offer that the letter was sent was an entry he claimed to have read in a document never admitted—or even offered—into

[87] T. 68-72, 117-20.

[88] T. 68, 118-19.

[89] T. 118.

[90] T. 122.

evidence.[91] This testimony, of course, was highly improper. *Thompson v. State*, 705 So. 2d 1046, 1048 (Fla. 4th DCA 1998) (business records exception "does not authorize hearsay *testimony* concerning the contents of business records which have not been admitted into evidence").

Even more importantly, Flores had no knowledge that the letter was sent in the manner required by the mortgage (i.e. by first class mail or proof of actual delivery):

> Q. And you have no knowledge this was sent via first class mail; right?
>
> A. No, sir.
>
> Q. You have no knowledge this was hand-delivered; right?
>
> A. No, sir.[92]

Further impugning the trustworthiness of the letter proffered by the BANK was the existence of another notice letter with the same date, but different language, which it had produced in discovery. Flores was equally ignorant as to whether this alternative letter was ever sent and offered no explanation as to why two different letters with the same date would even exist.[93]

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[91] T. 70.

[92] T. 120.

[93] T. 123.

Over objection, Flores was permitted to testify as to the routine practices of departments he did not supervise[94] and policies he had not created or even seen (and in one instance, a hearsay statement about company policy from a conversation with another employee the night before trial[95]). He claimed that "in normal circumstances" notices are sent out after 45 days of delinquency, that it is "routine" that letters are sent after default, and that "typically" they are sent by first class or certified mail.[96]

However, even if he were qualified to so testify, proof of practice, habit, or custom alone does not constitute performance of an act on a specific occasion. *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980). There must also be some proof that practice was followed in the particular circumstance. *Bernstein v. Liberty Mutual Insurance Co.*, 294 So. 2d 63 (Fla. 3d DCA 1974).

a. The trial court erred in denying [redacted] motions for involuntary dismissal because the BANK failed to adduce admissible evidence that it sent a Notice of Default, by first class mail or otherwise.

Because Flores was not a qualified witness to establish the prerequisites to the admission of the Notice Letter as a business record exception to hearsay, it was error to admit the letter or any testimony that it was sent. [redacted] had pled an affirmative defense which explicitly alleged that the BANK did not send the notice

[94] T. 69.

[95] T. 99.

[96] T. 69.

of default letter required by Paragraph 22 of the mortgage.[97] This specific denial of the BANK's allegation that it complied with this condition precedent shifted the burden to the BANK to prove that it had complied. *Sheriff of Orange County v. Boultbee*, 595 So. 2d 985 (Fla. 5th DCA 1992); 1967 comments to Fla. R. Civ. P. 1.120(c) ("A specific denial of a general allegation of the performance or occurrence of conditions precedent shifts the burden on the plaintiff to prove the allegations."); *Fidelity & Casualty Company of New York v. Tiedtke*, 207 So. 2d 40 (Fla. 4th DCA 1968), *quashed on other grounds*, 222 So. 2d 206 (Fla.1969).

Because the BANK failed to adduce any competent evidence that it had complied with a condition precedent to accelerate its loan and file suit, [redacted] was entitled to an involuntary dismissal. *See Day v. Amini*, 550 So. 2d 169, 171 (Fla. 2d DCA 1989) (reversal with instructions to amend judgment where trial court erroneously denied involuntary dismissal—"it is incumbent on the trial judge to grant the motion" where the evidence offered by the plaintiff does not establish a *prima facie* case); *Tylinski v. Klein Auto., Inc.*, 37 Fla. L. Weekly D1350 (Fla. 3d DCA 2012) (involuntary dismissal "should be granted when there is no reasonable evidence upon which the [fact finder] could legally predicate a verdict in favor of the non-moving party"); *See Mazine*, 67 So. 3d at 1132 (reversing trial court's

[97] Sixth Affirmative Defense, Defendant, [redacted] Amended Answer to Complaint and Affirmative Defenses, p. 5 (R. 170).

denial of motion for directed verdict due to bank's failure to submit admissible evidence of its standing).

The error in admitting the evidence was not harmless. As the Florida Supreme Court has explained, when the trial judge in a bench trial erroneously admits evidence over objection, without an express statement that such evidence did not contribute to the final determination, it cannot be presumed to have disregarded the evidence in reaching its decision. *Petion v. State*, 48 So. 3d 726 (Fla. 2010). Because the improperly admitted documents and testimony was the sole evidence supporting essential elements of the BANK's claim, due process compels reversal of the judgment.

b. The Notice of Default is also relevant to the determination of the amount due.

