In the District Court of Appeal
Fourth District of Florida

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

[redacted]

Appellant,

vs.

IMPERIAL-CS I, LLC

Appellee.

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

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

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Issue #1

To admit a summary, there must be timely written notice of the intention to use a summary, the summary must be made available in advance to other parties and, the originals or duplicates of the data from which the summary is compiled must also be made available in advance. A summary must be authenticated by the party who prepared it. Imperial did not give advanced notice that it intended to rely on a summary, and it failed to produce the summary and much of the underlying data in advance of trial. The summary was prepared by a third party that did not testify. Was it error to admit the summary as summary evidence?

Issue #2

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. The business-records exception to hearsay applies to records that are kept in the ordinary course of a regularly conducted business activity and it must be a regular practice of that business to make such a record. Documents created for litigation are not kept in the ordinary course of a regularly conducted business. It is undisputed that Imperial's witness requested the payment summary from FCI specifically for this litigation. The summary compiled records from another third-party, SLS. Was it error to admit the summary as a business record?

STATEMENT OF THE CASE AND FACTS

I. Introduction.

[redacted] appeals from a final judgment of foreclosure entered in favor of Appellee Imperial-CS, LLC ("Imperial") after a bench trial. Imperial filed suit to foreclose on the home of [redacted][1] The Corrected Second Amended Complaint (the "Complaint") alleged that [redacted] entered into an adjustable rate note with an initial interest rate of 10.4%, adjustable up to 16.4%.[2] The note was payable to Imperial Lending, LLC, a non-party unrelated to Imperial, and secured by a mortgage in favor of Mortgage Electronic Registration Systems, Inc. as nominee of the Imperial Lending, LLC.[3]

Imperial alleged that it acquired an "interest in this loan on August 21, 2007" through an assignment. The assignment was memorialized October 2, 2008 which is over a year after the alleged acquisition and almost a month after the filing of this case.[4] Imperial claimed it was "the legal and equitable owner and holder" of the note and mortgage.[5]

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[1] Initial Complaint, September 22, 2008 (R. 1-27).

[2] Complaint, February 25, 2010 (R. 273, 278-99).

[3] Mortgage attached to Complaint, (R. 273, 278-99).

[4] Complaint, February 25, 2010 (R. 272-73).

[5] *Id.*

Imperial also alleged that [redacted] had defaulted and it claimed a principal balance in the amount of $110,482.19 plus interest and any taxes or insurance that "may have" been advanced.[6] [redacted] answered and denied the vast majority of Imperial's allegations, including its allegations as to the amounts owing and damages.[7]

II. The trial court strikes Imperial's late filed exhibits.

The trial order required all trial exhibits to be disclosed no later than sixty (60) days prior to Calendar Call, *i.e.* by January 3, 2011.[8] Imperial filed a witness and exhibit list dated January 4, 2011, that identified eleven exhibits.[9] Over three weeks after the deadline for disclosing exhibits, Imperial filed a "Supplemental" list of exhibits on January 27, 2011, in which it purported to add 13 new exhibits.[10]

As a result, [redacted] moved in limine to exclude Imperial from introducing the seven exhibits listed on its Supplemental disclosure that did not appear to have been included in Imperial's January 4, 2011 exhibit list.[11] On February 25, 2011, the Circuit Judge, John J. Hoy, granted [redacted] motion to exclude Exhibits 3 (the

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[6] Complaint (R. 272-73).

[7] Answer, April 29, 2010 (R. 440-445).

[8] Order Setting Non-jury Trial and Directing Pretrial and Mediation Procedures, dated December 27, 2010 (R. 870-874).

[9] Imperial's Witness and Exhibit List, dated January 4, 2011 (R. 882-884).

[10] *See* Imperial's Supplemental Witness and Exhibit List, dated January 27, 2011 (R. 1178-1180).

[11] [redacted] Motion in Limine, February 9, 2011 (R. 1209-1215).

