In the District Court of Appeal
Fourth District of Florida

CASE NO.
(Circuit Court Case No.)

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and
Appellants,

v.

U.S. BANK NATIONAL ASSOCIATION, etc., et al.,

Appellee.

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

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

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Record references:

R. ___= Record on Appeal

Supp. R. ___= Supplement to Record on Appeal

ISSUES PRESENTED

Issue #1

In Florida, without a showing of good cause, an officer of a plaintiff corporation is required to attend a deposition in the forum where the action is pending. The Plaintiff objected to having the deposition of its Vice President taken in this forum, alleging (contrary to answer to interrogatories, other witnesses, and the agreement that governs the Plaintiff's trust) that its Vice President had no personal knowledge of the underlying facts. Was it error to deny the Defendants the right to depose the Plaintiff in this forum?

Issue #2

To be qualified to testify about a business record, a person must be the custodian of the record, in charge of the activity constituting the usual business practice, or the person who supervises preparation of the record. Otherwise, any testimony not made on personal knowledge is hearsay. The Plaintiff's witness had no personal knowledge nor did he even work for the Plaintiff. He was in-house counsel for a different company. In fact, within his own company he worked in a different department and different state than where his company's records were kept. Was the witness qualified to testify about the Plaintiff's business records?

STATEMENT OF THE CASE AND FACTS

I. U.S. Bank files suit to foreclose.

U.S. Bank National Association, as Trustee of the Security National Mortgage Loan Trust 2007-1 ("U.S. Bank") sought to foreclose on the property of [redacted] and [redacted] (collectively the "Vidals").[1] The Complaint pled that Mr. Vidal executed a promissory note to DHI Mortgage Company, Ltd. ("DHI") secured by a mortgage from the Vidals.[2] The attached note indicated the payee was DHI and it contained no endorsements.[3] The attached mortgage listed "Mortgage Electronic Registration Systems, Inc. ("MERS") as the mortgagee.[4] U.S. Bank also pled it owned the note and mortgage.[5]

The Vidals denied U.S. Bank was the owner of the note.[6] The second affirmative defense alleged that U.S. Bank was not the owner of the note or mortgage, and the attached unendorsed note was not negotiated to U.S. Bank.[7] The third affirmative defense denied the authenticity of any document presented as

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[1] Complaint, dated May 16, 2008 (R. 1-26).

[2] Complaint, ¶ 8 (R. 2).

[3] Note attached to Complaint, (R. 5-7).

[4] Mortgage attached to Complaint (R. 8).

[5] Complaint, ¶ 10 (R. 2).

[6] Second Am. Answer, served February 1, 2010, ¶10 (R. 617-28).

[7] *Id.* at 5-6 (R. 617-28).

the original promissory note, including any endorsements.[8] It also denied the authenticity of any signatures on the note and mortgage, and the authority of anyone making them.[9] The fourth affirmative defense pled the mortgage was improperly altered after notarization and was therefore void.[10]

Over four months after filing suit, U.S. Bank filed a note and mortgage which its counsel claimed was the original note and mortgage.[11] Unlike the note attached to the Complaint, the newly-produced note now contained a stamp purporting to endorse the note in blank. The signature on the endorsement was of a person holding himself out to be an assistant secretary—not of the original lender (DHI Mortgage Company, Limited) but of another company (DHI Mortgage Company GP). The endorsement asserted that the latter DHI company was the general partner of the original lender.[12]

II. The trial court denies the Vidals' motion for summary judgment.

The Vidals moved for summary judgment arguing that the Complaint failed to plead a transfer of the note to U.S. Bank and the attached mortgage showed the

[8] *Id.* at 6-7 (R. 617-28).

[9] *Id.*

[10] *Id.*

[11] Notice of Filing Note and Mortgage, dated September 24, 2008 (R. 84).

[12] *Id.*

mortgagee was not U.S. Bank.[13] U.S. Bank claimed the mortgage was assigned by an assignment it attached as an exhibit.[14] The assignment was executed after the suit was filed and it contained no earlier transfer date.[15] The Vidals argued that U.S. Bank could not have been the mortgagee at filing based on an assignment that post-dated the lawsuit.[16] U.S. Bank argued that there could have been a previous equitable transfer.[17] The court agreed and determined there needed to be an evidentiary hearing to find out if there was possibly an earlier transfer.[18]

III. The Vidals seek to depose the records custodian of the trust.

U.S. Bank is trustee of a trust which was formed by and governed by the Pooling and Servicing Agreement ("PSA").[19] The custodian under the PSA is U.S. Bank, specifically Ms. Cheryl Whitehead its Vice President.[20] U.S. Bank also identified Ms. Whitehead as a person with knowledge of whether it acquired the

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[13] Defs.' Mot. for Summary Judgment, dated October 6, 2008 (R. 112-19).

[14] Pl.'s Cross Mot. for Summary Judgment, dated February 6, 2009 (R. 156-63).

[15] *Id.*

[16] Tr. of Hr'g before the Honorable Jack Cook, Tr. p. 4 (R. 261-68).

[17] *Id.* at 9, 18 (R. 261-68).

[18] *Id.* at 9, 18 (R. 261-68).

[19] Tr. of Trial held before the Honorable Meenu Sasser ("Trial Transcript"), June 17 and 18, 2010, Vol. I, p. 68; Pooling and Servicing Agreement, Plaintiff's Exhibit A, dated March 1, 2007.

[20] PSA § 12.07(e).

mortgage prior to filing suit.[21] The Vidals sought Ms. Whitehead's deposition.[22] U.S. Bank moved for a protective order arguing that Ms. Whitehead had no personal knowledge and that she should not be deposed in Palm Beach County.[23] The court deferred ruling but agreed to revisit the issues after a different deposition.[24]

At a later hearing, the Vidals revisited their request to depose Ms. Whitehead in this forum.[25] The Vidals pointed out that Ms. Whitehead, Plaintiff's Vice President, is a corporate officer and designated records custodian of the trust.[26] U.S. Bank argued again that the Vidals should be required to fly to California for a live deposition.[27] The court held that U.S. Bank could designate who it wants to be deposed as corporate representative and the Vidals could not

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[21] Pl.'s Notice of Serving Answers to Defs.' Interrogs., June 15, 2009 (R. Supp. 89); Tr. of Hr'g before the Honorable Meenu Sasser, December 16, 2009, p. 5 (R. 511-22).

[22] Notice of Taking Dep., served October 21, 2009 (R. Supp. 90-95).

[23] Pl.'s Mot. for Protective Order ("Pl.'s MFPO"), December 3, 2009 (R. 303-14).

[24] Pl.'s Resp. to Mot. for Protective Order, Hr'g before the Honorable Meenu Sasser, December 16, 2009 (R. 511-22); Order on Pl.'s Mot. for Protective Order (R. 322).

[25] Tr. of Hr'g before the Honorable Meenu Sasser, January 13, 2010 (R. 535-52).

[26] *Id.* at p. 7-8 (R. 535-52).

[27] *Id.* at p. 5 (R. 535-52).

pick the corporate representative of their choosing.[28] It further held that the Vidals would have to fly to California to depose Ms. Whitehead in person.[29]

The Vidals, at an even later hearing, again requested that the deposition occur in this forum, to which the court again ruled that the deposition must occur in California.[30] Ms. Whitehead was never deposed. Instead of allowing Ms. Whitehead, who is the designated records custodian of the trust, to testify, U.S. Bank chose SN Servicing's Corporate Counsel Mr. William A. Fogleman.[31]

IV. The Vidals seek to exclude the testimony of SN Servicing's Counsel.

The Vidals moved in limine to exclude any testimony by Corporate Counsel on the grounds that he was not competent to testify as a records custodian and his testimony would be hearsay.[32] The Vidals argued that the records U.S. Bank sought to admit were not in Corporate Counsel's custody as a regular part of his work, that he did not create or supervise their creation, that he does not maintain the records, that he was not and is not a records custodian, and that he was only appointed custodian for purposes of litigation.[33]

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[28] *Id.* at p. 8 (R. 535-52).