At trial, Flores testified that the date of default was a missed payment on June 1, 2008 and that [redacted] had made no payment to cure the default after that date.[98] But Flores also testified that [redacted] had paid OneWest installments totaling $1,545.04 after that date. He did not mention these payments because "they are not contractual payments."[99] In other words, the BANK did not consider [redacted] payments as reducing principal or curing the default because it had already accelerated the loan as if it had, in fact, sent [redacted] a Notice of Default.

[98] T. 66.

[99] T. 126.

Only tendering an amount which would satisfy the entire loan in a single payment will cure the default after acceleration. Hence, the treatment of these payments—whether they reduce the amount due or go to pay the servicer's post-default expenses—hinges entirely on whether the BANK sent the notice.

c. The denial of discovery about the Notice of Default unfairly prevented [redacted] from developing and presenting his defense that it was never sent.

Even if [redacted] had some obligation to prove a negative—that the BANK did not send the Notice of Default—the relevant evidence was in the hands of his opponent, the BANK. Thus, the denial of discovery from the BANK precluded [redacted] from gathering the evidence he needed to prove the notice was not sent.

[redacted] notice of deposition of a BANK's representative expressly asked for a witness with the most knowledge of "[t]he conditions precedent to bringing this foreclosure action."[100] The BANK produced only Marcos Flores who, at the time, was so uninformed about the notice that he had to guess what department prepared it, and apparently, he guessed incorrectly.[101]

After the deposition, [redacted] went back to the trial court and asked that it compel the BANK to comply with the discovery rules (and the court's order

[100] No. 3 of Exhibit A to Re-Notice of Deposition of One or More Employees of Plaintiff, with the Most Knowledge of Each of the Areas on the Attached List, Exhibit A (R. 1141).

[101] Flores Depo., p. 45.

denying the BANK's earlier motion for protective order) by providing a witness who had actual knowledge about the notice.[102] The trial court denied this request.[103]

This denial of [redacted] discovery about the Notice of Default unfairly obstructed his ability to provide evidence on the subject of whether either one of the purported notices—two different letters dubiously dated the very same, conveniently appropriate day—had actually been sent. *See Rollins Burdick Hunter of New York, Inc. v. Euroclassics Ltd., Inc.*, 502 So. 2d 959, 962 (Fla. 3d DCA 1987) (Error in denying discovery was not harmless where it effectively deprived party of the opportunity to defend itself); *Saunders v. Florida Keys Elec. Co-op Ass'n, Inc.*, 471 So. 2d 88, 89 (Fla. 3d DCA 1985) (discovery error reversible because it hampered the presentation of evidence and prevented the fact finder from considering information about a key element of the case). *See also Epstein v. Epstein*, 519 So. 2d 1042, 1043 (Fla. 3d DCA 1988) (where information sought by a party would appear to be relevant to the subject matter of the pending action, it is a reversible abuse of discretion to deny discovery).

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[102] Defendant, [redacted] Motion to Compel Attendance at Deposition and Motion for Sanction of Dismissal, dated December 9, 2011, p. 2 (R. 1537).

[103] Transcript of Hearing before the Honorable Spencer Eig, December 12, 2011, p. 21.

Accordingly, if this Court finds that the denial of [redacted] motion for involuntary dismissal at trial was not reversible error, it should reverse and remand for a new trial to be held after the requested discovery is compelled.

2. The remainder of the BANK's key exhibits were also inadmissible.

Just as the Notice of Default was inadmissible, nearly every other BANK exhibit failed to meet the threshold requirements of the authenticity and hearsay rules. Flores was not a records custodian or otherwise qualified witness to identify the exhibit or to lay the necessary predicate for the business records hearsay exception. Specifically, the trial court erred in admitting:

- The Payment Records (Exhibit 4);
- The Promissory Note (Exhibit 2);
- The PSA (Exhibit 6); and
- The Loan Transfer History (Exhibit 7)

a. The Payment Records

As to the payment records, Flores did not input the transactions (either the payments or the interest and expense debits) nor did he supervise anyone who did.[104] He had no personal knowledge as to the first element of the hearsay exception—whether the records (the computer entries) were made at or near the time of the event (the receipt of payment). His self-serving statement that they

[104] T. 98.

were posted in 24 hours was actually hearsay allegedly told him the night before trial.[105] Nor was he involved in the rate change computations and could not confirm they were correct.[106] Additionally, some of the payment records were never incorporated into the OneWest records, but were instead simply shuttled into evidence as unvetted "archives" of the original servicer.[107] *See Thompson v. Citizens Nat. Bank of Leesburg, Fla.*, 433 So. 2d 32, 33 (Fla. 5th DCA 1983) (court may not consider evidence from witness who did not, and could not, state he had personal knowledge of records from another company); *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780, 783 (Fla. 4th DCA 2011) (same).