Bill of Sale); 4 (customer service and collection records; allowing them only for rebuttal); and 5 (power of attorney and servicing agreement); stated that "exhibit 6 is stricken," and denied the motion as to Exhibits 1 and 16, and as to Exhibit 17 "without prejudice."[12]

III. Lavergne was the only witness to testify at trial.

At trial, Imperial chose not to call any witness from the original lender or any servicer, instead it called Danny Lavergne, Vice President of Imperial as its only witness. Lavergne testified that he was being "weaned" into employment by Imperial beginning in "late spring, early summer" of 2008 but could not identify a month when that "weaning" period began.[13] He further testified that it was not until November 2008 that he "stepped back from" his role with a different employer to take "a larger role" with Imperial.[14]

Lavergne testified that Specialized Loan Servicing ("SLS") was servicing [redacted] loan as Imperial's third party loan servicer in 2008, when [redacted] allegedly defaulted and Imperial filed suit.[15] Subsequently, at the end of 2008, FCI Trust

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[12] Order on Motion in Limine, February 25, 2011 (R. 1255-1256). Judge Hoy presided over pretrial proceedings while the Honorable Susan R. Lubitz, a senior judge presided over the trial.

[13] Transcript of Trial held before the Honorable Judge Susan R. Lubitz ("Trial Transcript"), dated March 9, 2011, p. 42.

[14] Trial Transcript, p. 42.

[15] Trial Transcript, p. 30.

Services ("FCI") became the loan servicer.[16] Lavergne was never an employee of either SLS or FCI and never officially supervised any of their record keeping.[17]

IV. Imperial relied on a servicer's payment summary of another servicer's payment history to establish the amounts owed.

To establish the amount owed Imperial relied on a two-page payment summary [Plaintiff's Exhibit 3].[18] The summary was allegedly given to Lavergne by FCI specifically for this litigation.[19] Lavergne, however, only knew about payments and fees owed by borrowers by reviewing records created by third party servicers.[20] Lavergne similarly relies on FCI for all information about taxes, insurance, late charges and interest [redacted] allegedly owed.[21] Lavergne claimed that FCI created the payment summary from records that had been kept by SLS, a prior servicer.[22] Niether FCI or SLS's underlying records, which were purportedly

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[16] Trial Transcript, p. 30.

[17] Trial Transcript, p. 103, 107-08.

[18] Trial Transcript, p. 76-80. Also admitted as evidence were a note and mortgage [Plaintiff's Exhibit 1] and a default letter [Plaintiff's Exhibit 2] (Trial Transcript, p. 4.)

[19] Trial Transcript, p. 76.

[20] Trial Transcript, p. 103.

[21] Trial Transcript, p. 120-22.

[22] Trial Transcript, p. 110-11.

summarized, were ever introduced into evidence.[23] Lavergne admitted further that if SLS's records were inaccurate, FCI's records would also be inaccurate.[24]

Lavergne testified that he had personal knowledge of the amounts owed.[25] When actually questioned about the amounts in the summary, however, Lavergne did not know how the late charges on the summary were calculated.[26] Nor did he have personal knowledge of how the amount owed reflected on the payment summary was calculated.[27] Lavergne was also unable to explain the discrepancy between the per diem interest rate he swore to in previous testimony and the higher per diem rate stated in the payment summary.[28] Lavergne was simply parroting the amounts stated in summaries provided to him by FCI.[29] In fact, he admitted that before trial he had simply memorized the amounts stated in the FCI's payment summary.[30]

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[23] Trial Transcript, p. 136-37.

[24] Trial Transcript, p. 110.

[25] Trial Transcript, p. 121-22.

[26] Trial Transcript, p. 157-58.

[27] Trial Transcript, p. 165-66.

[28] Trial Transcript, p. 138-39.

[29] Trial Transcript, p. 131-32.

[30] Trial Transcript, p. 180-81.

[redacted] objected on the grounds that the summary was hearsay, Lavergne was not a record's custodian, and the payment summary had never been disclosed.[31] The trial court nevertheless admitted the payment summary which Imperial exclusively relied on to establish the fact and amount of its damages.[32]

V. The trial judge renders her verdict for the plaintiff Imperial.

At the close of Imperial's case, [redacted] moved for dismissal based on Imperial's failure to put on admissible and competent evidence tending to prove all of the elements of its cause of action.[33] Specifically, [redacted] argued that Imperial had not submitted admissible evidence of damages because the payment summary was a summary of underlying records that were not put into evidence, Imperial failed to disclose its intention to use a summary of records prior to trial, and the summary was hearsay prepared in anticipation of litigation.[34] The trial court summarily denied the motion and ultimately found for the plaintiff and entered judgment for Imperial.[35]

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[31] Trial Transcript, p. 81-85.