[29] *Id.*

[30] Hearing before the Honorable Meenu Sasser, February 2, 2010 p. 32 (R. 893).

[31] Notice of Filing Dep. of William Fogleman, February 2, 2010 (R. Supp. 265).

[32] Defs.' Mot. In Limine to Prohibit Evidence Based on the Testimony of William Fogleman as "Records Custodian," served on June 16, 2010 (R. Supp. 750-81).

[33] *Id.* at 3.

The Vidals noted that Corporate Counsel became involved in this case only after litigation began.[34] He works in the legal department in Louisiana, not the servicing department.[35] He did not know the name of the program used to keep electronic records, had no knowledge of who inputs the information, and he did not even know who heads that department.[36] He repeatedly identified Ms. Whitehead as the person he would have to see to get records.[37] He stated she would have had custody of the original documents in the vault in California, including the note and mortgage.[38]

The Vidals also argued that the "final certification"—a document purporting to show that the Plaintiff's trust had actually received the mortgage loan designated for transfer—should be excluded because Corporate Counsel admitted at his deposition that he had never seen it and would have to contact Ms. Whitehead to locate it.[39] Mr. David Duclos, also from U.S. Bank, stated that he himself would be the one to receive the final certification.[40] The Vidals also sought to preclude U.S. Bank from introducing any evidence beyond what is framed by the pleadings.

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[34] *Id.* at 4.

[35] *Id.* at 16.

[36] *Id.* at 17.

[37] *Id.* at 7-8.

[38] *Id.* at 7-8, 20.

[39] *Id.* at 25.

[40] *Id.*

Specifically, evidence of an un-pled transfer, and that the note and mortgage showed one entity own the note and another owned the mortgage.[41] The trial court allowed Corporate Counsel to testify but reserved ruling on the competency and hearsay objections.[42] The trial court ultimately denied both motions in limine.[43]

V. At trial, the court admits evidence, the only foundation for which was the testimony of SN Servicing's in-house counsel.

The court admitted over hearsay, authenticity, and lack of competence objections the following exhibits for the Plaintiff: a pooling and servicing agreement ("PSA") (Exhibit A), a final certification (Exhibit B), a note (Exhibit C), a mortgage (Exhibit D), notices of default (Exhibits E and F), and a payoff letter (Exhibit G).[44] All of these documents except for the note and mortgage were admitted based on the testimony of U.S. Bank's only witness, Mr. William A. Fogelman, SN Servicing's Corporate Counsel.[45]

Corporate Counsel testified he was in charge of the legal department and works out of Baton Rouge, Louisiana.[46] The legal department handles foreclosures in different states and he typically becomes involved when foreclosure cases

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[41] Defs.' Mot. In Limine to Prohibit Evidence as to Any Transfer of Note and Mortgage, dated June 16, 2010 (R. Supp. 729-33).

[42] Trial Transcript, Vol. I, p. 44-46.

[43] Trial Transcript, Vol. I, p. 50.

[44] Trial Transcript, Vol. I, p. 4.

[45] Trial Transcript, Vol. I.

[46] Tr. of Dep. of William Fogleman, p. 6 (R. 633-800).

become contested.[47] He then reviews matters with local counsel.[48] SN Servicing's files are kept in the servicing department in California.[49] Mr. Robin Arkley is President and head of the servicing department.[50] Corporate Counsel has never worked in the California office.[51] Before filing suit in May of 2008, the legal department did not have the servicing file for this case.[52] Corporate Counsel admitted that he had no involvement in this case in any way until about six months after it was filed, because he believed counterclaims were filed.[53] No counterclaims were filed. He also admitted he was designated as a representative to testify about this file.[54] No document exists to memorialize this designation.[55]

A. The court admits the PSA into evidence over objection.

The Vidals objected to the PSA's (Exhibit A) admission on the grounds that Corporate Counsel did not meet the requirements for a records custodian.[56] The Vidals also objected that Corporate Counsel did not work in the department that

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[47] Trial Transcript, Vol. I, p. 60-62.

[48] *Id.*

[49] Trial Transcript, Vol. I, p. 138-40.

[50] *Id*; Section 12.07(a), (b) of the PSA, p. 120.

[51] Trial Transcript, Vol. I, p. 140.

[52] Trial Transcript, Vol. I, p. 136.

[53] Trial Transcript, Vol. I, p. 66, 137-38.

[54] Trial Transcript, Vol. II, p. 178.

[55] Trial Transcript, Vol I, p. 140-41.

[56] Trial Transcript, Vol. I, p. 72.

oversees the PSA and the PSA is not a business record.[57] The Vidals were allowed to *voir dire* Corporate Counsel on these issues.[58] On voir dire, he testified that he participates in foreclosures and handles in-house legal issues.[59] He admitted the records are kept by the servicing department and not his office.[60] Before allowing the Vidals to complete *voir dire*, the court admitted the PSA into evidence.[61] After cross examination, the Vidals moved to strike the PSA based on hearsay objections and Corporate Counsel's lack of competence to testify.[62] The court found Corporate Counsel had personal knowledge and denied the motion.[63]

The PSA itself names U.S. Bank as the "trustee" and "custodian."[64] Specifically, it identifies Ms. Whitehead as the custodian and indicates that she works in U.S. Bank's California office.[65] As official custodian, Ms. Whitehead's office must hold the mortgage file and respond to any requests to release files.[66] Section 9.13(b) of the PSA, requires delivery of a "request for release of document

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[57] *Id.*

[58] Trial Transcript, Vol. I, p. 73.

[59] Trial Transcript, Vol. I, p. 75.

[60] Trial Transcript, Vol. I, p. 76.

[61] Trial Transcript, Vol. I, p. 80.

[62] Trial Transcript, Vol. I, p. 211-12.

[63] Trial Transcript, Vol. I, p. 214.

[64] PSA, p. 43, 63-65.

[65] Section 12.07(e) of the PSA.

[66] Section 10.01(a) of the PSA.

and receipt" to the custodian by the servicer. That section also requires the custodian to endorse the note in the name of the trustee on any endorsement in blank when releasing the mortgage file to the servicer for foreclosure.[67] Exhibit B-4 of the PSA shows how this endorsement should look.[68] Corporate Counsel testified that the note admitted into evidence did not have the appearance (i.e. an endorsement by U.S. Bank) required by the PSA.[69] The PSA also requires an initial certification, an interim certification, and a final certification by the trustee that all the mortgage loans in the pool had been received.[70] Corporate Counsel never saw an initial or interim certification.[71]

B. The court admits the final certification into evidence over objection.

At the time of the deposition, Corporate Counsel was not aware of the final certification.[72] Nor did he provide it at that time and stood by his answer that all documents that would be relied on as evidence at trial had been previously produced.[73] Sometime after the deposition, Corporate Counsel finally inquired

[67] Section 9.13(b) of the PSA.

[68] Exhibit B-4 of the PSA.

[69] Trial Transcript, Vol. II, pp. 197-98.

[70] Sections 2.02(a), (b) of the PSA, p. 37.

[71] Trial Transcript, Vol. I, pp. 146-47, 178-82.

[72] Trial Transcript, Vol. I, p. 94.

[73] Tr. of Dep. of William Fogleman, January 27, 2010, p. 114 (R. 633-800).

into the final certification and requested it from the California office.[74] It was only provided to the Vidals the week of trial.[75] The Vidals objected to its admission based on hearsay and lack of competence, which the court overruled.[76] The Vidals renewed their objections after cross-examination and moved to strike the final certification, which was denied by the court.[77]

The final certification certifies that the custodian has received and reviewed the applicable documents listed in Section 2.01(c) of the PSA and that such documents appear to be complete.[78] Section 2.01(c) of the PSA, however, only refers to non-MERS loans,[79] while the subject mortgage was granted to MERS.