Worse, the only evidence as to the amount that [redacted] allegedly owed came when the court permitted the BANK to reopen its case, recall Flores, and have him testify from an email containing "final figures" that he had prepared and sent to the BANK's counsel the very day of trial.[108] The email purportedly summarized information which he took directly from "Fidelity LPS," the OneWest computer system which Flores conceded was the best evidence of the debt.[109] To the extent the email summarizes years of calculations of payments, interest and

[105] T. 99.

[106] T. 114-15.

[107] T. 116 ("..it was from the archives, it is not from our One West system")

[108] T. 182-83.

[109] T. 62-63, 188.

principal adjustments, and other charges, the information in the email violated the rule regarding summaries and compilations. That rule mandated that the BANK provide [redacted] with timely written notice of its intent to use such a summary, as well as the summary itself and all the underlying information. §90.956, Fla. Stat. (2012). Florida courts require strict compliance with this notice rule. *Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234, 240 (Fla. 5th DCA 1991). Damages proved only through a summary for which no notice was given may not be properly awarded. *Id*; *see also Valdes v. Valdes*, 62 So. 3d 7 (Fla. 3d DCA 2011) (reversing judgment based on admission of summary introduced in violation of trial court's trial order).

Worse still, the trial court permitted Flores to read the email into the record under the guise of refreshing his recollection. Together with the inadmissibility of the email itself, this created reversible error as to the amount due. *See K.E.A. v. State*, 802 So. 2d 410, 411 (Fla. 3d DCA 2001) (adjudication reversed where witness improperly read from a report instead of using it to refresh his recollection); *McKeehan v. State*, 838 So. 2d 1257, 1260 (Fla. 5th DCA 2003) (where original evidence is available, best evidence rule bars "substitutionary" evidence, such as oral testimony about the original evidence); *Stambor v. One Hundred Seventy-Second Collins Corp.*, 465 So. 2d 1296, 1297-98 (Fla. 3d DCA. 1985) (finding that whenever a record is made for the purpose of preparing for

litigation, its trustworthiness is suspect and should be closely scrutinized) *citing* 1 C. Ehrhardt, Florida Evidence § 803.6, at 490-91 (2d ed. 1984).

b. The Promissory Note

As to the promissory note, Flores admitted that neither he nor his company (OneWest) was ever its custodian; if the loan was actually sold to DEUTSCHE and pooled within its trust, then DEUTSCHE was the custodian.[110] The significance is that neither Flores nor anyone at his company would be in a position to know when the endorsements to DEUTSCHE were first placed on the note—and in fact, he did not know.[111]

Notably, before trial, DEUTSCHE itself gave two different stories as to when it acquired the loan. First, it represented that INDYMAC transferred the loan to DEUTSCHE subsequent to the filing of the Complaint by way of an assignment in 2008.[112] Then, after this matter had been set for trial, it filed a motion directly contradicting its earlier statement, saying that it bought the "blank indorsed note on or around September 25, 2005"[113]—three years to the day before INDYMAC had filed the case claiming to be the "holder" of a lost note.[114]

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[110] T. 89.

[111] T. 94.

[112] Motion Substituting Party Plaintiff, dated September 1, 2010 (R. 254).

[113] Motion to Substitute [Second] Party Plaintiff, dated November 18, 2011, p. 1 (R. 1162).

[114] Complaint, dated September 25, 2008 (R. 12).

By way of technical admissions for failure to timely respond to [redacted] requests for admission, the BANK had conceded that the subject note was not endorsed prior to the filing of the lawsuit.[115] Although highly prejudicial to the preparation of [redacted] defense, the court relieved the BANK of these admissions on the morning of trial.[116]

The timing of the endorsement is dispositive of the BANK's claim of standing as the holder of a note. *McLean v. JP Morgan Chase Bank Nat. Ass'n*, 79 So. 3d 170 (Fla. 4th DCA 2012) (where note attached to complaint is unendorsed and later version of the note bears an undated endorsement, necessary evidence that plaintiff had standing before the suit was filed was lacking); *Rigby v. Wells Fargo Bank, N.A.*, 84 So. 3d 1195 (Fla. 4th DCA 2012) (undated endorsement with post-complaint assignment failed to establish standing). Because Flores could not testify about the note or the date of the endorsement, the BANK did not adduce any evidence that it was the holder of the note when suit was filed. Involuntary dismissal should have been granted on this narrow issue (recognizing that the true owner or holder would not be barred from pursuing foreclosure).