C. Re-creations of notices of acceleration are admitted over objection.

U.S. Bank amended its exhibit list the day of trial to include two notices of acceleration that were not previously provided.[80] The notices were not originals or copies of originals but were unsigned electronic re-creations allegedly provided by

[74] Trial Transcript, Vol. I, p. 94-95.

[75] Trial Transcript, Vol. I, p. 7; Defs.' Mot. for Leave to Am. Witness List, June 15, 2010 (R. 1310-13).

[76] Trial Transcript, Vol. I, pp. 91, 93, 99.

[77] Trial Transcript, Vol. I, pp. 214-18.

[78] Final Certification (Plaintiff's Exhibit B).

[79] Loans where Mortgage Electronic Registration Systems, Inc. ("MERS") is not the original mortgagee.

[80] Pl.'s Mot. for Leave to Am. Ex. List, served June 17, 2010 (R. 1320-24).

the California office.[81] Corporate Counsel did not personally retrieve the documents and admitted the originals would have been signed.[82] The Vidals objected on the grounds of hearsay and lack of competence.[83] The court overruled the objection.[84] The Vidals moved to strike the exhibits after cross-examination, which the court denied.[85]

D. The payoff letter is admitted over objection.

Corporate Counsel testified that the accounting department, not his department, created and maintained the payoff figures.[86] The Vidals objected based on hearsay and lack of competence.[87] The court overruled the objection.[88] The Vidals moved to strike the payoff letter after cross examination, which the court denied.[89]

[81] Trial Transcript, Vol. I, pp. 122-27.

[82] Trial Transcript, Vol. I, p. 122, 127.

[83] Trial Transcript, Vol. I, p. 123.

[84] Trial Transcript, Vol. I, pp. 123, 127.

[85] Trial Transcript, Vol. I, p. 221.

[86] Trial Transcript, Vol. I, p. 132, Vol II, p. 161.

[87] Trial Transcript, Vol. I, pp. 133-34.

[88] Trial Transcript, Vol. I, p. 134.

[89] Trial Transcript, Vol. II, pp. 222-233.

E. The court does not admit the note and mortgage using the testimony of Corporate Counsel but *sua sponte* admits them through the Vidals' depositions.

Corporate Counsel had never seen the alleged original note and mortgage.[90] He claimed to have viewed copies attached to the Complaint.[91] When questioned about the attached note, he testified that it had an endorsement that said "pay to the order of."[92] After actually viewing the attached note, he admitted there was no endorsement on it.[93] The Vidals objected to the admission of the note and mortgage based on hearsay, competence, and that he had never actually seen the note and mortgage.[94] The Vidals also objected to the admission of the endorsed version of the note and mortgage on the grounds that U.S. Bank was bound by its own pleadings which asserted that it was travelling under an unendorsed note. [95]

The judge reserved ruling because she determined, *sua sponte*, that the depositions of the Vidals may authenticate the note and mortgage.[96] U.S. Bank provided excerpts of the Vidals deposition transcripts for the trial judge to read.[97]

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[90] Trial Transcript, Vol. I, p. 112.

[91] Trial Transcript, Vol. I, p. 113.

[92] *Id.*

[93] Trial Transcript, Vol. I, p. 114.

[94] Trial Transcript, Vol. I, pp. 111-14.

[95] Trial Transcript, Vol. I, p. 110.

[96] Trial Transcript, Vol. I, p. 115, Vol II, p, 219.

[97] Trial Transcript, Vol. I, pp. 58-59.

The judge stated that she "need[ed] to read the deposition excerpts . . . because Mr. Fogleman couldn't testify as to the original note coming into evidence."[98] Then, before reading the excerpts, she said: "I believe during deposition–Mr. Miller [U.S. Bank's counsel] is correct. During the deposition, your clients identified the note and Mr. Miller [cited] those portions of the depositions into evidence that identified the note by your client."[99] At that point, U.S. Bank rested.[100] The court later, during the Vidals' argument on their motion for involuntary dismissal, overruled the objections and admitted the note and mortgage based on U.S. Bank's excerpts without reading the full deposition transcripts.[101]

F. The Vidals move for an involuntary dismissal.

At the close of U.S. Bank's case, the Vidals moved to dismiss for failure to make a prima facie case.[102] First, they argued that U.S. Bank had the initial burden of proving the chain of title to show it was both the owner of the note and mortgage, which it failed to do.[103] Next, the Vidals argued that U.S. Bank was

[98] Trial Transcript, Vol. II, p. 219.

[99] *Id.*

[100] Trial Transcript, Vol. II, p. 236.

[101] Trial Transcript, Vol. II, p. 258.

[102] Trial Transcript, Vol. II, p. 236.

[103] Trial Transcript, Vol. II, pp. 242, 266.

bound by its pleadings which included an unendorsed note payable to DHI, and that the note it sought to admit did not comply with the PSA and its forms.[104]

After the court interrupted argument to admit the note, the Vidals argued that the note could not be admitted based on a deposition where Mr. Vidal was not shown the original note or mortgage.[105] Also, U.S. Bank failed to prove the authenticity of the note and endorsement, including the authority of the signer, because it was made an issue by the pleadings.[106] Further, U.S. Bank did not plead or prove any transfer because the PSA on its face does not transfer anything and is not even a complete agreement.[107] Additionally, the Vidals argued that there was no evidence that their mortgage loan had ever been transferred to the trust because U.S. Bank's only witness had never seen the required initial and interim certifications, because the final certification in evidence applied only to non-MERS loans, and because the endorsement on the note (if it could be considered at all) had not been modified to specify it was endorsed to and by U.S. Bank.[108]

The Vidals also argued that the notices of default which were not even photocopies of originals and were thus legally insufficient to prove compliance

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[104] Trial Transcript, Vol. II, pp. 237, 246, 249, 250-51.

[105] Trial Transcript, Vol. II, pp. 254, 266.

[106] Trial Transcript, Vol. II, p. 261-62.

[107] Trial Transcript, Vol. II, p. 237-38.

[108] Trial Transcript, Vol. II, p. 241-48.

with paragraph 22 of the mortgage.[109] They also argued that the payoff letter was produced by unknown persons with unverified numbers and was legally insufficient to show damages.[110]

U.S. Bank responded by arguing that even though it failed to plead it was the holder, it was sufficient to plead it was entitled to enforce the note.[111] Also, any problems with the pleadings should have been addressed by a motion to dismiss.[112] It admitted that the note did not comply with the PSA, but argued it was irrelevant.[113] U.S. Bank also argued that the notices of default provide enough information.[114]

After the involuntary dismissal arguments, as the court scheduled the afternoon session, U.S. Bank moved to amend the pleadings to conform to the evidence—a tactic the trial judge, not U.S. Bank's counsel, had first suggested would cure the pleading deficiencies.[115] The Vidals objected but the court reserved ruling on the motion for involuntary dismissal and the motion to amend.

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[109] Trial Transcript, Vol. II, p. 271.

[110] Trial Transcript, Vol. II, p. 271-72.

[111] Trial Transcript, Vol. II, pp. 275-76.

[112] Trial Transcript, Vol. II, p. 276.

[113] Trial Transcript, Vol. II, p. 280.

[114] Trial Transcript, Vol. II, p. 282-83.

[115] Trial Transcript, Vol. II, p. 291-92.

G. The Vidals put on their case.

The Vidals called by deposition Mr. William Fogleman, SN Servicing's Corporate Counsel;[116] Mr. David Duclos, Vice President of U.S. Bank; Mr. Eric Simon, the closing attorney; Mr. Jose Vidal, the Defendant; and Ms. [redacted] the Defendant. The Vidals also introduced a second mortgage (Exhibit 1) that was closed on the same day as the loan in this case.

By deposition, Corporate Counsel testified that the PSA did not itself document what loans are in the pool but references an outside document.[117] Also, the PSA did not by itself transfer any mortgage to U.S. Bank.[118] He also testified that the PSA is not a purchase agreement and does not specifically reference the loan.[119] He admitted that Ms. Whitehead, the custodian for U.S. Bank, keeps the documents as outlined in the PSA.[120] She would have much of the knowledge about when and if the original documents ever were in U.S. Bank's vault.[121] The PSA required the custodian to maintain written policies and procedures with

[116] Tr. of Dep. of William Fogleman, January 27, 2010, p. 6 (R. 633-800).

[117] Tr. of Dep. of William Fogleman, January 27, 2010, p. 74-75 (R. 633-800).

[118] Tr. of Dep. of William Fogleman, January 27, 2010, p. 62 (R. 633-800).

[119] Tr. of Dep. of William Fogleman, January 27, 2010, p. 6 (R. 633-800).

[120] Tr. of Dep. of William Fogleman, January 27, 2010, pp. 88, 173 (R. 633-800).

[121] Tr. of Dep. of William Fogleman, January 27, 2010, pp. 87, 100-04 (R. 633-800).

respect to access and storage of mortgage files.[122] Corporate Counsel was not aware of any policies but Ms. Whitehead would be.[123] He had never seen the final certification and would begin with Ms. Whitehead to locate it.[124] As to computer records, he testified that he did not know the name of the program used, who inputs the information, and did not know who even heads that department.[125] As for the endorsement that first appeared sometime after this case was filed, Corporate Counsel testified that he did not know the person whose signature appeared there.[126]

Mr. Duclos, Vice President of U.S. Bank testified that he signed the PSA as trustee.[127] He also testified that he did not sign as custodian because the loans were going to be housed in a custody location at U.S. Bank and reviewed by the party that signed the PSA as custodian.[128] The custodian would have more knowledge of whether U.S. Bank keeps electronic copies of documents.[129] Also, that the custodian is generally required in connection with these pooling and

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[122] Tr. of Dep. of William Fogleman, January 27, 2010, p. 173 (R. 633-800).

[123] *Id.*

[124] Tr. of Dep. of William Fogleman, January 27, 2010, p. 137 (R. 633-800).

[125] Tr. of Dep. of William Fogleman, January 27, 2010, pp. 157-58 (R. 633-800).

[126] Tr. of Dep. of William Fogleman, January 27, 2010, p. 171-72 (R. 633-800).

[127] Tr. of Dep. of David Duclos, December 29, 2009, p. 14 (R. Supp. 138-214).

[128] *Id.*

[129] Tr. of Dep. of David Duclos, December 29, 2009, p. 50 (R. Supp. 138-214).

servicing agreements to keep the original notes in some kind of locked vault.[130] He also testified that generally, a release request would go from the servicer to the custodian to request documents.[131] Mr. Duclos identified the custodian as "Cheryl Whitehead."[132]

Mr. Vidal testified that he did sign a note to DHI.[133] He never testified about any endorsements on any note.[134] He testified that the mortgage he signed at closing only listed his name in the borrower section and not Ms. [redacted][135] He further testified that the mortgage U.S. Bank brought to the deposition did not seem to be consistent with the mortgage he was given at closing.[136] Ms. [redacted] testified that she did not recognize the mortgage.[137] While she recognized her initials, she testified that she was signing for title and was not aware of what documents she signed.[138]

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[130] *Id.*

[131] Tr. of Dep. of David Duclos, December 29, 2009, p. 51-52 (R. Supp. 138-214).

[132] Tr. of Dep. of David Duclos, December 29, 2009, p. 60 (R. Supp. 138-214).

[133] Tr. of Dep. of Jose Vidal, May 13, 2010, p. 26 (R. Supp. 1007-1159).

[134] Tr. of Dep. of Jose Vidal, May 13, 2010 (R. Supp. 1007-1159).

[135] Tr. of Dep. of Jose Vidal, May 13, 2010, p. 56 (R. Supp. 1007-1159).

[136] Tr. of Dep. of Jose Vidal, May 13, 2010, p. 59 (R. Supp. 1007-1159).

[137] Tr. of Dep. of [redacted] May 13, 2010, p. 18-19 (R. Supp. 1007-1159).

[138] Tr. of Dep. of [redacted] May 13, 2010, p. 20 (R. Supp. 1007-1159).

Mr. Simon, the closing attorney, testified that his office would often change the mortgage after it was notarized to add parties and witnesses.[139] The Vidals also sought to call U.S. Bank's Counsel, Daniel Miller to testify about the final certification and its footers. The court sustained U.S. Bank's objection.[140]

U.S. Bank had no rebuttal.[141] The Vidals renewed their motion for involuntary dismissal, which the court denied.[142] The court granted U.S. Bank's motion to amend the pleadings to conform to the evidence over objection.[143]

VI. The trial judge, as the fact-finder, renders her verdict for the Plaintiff U.S. Bank.

The trial judge found that Corporate Counsel's testimony was sufficient to show the default date and that notices of default were sent out pursuant to the mortgage.[144] She also found that Mr. Vidal's loan was transferred to U.S. Bank pursuant to the PSA.[145] Further, that the final certification confirmed that U.S. Bank had received the original documents for various loans subject to the PSA.[146]

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[139] Tr. of Dep. of Eric Simon, May 7, 2010, p. 9-10 (R. Supp. 906).

[140] Trial Transcript, Vol III, p. 340-42.

[141] Trial Transcript, Vol. III, p. 349.

[142] *Id.*

[143] Trial Transcript, Vol. III, p. 350-59.

[144] Findings of Fact and Conclusions of Law, July 6, 2010 (R. 1449-52).

[145] *Id.*

[146] Findings of Fact and Conclusions of Law, July 6, 2010 (R. 1449-52).

The court found the note was an original that was filed with the court.[147] As a matter of law, the court held the note was self-authenticating, that U.S. Bank owns and holds the note and mortgage, and it became the owner and holder of the note and mortgage prior to the filing of this case.[148] The court entered a final judgment.[149] The Vidals filed a timely notice of appeal.[150]

[147] *Id.*

[148] *Id.*

[149] Final Judgment of Foreclosure (R. 1453-58).

[150] Notice of Appeal (R. 1461-68).

SUMMARY OF THE ARGUMENT

It was error to deny the Vidals the right to depose Ms. Whitehead in this forum. Absent a showing of good cause, an officer of a plaintiff corporation is required to attend a deposition in the forum where the action is pending. Ms. Whitehead is Plaintiff's corporate officer and custodian. As reflected in the record, no good cause was shown to exempt U.S. Bank from being deposed in this forum.

Also, Mr. Fogleman was not qualified to testify about U.S. Bank's business records. To be qualified to testify about a business record, a person must be the custodian of the record, in charge of the activity constituting the usual business practice, or the person who supervises preparation of the record. Otherwise, any testimony not made on personal knowledge is hearsay. Mr. Fogleman had no personal knowledge and did not even work for U.S. Bank. He was in-house counsel for a different company. Within that company, he worked in a different department which was located in a different state than where the records were kept.

Further, the final certification was likely fraudulent and is at best irrelevant, and the notices of acceleration and payoff letter were created specifically for litigation. The alleged original note and mortgage were improperly admitted using deposition testimony of the Vidals, who were not even shown the alleged originals. Since it was error to admit all of U.S. Bank's exhibits, the judgment in this case should be reversed with instructions to enter judgment in favor of the Vidals.