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[115] Defendant, [redacted] Requests for Admission Regarding Promissory Note, dated October 11, 2011 (R. 799).

[116] T. 16.

c. The PSA and Loan Transfer History

Perhaps recognizing that it could not establish standing as a holder, the BANK attempted to prove it owned the note by way of a transfer allegedly shown in the PSA and the Loan Transfer History. Because Flores was not involved in this transaction, knew nothing at all about the transferor (IndyMac MBS) and had never even seen a signed copy of the PSA,[117] he was decidedly unqualified to testify about the purchase or to conduct the PSA into evidence.

In addition, the PSA does not establish that the subject loan was among those pooled into the trust. The PSA references a list of mortgages—the "mortgage schedule"—which Flores claimed to have seen, but which was never admitted, or even offered into evidence.[118]

Lastly, the alleged Loan Transfer History was a printout about which Flores had no personal knowledge. He knew nothing about how transfers were updated into the system.[119] He did not testify that the entries were made at or about the time of the transfers by persons with personal knowledge. In fact, he testified that they were made "[a]t the time of servicing acquisition or to memorialize a sale or

[117] T. 102, 106-07.

[118] T. 107.

[119] T. 104-05.

transfer."[120] But the transfer he read to the fact finder allegedly occurred in 2005, while OneWest did not acquire the servicing rights until 2009.[121]

Ultimately, Flores knew nothing about the policies and procedures concerning the creation of the Loan Transfer History, which allegedly memorialized a transfer that occurred before he even worked there.[122] What little information he offered on the subject came from a hearsay conversation with another employee.[123]

Accordingly, all the evidence offered by the BANK to show that it was either the holder or the owner of the note at the time it filed suit was inadmissible. There simply was no competent evidence upon which to enter a judgment for the BANK.

B. The Trial Court Erred in Denying Discovery as to the Trustworthiness of the BANK's Records, As Well As Its Claim of Standing.

As shown above, the BANK relied entirely on documents that should not have been admitted by way of a professional testifier who had no personal knowledge of their creation or maintenance. Even if they were admissible, they were completely devoid of any indicia of reliability. For example, the records of

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[120] T. 84, 104.

[121] T. 32, 117. Even the first transfer of servicing rights did not occur until July of 2008—almost three years after the alleged transfer of the promissory note to DEUTSCHE. T. 37.

[122] T. 104.

[123] T. 104.

the transfer to DEUTSCHE in 2005 contradicted its own representation to the court and its own assignments recorded in the public records (which the BANK itself objected to as hearsay and not necessarily "truthful or accurate"[124]). And duplicative endorsements appeared for the first time on the note long after the case was filed.

Similarly, the reliability of the BANK records tracking the dollar amount owed is tarnished. They do not show any changes in the variable interest rate and Flores did not personally calculate a rate change or confirm they were correctly applied by a department in which he is not a supervisor or even an employee.[125] The computation of the amount due itself assumes an acceleration based on a Notice of Default—a document that the BANK inexplicably produced in two different versions.

Thus, the discovery regarding the BANK's standing and its claim regarding the amount due and owing was not only relevant, but critical to the defense of the case.

1. The deposition of the BANK's self-designated representative.

was unfairly prejudiced by the BANK's refusal to produce a representative with some knowledge, much less the most knowledge, of topics

[124] T. 168-69.

[125] T. 115.

such as conditions precedent and standing. As shown above, Flores had little information, and no personal knowledge of the area had designated. Indeed, Flores gathered additional relevant knowledge after his deposition by initiating hearsay conversations with other OneWest employees. was entitled to obtain this information directly from the other employees and to cross-examine their assertions. The trial court erred in failing to compel the BANK to comply with the rules of discovery and produce these other, more knowledgeable employees for deposition. *Saunders v. Florida Keys Elec. Co-op Ass'n, Inc.*, 471 So. 2d 88, 89 (Fla. 3d DCA 1985); *see Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981)(disapproving of practice of trial by ambush).

2. The deposition of BANK's representative designated by (Erica Johnson-Seck).

Similarly, it was reversible error to deny the deposition of Erica Johnson-Seck. Johnson-Seck is an officer of OneWest whose job it was to give depositions as often as twice a day.[126] As an officer of the original plaintiff, INDYMAC, she executed the original summary judgment affidavit in this case, claiming to have knowledge of its books and records. was entitled to choose her as the BANK's representative for deposition. *Plantation-Simon Inc. v. Bahloul*, 596 So. 2d 1159, 1160 (Fla. 4th DCA 1992).