STANDARD OF REVIEW

The standard of review for discovery orders is abuse of discretion. *Philippon v. Shreffler*, 33 So. 3d 704, 708 (Fla. 4th DCA 2010).

The standard of review of a trial court's decision to admit evidence is abuse of discretion. *Id.* Legal issues are reviewed *de novo*. *Chackal v. Staples*, 991 So. 2d 949, 953 (Fla. 4th DCA 2008). Findings of fact are reviewed under the competent substantial evidence standard of review. *Id.*; *Taylor v. Richards*, 971 So. 2d 127, 129 (Fla.4th DCA 2007) (reversing trial judge based on insufficiency of evidence).

The burden is on the plaintiff to establish a prima facie case. *Tillman v. Baskin*, 260 So. 2d 509, 512 (Fla. 1972).

ARGUMENT

I. The Plaintiff's Vice President should have been required to attend a deposition in Palm Beach County.

It is well established that the officer of a plaintiff corporation is required to attend a deposition in the forum where the action is pending. *Wally v. Nat'l City Mortgage Co.*, 867 So. 2d 444, 445 (Fla. 4th DCA 2004); *Ormond Beach First Nat'l Bank v. J.M. Montgomery Roofing, Co.*, 189 So. 2d 239 (Fla. 1st DCA 1966). Without a showing of good cause, the corporate officer must come to the forum to be deposed. *Logitech Cargo, U.S.A., Corp. v. JW Perry, Inc.*, 817 So. 2d 1033, 1034 (Fla. 3d DCA 2002); *Bob Hilson & Co., Inc. v. Garcia*, 985 So. 2d 1176, 1177 (Fla. 3d DCA 2008). Further, an examining party can designate the corporate official to be deposed. *See Plantation-Simon Inc. v. Bahloul*, 596 So. 2d 1159, 1160 (Fla. 4th DCA 1992).

Here, the Vidals chose to depose Ms. Whitehead.[151] It is undisputed that she was the Plaintiff's Vice President and the records custodian named in the trust.[152] U.S. Bank itself listed her as a person with knowledge relevant to the issue of whether U.S. Bank acquired the mortgage prior to filing of the complaint in its

[151] Notice of Taking Dep., October 21, 2009 (R. Supp. 90-95).

[152] Pl.'s MFPO (R. 303-14); Aff. of Cheryl Whitehead, Vice President of U.S. Bank, ¶ 6 (R. 318-21).

answers to interrogatories.[153] Despite these undisputed facts, U.S. Bank moved for a protective order arguing that Ms. Whitehead had "no independent knowledge of the facts underlying the PSA" and that her role as records custodian ended when she released the mortgage loan file for purposes of the foreclosure.[154] Her affidavit stated that the loan file was released in May of 2008.[155] U.S. Bank also requested that the deposition be taken where Ms. Whitehead resides.[156] The trial court agreed and required the deposition to occur in California.[157]

The court erred as a matter of law because the Vidals are entitled to Ms. Whitehead's deposition (as a corporate representative) upon simple notice, and without traveling to wherever she may live. They have the right under the rules of procedure to depose a representative of their choosing as long as the deponent is an officer of the corporation. Neither Ms. Whitehead's affidavit nor the motion for protective order show good cause for not requiring the Plaintiff's corporate officer and records custodian to be deposed in the forum. While Ms. Whitehead asserted

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[153] Pl.'s Notice of Serving Answers to Defs.' Interrogs., June 15, 2009 (R. Supp. 89); Tr. of Hr'g before the Honorable Meenu Sasser, December 16, 2009, p. 5 (R. 511-22).

[154] MFPO, ¶¶ 9, 10, 12 (R. 303-14).

[155] Aff. of Cheryl Whitehead, Vice President of U.S. Bank, ¶ 6 (R. 318-21).

[156] MFPO, ¶ 12 (R. 303-14).

[157] Hr'g before the Honorable Meenu Sasser, January 13, 2010, p. 8 (R. 535-52); Order on Pl.'s Mot. for Protective Order (R. 344); Hr'g before the Honorable Meenu Sasser, February 2, 2010 p. 32 (R. 893).

that she had released the file in 2008, the Vidals were entitled to cross-examine her on that statement and to establish that she, not a non-party's in-house counsel, was the records custodian of the file. Moreover, because U.S. Bank was required to establish possession of the note before the case was filed (indeed, the bank needed to show the entire chain of possession from the original lender), the time period before May of 2008 was perhaps the most relevant time period for the Vidals' discovery.

The denial of this corporate representative's deposition in the forum was reversible error. Notably, this deposition was particularly important because it would have developed evidence from the "real" records custodian, rather than a person appointed to pose as the records custodian solely for purposes of this litigation—Mr. Fogleman.

II. The trial court erred in admitting into evidence and relying upon documents that were unauthenticated hearsay.

A. SN Servicing's Corporate Counsel was not a records custodian or other qualified witness.

To be qualified to testify about a business record, a person must be the custodian of the record, in charge of the activity constituting the usual business practice, or the person who supervises preparation of the record. *Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121, 1121 (Fla. 2d DCA 1988) (holding that general manager with no personal knowledge of transaction, who admitted that

neither he nor anyone under his supervision prepared the record, could not lay the proper predicate for admission of the record); § 90.803(6), Fla. Stat. To prove a fact of evidence of usual business practices, it must first be established that the witness is either in charge of the activity constituting the usual business practice or is well enough acquainted with the activity to give the testimony. *Alexander v. All State Insurance Co.*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980). Otherwise, a statement offered into evidence other than one made by the declarant on personal knowledge to prove the truth of the matter asserted is hearsay. *See* § 90.801, Fla. Stat.

Here, Corporate Counsel had no personal knowledge about the underlying transaction and even admitted he had no involvement in this case until about six months after it was filed.[158] Since Corporate Counsel had no personal knowledge and was not a records custodian, he needed to be a qualified witness of U.S. Bank to authenticate a business record or to establish the prerequisites for a business records exception to hearsay; which he was not.

The record shows Corporate Counsel was not qualified to testify about U.S. Bank's records. First, he does not work for U.S. Bank or keep its records. He works for SN Servicing and was in charge of its legal department in Baton Rouge,

[158] Trial Transcript, Vol. I, p. 66, 137-38.

Louisiana.[159] The legal department handles foreclosures in different states and Corporate Counsel typically becomes involved when cases become contested.[160] When issues arise, he reviews matters with local counsel.[161] SN Servicing's files are kept in the servicing department in California which is supervised by SN Servicing's President.[162] Corporate Counsel has never worked in the California office.[163] Before the filing of suit in May of 2008, the legal department did not have the servicing file for this case.[164] Corporate Counsel admitted that he had no involvement in this case in any way until about six months after it was filed.[165] He became involved because he [incorrectly] believed counterclaims were filed.[166] He admitted he was only designated as a representative to testify about this case.[167] This designation was not memorialized but seemingly made when he decided to become involved in this case.[168]

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[159] Dep. of William Fogleman, p. 6 (R. 633-800).

[160] Trial Transcript, Vol. 1, p. 60-62.

[161] *Id.*

[162] Trial Transcript, Vol. 1, p. 138-40; Section 12.07(a), (b) of the PSA, p. 120.

[163] Trial Transcript, Vol. 1, p. 140.

[164] Trial Transcript, Vol. 1, p. 136.

[165] Trial Transcript, Vol. 1, p. 66, 137-38.

[166] *Id.*

[167] Trial Transcript, Vol. 1, p. 140.

[168] Trial Transcript, Vol I, p. 140-41.

Further, the PSA requires that the custodian keep the original notes in a locked vault.[169] It also requires the custodian to maintain written policies and procedures with respect to access and storage of mortgage files.[170] For a servicer to get originals, a release request would go from the servicer to Ms. Whitehead.[171] Corporate Counsel admitted he was not aware of any policies, but stated the custodian would be.[172]

As to U.S. Bank's electronic records, the custodian would also have that knowledge.[173] Corporate Counsel did not have such knowledge. In fact, he did not even have knowledge of his own company's electronic records. He admitted he did not know the name of the program used to keep computer records, he had no knowledge of who input the information, and he did not even know who heads that department for SN Servicing.[174]

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[169] Tr. of Dep. of David Duclos, December 29, 2009, p. 50 (R. Supp. 138-214).

[170] Tr. of Dep. of William Fogleman, January 27, 2010, p. 173 (R. 633-800).

[171] Tr. of Dep. of David Duclos, December 29, 2009, p. 51-52 (R. Supp. 138-214).

[172] Tr. of Dep. of William Fogleman, January 27, 2010, p. 173 (R. 633-800).

[173] Tr. of Dep. of David Duclos, December 29, 2009, p. 50 (R. Supp. 138-214).

[174] Defs.' Mot. In Limine to Prohibit Evidence Based on the Testimony of William Fogleman as "Records Custodian," served on June 16, 2010, p. 17 (R. Supp. 750-81).

B. SN Servicing's Corporate Counsel was not the proper witness to testify about U.S Bank's records.

A witness that has knowledge of a record based only upon the litigation is not the proper witness to qualify a record for the business record exception to hearsay. *See Snelling and Snelling, Inc. v. Kaplan*, 614 So. 2d 665 (Fla. 2d DCA 1993). In *Snelling*, a property manager testified about a property's income and expenses using a ledger sheet which he reviewed sometime between his deposition, at which time he did not know the expenses, and the evidentiary hearing two months later. *Snelling*, 614 So. 2d at 665-66. The ledger sheet was prepared by the landlord of the property who was located out of state. *Id.* at 666. The trial court permitted the property manager to testify about the expenses and admitted the ledger into evidence over objection. *Id.* at 665.

The court reversed, finding that the property manager was not the proper witness to qualify the ledger as a business record. *Id.* at 666. It noted that the property manager was not the custodian of the records nor was he familiar with the underlying transactions allegedly reported. *Id.* Also, he did not testify that the ledger was kept in the ordinary course of regularly conducted business activity, therefore, the admission of the ledger could not be based on the property manager's testimony because it was not based on personal knowledge. *Id.* Nor could it be considered as competent evidence because there was insufficient

foundation to admit it into evidence as a business record. *Id*; *see also Jackson v. State*, 738 So. 2d 382, 385 (Fla. 4th DCA 1999) (dictum).

Here, Corporate Counsel repeatedly identified Ms. Whitehead, U.S. Bank's Vice President, as the person he would have to see to get records.[175] He also admitted she would have had custody of the original documents in U.S. Bank's vault in California, including the note and mortgage.[176] Mr. Duclos confirmed that Ms. Whitehead would have knowledge of how U.S. Bank keeps original records, electronic copies, and how it responds to requests for records.[177]

Corporate Counsel had no personal knowledge of this case, he did not keep any files, he was not familiar with how any records were kept by U.S. Bank or SN Servicing (paper and electronic), and his only knowledge came from the litigation. In fact, he seemingly appointed himself as U.S. Bank's representative six months after the case began as a result of his incorrect belief that Mr. Vidal had filed counterclaims. There is no evidence in the record that he was ever designated by U.S. Bank. Given his lack of familiarity with the records in this case and his suspect designation, the court erred in denying the Vidals' motion in limine and allowing Corporate Counsel to testify. It also erred in overruling the many

[175] *Id.* at 7-8.

[176] *Id.* at 7-8, 20.

[177] Tr. of Dep. of David Duclos, December 29, 2009, p. 50-52 (R. Supp. 138-214).

motions and objections to Corporate Counsel's testimony based on hearsay, authenticity, and competence.

C. The final certification (Exhibit B) was unauthenticated hearsay.

At the time of his deposition on January 27, 2010, which was over a year and a half into the case, Corporate Counsel was not aware of the final certification (Exhibit B) nor did he provide it when requested but stood by his answer that all documents were previously produced that would be relied on as evidence at trial.[178] Only afterwards, did he request it from the California office.[179] Accordingly, Corporate Counsel was not the proper witness to qualify the final certification as U.S. Bank's business record.

Exactly like the property manager's testimony in *Snelling*, Corporate Counsel testified about U.S. Bank's ownership of the note and mortgage using a final certification which he reviewed sometime between his deposition, at which time he had not seen the final certification, and the trial almost five months later. In fact, it was only produced the week of trial. Accordingly, this Court should follow *Snelling* and reverse. It is undisputed that the final certification was not kept by Corporate Counsel or his department in the ordinary course of his regularly conducted business activity. He was in-house counsel for a non-party. The final

[178] Trial Transcript, Vol. 1, p. 94; Tr. of Dep. of William Fogleman, January 27, 2010, p. 114 (R. 633-800).

[179] Trial Transcript, Vol. 1, p. 95.

certification was kept in California by a different company. Therefore, its admission could not be based on personal knowledge and it could not be considered competent evidence because there was insufficient foundation to admit it into evidence as a business record.

D. The final certification was most likely fraudulent.

The final certification consisted of three documents: the actual certification and two printouts of spreadsheets purportedly listing the loans contained with the mortgage pool of Plaintiff's trust. Oddly, the two spreadsheet printouts contained a file path in the footer that included Plaintiff counsel's last name and initials: "C:\Documents and Settings\damiller\Local Settings\Temporary Internet Files\OLK3\pool schedule redacted for Vidal.xls" and "C:\Documents and Settings\damiller\Local Settings\Temporary Internet Files\OLK3\ redacted exception report for Vidal Pool.xls." (emphasis added).

The Vidals sought to question Plaintiff's counsel because it appeared the final certification was manufactured and not what it purported to be. The Vidals sought to call Plaintiff's counsel as a witness to testify at trial that the final certification was actually three separate documents and that he had assembled them as if they were one after printing out the two spreadsheets from files that had been emailed to him. (The OLK3 file location is used by Microsoft's Windows email

client, Outlook, for temporary storage of attachments.).[180] U.S. Bank objected to having the witness testify and the trial court sustained the objection.[181] Corporate Counsel, however, testified that the markings were a footer that was printed on the document when the redaction was done.[182] But the actual certificate was a physical document that referred to only one attached list (an exception report), which obviously would have been printed in January of 2008 along with the certificate. It did not reference electronic worksheets that could be later mailed and modified by counsel. The trial court abused its discretion by admitting the eleventh-hour document, and by preventing the Vidals from cross-examining Plaintiff's counsel to determine his role in its creation.

Furthermore, the final certification on its face certifies that the custodian had received and reviewed the applicable documents listed in Section 2.01(c) of the PSA and that such documents appear to be complete.[183] Section 2.01(c) of the PSA, refers only to non-MERS loans.[184] This case indisputably involved a MERS loan,[185] therefore, Corporate Counsel's self-serving testimony that the final

[180] Trial Transcript, Vol. III, p. 340.

[181] Trial Transcript, Vol. III, p. 340-42.

[182] Trial Transcript, Vol. III, p. 104-05.

[183] Final Certification (Plaintiff's Exhibit B).

[184] Non-MERS loans are loans where Mortgage Electronic Registration Systems, Inc. ("MERS") is not the original mortgagee.

[185] MERS is the original mortgagee in this case.

certification proves the trustee's receipt of the subject mortgage loan is contradicted by the certification itself.[186]

Accordingly, the final certification is likely fraudulent and Corporate Counsel's testimony was false. At a minimum, the certification cannot stand for anything in this case and was not competent evidence. The trial court erred in refusing to grant the Vidals' motion in limine and in overruling the Vidals' objections based on authenticity, hearsay, and lack of competence.[187] Given that U.S. Bank's only evidence that it possessed the note and mortgage prior to the filing of this case was the dubious final certification, the Vidals' motion for involuntary dismissal should have been granted.