[126] Deposition of Erica Johnson-Seck taken in the *IndyMac Bank, F.S.B. v. Malerman* case, February 5, 2009, p. 11 (Supp. R. 14).

3. The deposition of MERS.

The BANK's standing turns on whether [redacted] loan was transferred to DEUTSCHE prior to the filing of the case and the assignment from MERS to INDYMAC is relevant to dating that transfer. *McLean v. JP Morgan Chase Bank Nat. Ass'n*, 79 So. 3d 170 (Fla. 4th DCA 2012). The assignment, which professes to convey both the note and mortgage, is itself ambiguous, because the handwritten dates of execution are unclear. It appears to have been executed either one day before the complaint was filed, or two days after. Thus, the deposition of a MERS representative was crucial to shedding light on the timing and legitimacy of the claimed transfer. The trial court erred in failing to compel MERS, a party to this litigation, to attend a deposition that was critical to [redacted] defense.

CONCLUSION

This Court should reverse and remand for entry of judgment in favor of [redacted] or in the alternative, for a new trial to take place only after [redacted] is permitted full depositions of representatives of the BANK and MERS.

DATED: July 10, 2012

ICE LEGAL, P.A.
Counsel for Appellant
1015 N. State Road 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888
Email: mail@icelegal.com

By:

Thomas Erskine Ice, Esq.
Florida Bar No. 0521655

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby respectfully certifies that the foregoing brief complies with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure and has been typed in Times New Roman, 14 Point.

ICE LEGAL, P.A.
Counsel for Appellant
1015 N. State Road 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888
Email: mail@icelegal.com

By:

Thomas Erskine Ice, Esq.
Florida Bar No. 0521655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this July 10, 2012 on all parties on the attached service list. I also certify that a digital copy of the foregoing was emailed to the Court.

ICE LEGAL, P.A.
Counsel for Appellant
1015 N. State Road 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888
Email: mail@icelegal.com

By:

Thomas Erskine Ice, Esq.
Florida Bar No. 0521655

SERVICE LIST

Nancy M. Wallace, Esq.
Katherine E. Giddings, Esq.
AKERMAN SENTERFITT
106 East College Avenue, Suite 1200
Tallahassee, FL 32301
Plaintiff/Appellee's counsel

William P. Heller, Esq.
Nathaniel D. Callahan, Esq.
AKERMAN SENTERFITT
Las Olas Centre II, Suite 1600
350 East Las Olas Boulevard
Fort Lauderdale, FL 33301
Plaintiff/Appellee's counsel

Robert Brochin, Esq.
MORGAN, LEWIS & BOCKIUS
5300 Wachovia Financial Center
200 South Biscayne Blvd.
Miami, FL 33131
Counsel for MERS
[defaulted party; courtesy copy only]

#	DATE	MOTION	HEARING/ORDER
1.	3/25/2010	Deposition of MERS officer, Bill Hultman Noticed to Take Place 4/9/2010	
2.	4/2/2010	MERS Motion to Quash	
3.	12/6/2010		J. Kreeger - denied #2
4.	12/22/2010	MERS Motion to Vacate #3	
5.	1/13/2011	MERS [second] Motion to Quash	
6.	2/3/2011		J. Warren - denied #4 and #5
7.	2/28/2011	Motion to Compel Compliance with #6	
8.	3/1/2011	MERS Notice of Non-Appearance and [2nd] Motion for Reconsideration re: #6	
9.	3/4/2011		J. Gordon – no ruling
10.	8/11/2011		J. Eig – upheld prior rulings
11.	8/25/2011	MERS [third] Motion for Reconsideration re: #10	
12.	9/8/2011		J. Eig – reversed all prior rulings
13.		Motion for Reconsideration re: #12 based on Plaintiff's listing of assignment as exhibit	
14.	11/9/2011	Notice Corp. Representative Deposition of MERS for 11/18/11	
15.	11/15/2011	MERS' Motion for Protective Order re: #14	
16.	11/17/2011		J. Eig – granting MERS motion for protective order #15
17.	12/12/2011		J. Eig – denied #13 (upholding #12)
18.	12/15/2011	second motion for reconsideration of #12 and #17	
19.	12/19/2011		J. Eig – denied #18 (day of trial)

TABLE 1