E. The re-creations of the acceleration notices (Exhibits E and F) were unauthenticated hearsay.

The acceleration notices were not originals, which Corporate Counsel admitted would have been signed.[188] They were not even photocopies of originals or scanned images of the originals that U.S. Bank had purportedly sent.[189] Instead, the unsigned notices being offered in evidence were allegedly re-printed with the program from which the original had been printed—essentially exemplars of what the notices might have looked like. Corporate Counsel did not personally retrieve

[186] Mortgage attached to Complaint (R. 8).

[187] Trial Transcript, Vol. 1, p. 91-99, 214-18.

[188] Trial Transcript, Vol. I, pp. 122-27.

[189] *Id.*

these re-creations; they were provided by the California office where the electronic records were kept.[190] Further, the acceleration notices were never produced before trial.[191] The day of trial U.S. Bank amended its exhibit list to include the notices, over objection.[192] Yet, Corporate Counsel had testified under oath that everything had been produced.[193]

The court erred in admitting the acceleration notices. The notices were kept outside of the legal department in another state. Corporate Counsel was wholly unfamiliar with the electronic record keeping. And, until the night before trial, he was seemingly unaware that the acceleration notices even existed. Accordingly, the notices were prepared specifically for litigation and would constitute double hearsay. *See 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).

The unsigned notices are admittedly not even photocopies of originals. Neither exhibit was properly admitted. The trial court erred in denying the motion

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[190] *Id.*

[191] Trial Transcript, Vol. I, pp. 122-27.

[192] Trial Transcript, Vol. I, p. 33.

[193] Tr. of Dep. of William Fogleman, January 27, 2010, p. 114 (R. 633-800).

in limine, overruling objections, and denying the motion to strike based on lack of competence, authenticity, and hearsay.

F. The payoff letter (Exhibit G) was unauthenticated hearsay.

The accounting department handles payoff figures.[194] It created the payoff letter which is stored electronically.[195] Since Corporate Counsel was wholly unfamiliar with the electronic record keeping, the trial court erred in admitting the payoff letter. It was kept outside of the legal department and in another state. Even worse, the payoff letter was prepared specifically for this case by the California office. Accordingly, its trustworthiness is suspect and should be closely scrutinized. *Stambor*, 465 So. 2d at 1297-98. The trial court erred in denying the Vidals' motion in limine, overruling objections, and denying the motion to strike based on lack of competence and hearsay.

III. The court erred in admitting the note and mortgage into evidence.

A. The note (Exhibit C) was unauthenticated hearsay.

The first time that Corporate Counsel had ever seen what U.S. Bank proffered as the original note was when it was shown to him at trial.[196] Before that, he had only looked at copies that were attached to the complaint.[197] When

[194] Trial Transcript, Vol. I, p. 161.

[195] Trial Transcript, Vol. I, p. 132.

[196] Trial Transcript, Vol. I, p. 112-13.

[197] Trial Transcript, Vol. I, p. 112-13.

questioned about the copies attached to the Complaint, he incorrectly testified that the note had an endorsement that said "pay to the order of."[198] After actually viewing the attached note, he admitted that there was no endorsement on it.[199] Section 9.13(b) of the PSA also requires the custodian to endorse the note in the name of the trustee on any endorsement in blank. The PSA also has a specific form that shows exactly how this endorsement should look.[200] Corporate Counsel admitted the proffered note did not contain the name of the trustee as required.[201]

The Vidals objected to the admission of the note because the note attached to the Complaint contained no endorsements, while the proffered note was endorsed in blank, and because Corporate Counsel was not a records custodian and had never actually seen the note.[202] The judge sustained the objection on the latter grounds but reserved ruling because she determined, *sua sponte*, that the depositions of the Vidals may authenticate the note.[203] U.S. Bank provided excerpts of the Vidals' deposition transcripts.[204] The judge stated that she "need[ed] to read the deposition excerpts . . . because Mr. Fogleman couldn't

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[198] *Id.*

[199] Trial Transcript, Vol. I, p. 114.

[200] Exhibit B-4 of the PSA.

[201] Trial Transcript, Vol. II, pp. 197-98.

[202] Trial Transcript, Vol. I, pp. 110-14.

[203] Trial Transcript, Vol. I, p. 115, Vol. II, p. 219.

[204] Trial Transcript, Vol. I, pp. 58-59.

testify as to the original note coming into evidence."[205] Then, before actually reading the excerpts provided by U.S. Bank, the trial judge stated "I believe during deposition – Mr. Miller is correct. During the deposition, your clients identified the note and Mr. Miller read those portions of the depositions into evidence that identified the note by your client."[206] At that point, U.S. Bank rested.[207] The court later, during the Vidals' argument on their motion for involuntary dismissal, overruled the objections and admitted the proffered note and mortgage based on the deposition excerpts and without reading the full deposition transcripts.[208]

The trial court erred by admitting the note based on excerpts without reading the full deposition. The Vidals objected several times to the court reviewing and relying only on excerpts. Further, based on the judge's comment above, she had decided the case before actually reviewing any deposition testimony. Had she actually read Mr. Vidal's deposition, she would have realized that it could not authenticate the note. While Mr. Vidal did sign a note to DHI, the Vidals specifically disputed the authenticity of the note and endorsements filed by U.S. Bank. Second, U.S. Bank admitted that the original note was never presented to Mr. Vidal at the deposition, so he never had the opportunity to admit or deny its

[205] Trial Transcript, Vol. II, p. 219.

[206] *Id.*

[207] Trial Transcript, Vol. II, p. 236.

[208] Trial Transcript, Vol. II, p. 258.

authenticity. Lastly, Mr. Vidal never testified about any endorsements on any note. In fact, the word endorsement does not appear at all in the Vidals' depositions. The note was unauthenticated hearsay and it was error to admit it.

B. The note was not self-authenticating because its authenticity was specifically denied in the pleadings.

It was reversible error to find that the note was self-authenticating. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required for: (8) Commercial papers and signatures thereon and documents relating to them, to the extent provided by the Uniform Commercial Code. § 90.902, Fla. Stat. The Florida version of the Uniform Commercial Code, however does not provide for any commercial papers to be self-authenticating, only the signatures thereon:

> In an action with respect to an instrument, the authenticity of, and authority to make, *each signature on the instrument* is admitted unless specifically denied in the pleadings. (emphasis added).

§ 673.3081(1), Fla. Stat. Moreover, even the signatures on commercial paper are not self-authenticating if authenticity is specifically denied by the pleadings:

> *If the validity of a signature is denied in the pleadings*, the burden of establishing validity is on the person claiming validity . . . . (emphasis added).

§ 673.3081(1), Fla. Stat. The editor's notes to section 673.3081 explain that the pleading requirement is to put the plaintiff on notice that proof of authenticity will need to be gathered and presented:

> The purpose of the requirement of a specific denial in the pleadings is to give the plaintiff notice of the defendant's claim of forgery or lack of authority as to the particular signature, and to afford the plaintiff an opportunity to investigate and obtain evidence. If local rules of pleading permit, the denial may be on information and belief, or it may be a denial of knowledge or information sufficient to form a belief. It need not be under oath unless the local statutes or rules require verification. …

The Vidals' Third Affirmative Defense does just that:

> Defendants specifically deny the authenticity of any document presented as the original promissory note, as well as any endorsements contained thereon and any allonges attached thereto and the authority of any signatures purporting to transfer the note by way of endorsement, allonge or assignment.[209]

Despite being made aware of the affirmative defense specifically denying the authenticity of the note, endorsement and signature,[210] the court determined that the note (and the endorsement) was self-authenticating citing to *Riggs v. Aurora Loan Services, LLC*, 36 So. 3d 932 (Fla. 4th DCA 2010). *Riggs*, however, actually quotes the language of the statute that carves out an exception to self-authentication when authenticity is "*specifically denied in the pleadings*." *Id*. at 933 (emphasis added). *Riggs* specifically states that "nothing in the pleadings placed the authenticity of [the endorser's] signature at issue." *Id*. Since the pleadings placed authenticity at issue in this case, *Riggs* precludes any argument that the note was self-authenticating.

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[209] Second Am. Answer, p. 6 (R. 617-28).

[210] Trial Transcript, Vol. II, p. 261-62.

Other Florida cases hold the same. "There is no presumption that the endorsements of a prior holder are genuine, and when properly put in issue by the pleadings, the party seeking to establish the status of holder of order paper must prove the validity of those endorsements on which his status depends. *Ederer v. Fisher*, 183 So. 2d 39, 41 (Fla. 2d DCA 1965).

U.S. Bank was placed on notice of its burden to establish the validity of the note and endorsement. Yet, it introduced nothing to authenticate the note and the purported signature on the endorsement. The note is suspicious. Foremost, Corporate Counsel had never seen the note proffered by U.S. Bank. He admitted its appearance—specifically, the appearance of the endorsement—did not comport with that mandated by the PSA and its forms. Indeed, the endorsement first appeared long after the case was filed. Further, it was not signed by the lender but by a different company—and there was no evidence that the other company was actually a general partner authorized to endorse this note. Corporate Counsel admitted he did not know the person whose signature appeared there.[211] He had no idea it was different from the note attached to the Complaint. Accordingly, the trial court erred in admitting the note on the basis that it was self-authenticating.

[211] Tr. of Dep. of William Fogleman, January 27, 2010, p. 171-72 (R. 633-800).

C. The mortgage (Exhibit D) was unauthenticated hearsay.

As with the note, Corporate Counsel had never seen the original mortgage.[212] After sustaining objections on authenticity and hearsay, the court reserved ruling to read the Vidals' deposition transcripts.[213] The court later overruled the Vidals' objections and admitted the mortgage based on only the deposition excerpts proffered by U.S. Bank without reading the full deposition transcripts.[214]

The court once again erred by not reading the full deposition before ruling. The judge's comment, before reading anything, that she agreed with U.S. Bank's Counsel shows that she did not make a proper consideration of the deposition testimony. Even if she had made a proper consideration, the Vidals' depositions simply could not authenticate the mortgage. Foremost, the Vidals pled the mortgage was altered.[215] In fact, Mr. Vidal testified that the mortgage he signed at closing only listed his name in the borrower section and not Ms. [redacted] and that the mortgage U.S. Bank brought to the deposition did not seem to be

[212] Trial Transcript, Vol. I, p. 112.

[213] Trial Transcript, Vol. I, pp. 115, Vol. II, p. 219.

[214] Trial Transcript, Vol. I, pp. 58-59, Vol. II, p. 258.

[215] Second Am. Answer, p. 6 (R. 617-28).

consistent with the mortgage he was given at closing.[216] Ms. [redacted] testified that she did not recognize the mortgage.[217]

Moreover, the closing agent Mr. Simon testified that his office would often change mortgages to add borrowers and witnesses.[218] Notably, U.S. Bank admitted the mortgage produced at the depositions was not the original.[219] Given that the Vidals pled the mortgage was altered, denied that the mortgage produced at the depositions was the same as the one from closing, and were not shown the original, the Vidals' depositions could not have authenticated the mortgage. Accordingly, it was reversible error to admit the mortgage.

IV. There is no evidence to support the judgment.

It was error to deny the Vidals' motions for involuntary dismissal. It is the plaintiff's burden to establish a prima facie case. *Tillman v. Baskin*, 260 So. 2d 509, 512 (Fla. 1972). After the close of a plaintiff's case, a party may move for dismissal on the ground that on the facts and the law the party seeking affirmative relief has shown no right to relief. Fla. R. Civ. P. 1.420(b).

Here, U.S. Bank did not prove it owned the note. The proper party with standing to foreclose a note and mortgage is the holder of the note and the owner

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[216] Tr. of Dep. of Jose Vidal, May 13, 2010, pp. 56, 59 (R. Supp. 1007-1159).

[217] Tr. of Dep. of [redacted] May 13, 2010, p. 18-19 (R. Supp. 1007-1159).

[218] Tr. of Dep. of Eric Simon, May 7, 2010, p. 9-10 (R. Supp. 906).

[219] Trial Transcript, Vol. II, p. 281.

of the mortgage. *See BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean Jacques*, 28 So. 3d 936, 938 (Fla. 2d DCA 2010). U.S. Bank pled it owned the note and mortgage.[220] The note attached to the Complaint indicated that DHI was the payee.[221] It contained no endorsements. [222] A note that is specially endorsed identifies a specific person to whom it is payable. § 673.2051(1), Fla. Stat. It is only payable to that specific person and must be negotiated by the endorsement of that person. § 673.2051(1), Fla. Stat. Accordingly, the note attached to the Complaint was only payable to DHI.

Since the note was payable to DHI, U.S. Bank was required to plead and prove that it owned the note and mortgage through a valid assignment, proof of purchase of the debt, or evidence of an effective transfer. *See BAC Funding*, 28 So. 3d at 939. In fact, the only reason summary judgment was not granted for the Vidals, given that the assignment U.S. Bank produced was executed after the case was filed, was because it argued and the court agreed that there could have possibly been a previous transfer undocumented by a contemporaneous assignment. Despite failing to plead such a transfer, U.S. Bank attempted to prove a transfer using the belatedly produced final certification. It did so because the PSA admittedly does not itself document what loans are in the pool but rather,

[220] Complaint, ¶ 10 (R. 2).

[221] Note attached to Complaint, (R. 5-7).

[222] *Id*.

references another record.[223] Corporate Counsel conceded under oath that the PSA is not a purchase agreement and that it does not specifically reference the loan in this case.[224] Therefore, it needed to prove the transfer using something more than the PSA.

The final certification, however, indisputably referred specifically to a type of mortgage not involved in this case. Accordingly, the Vidals' motion for involuntary dismissal at the close of U.S. Bank's case should have been granted.

Additionally, after being cued by the trial court that its pleadings were possibly deficient,[225] U.S. Bank moved to amend the pleadings to conform to the evidence.[226] The court granted U.S. Bank's motion over objection that this new unpled theory of ownership was not tried by consent.[227] Indeed, the Vidals had objected at every possible instance to evidence that was irrelevant to the actual theory of ownership solidified by U.S. Bank's complaint.

Even so, conforming the pleadings is futile here because the unauthenticated note was hearsay and should not have been admitted. Accordingly, it was reversible error to deny the Vidals' motions for involuntary dismissal made both at

[223] Tr. of Dep. of William Fogleman, January 27, 2010, p. 74-75 (R. 633-800).

[224] Tr. of Dep. of William Fogleman, January 27, 2010, p. 6 (R. 633-800).

[225] Trial Transcript, Vol. II, pp. 266-67.

[226] Trial Transcript, Vol. II, p. 291.

[227] Trial Transcript, Vol. III, p. 349.

the close of U.S. Bank's case and after the Vidals' case. There simply was no evidence to support the judgment.

CONCLUSION

Corporate Counsel was unable to lay a proper foundation for any exhibit. The final certification was likely fraudulent and failed to prove anything. The note and mortgage were unauthenticated hearsay which Corporate Counsel had never actually seen. The notices of acceleration and payoff letter were created specifically for litigation. Since the court erred in admitting these exhibits, the judgment in this case should be reversed with instructions to enter judgment in favor of the Vidals.

Dated April 22, 2011

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this April 22, 2011 on all parties on the attached service list.

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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 and has been typed in Times New Roman, 14 Point.

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