[32] Trial Transcript, p. 85.

[33] Trial Transcript, p. 185.

[34] Trial Transcript, p. 196-98.

[35] Trial Transcript, p. 217.

[redacted] moved for rehearing arguing that the payment summary should not have been admitted into evidence.[36] Among other things, [redacted] argued that the payment summary was a summary of two different servicers' records and was triple hearsay, that it was not listed on Imperial's exhibit list, as required by the Judge Hoy's trial order, that page 1 of the summary was not timely disclosed in discovery, and page 2 was never disclosed in discovery.[37] [redacted] also argued that the document was a summary of other documents, and as such, Imperial was required by Florida Statutes § 90.956 to give notice before trial of its intention to use the summary and to provide the summary, but had not done so.[38] Judge Lubitz denied the motion.[39] [redacted] timely filed a notice of appeal.

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[36] Motion for Rehearing, dated March 21, 2011 (R. 1149-1457).

[37] Motion for Rehearing, dated March 21, 2011 (R. 1149-1457); *see also* Notice of Filing of the Transcript of the Motion for Rehearing Held before the Honorable Susan R. Lubitz held May 12, 2011 (R. 1496-1517).

[38] Motion for Rehearing, dated March 21, 2011 (R. 1149-1457); *see also* Notice of Filing of the Transcript of the Motion for Rehearing Held before the Honorable Susan R. Lubitz held May 12, 2011 (R. 1496-1517).

[39] Order Denying Motion for Rehearing, dated May 13, 2011 (R. 1492-93).

SUMMARY OF THE ARGUMENT

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

To admit a summary, there must be timely written notice of the intention to use a summary, the summary must be made available in advance to other parties and, the originals or duplicates of the data from which the summary is compiled must be made available in advance to other parties. In addition, a summary must be authenticated by the party who prepared it.

Here, Imperial did not give advanced notice that it intended to rely on a summary and it failed to produce the summary and portions of the underlying records in advance of trial. Further, FCI prepared the summary from SLS's records. Meaning, neither Lavergne nor his employer prepared the summary, therefore, Lavergne was not the correct person to authenticate the summary. The summary violated the summary evidence rule and was inadmissible hearsay.

Further, documents created for litigation are made under circumstances that show lack of trustworthiness and are not kept in the ordinary course of a regularly conducted business activity. Lavergne admitted the summary from FCI was requested for this litigation. Also, the business-records exception does not

authorize hearsay testimony concerning the contents of business records which have not been admitted into evidence. The payment summary was a summary of records that were not admitted into evidence and was inadmissible.

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. Here, SLS serviced the loan at all relevant times.[40] FCI allegedly created the summary.[41] Lavergne did not work for SLS or FCI and never officially supervised their record keeping.[42] Lavergne's only knowledge about payments came from servicers' records.[43] He had no personal knowledge of how the amount owed was calculated, he did not know how the late charges were calculated, and he was unable to explain the discrepancy between his previous testimony and the payment summary's higher per diem interest rate.[44]

Lavergne's lack of knowledge precluded him from being a qualified witness. The trial court erred in admitting the payment summary and the judgment should be reversed.

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[40] Trial Transcript, p. 76.

[41] Trial Transcript, p. 110-11.

[42] Trial Transcript, p. 103, 107-08.

[43] Trial Transcript, p. 103, 120-22.

[44] Trial Transcript, p. 138-39, 157-58, 165-66.

STANDARD OF REVIEW

While a court's decision to admit evidence is reviewed for an abuse of discretion, the *de novo* standard applies if the issue is whether the trial court erred in applying a provision of the Florida Evidence Code. *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). This case is reviewed *de novo* because [redacted] challenges the trial court's application of the Florida Evidence Code.

A motion for involuntary dismissal is also reviewed *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)). An "involuntary dismissal is appropriate if the plaintiff fails to establish a prima facie case." *Boca Golf View, Ltd. v. Hughes Hall, Inc.*, 843 So. 2d 992, 993 (Fla. 4th DCA 2003). The burden is on the plaintiff to establish a prima facie case. *Tillman v. Baskin*, 260 So. 2d 509, 512 (Fla. 1972). A denial of a motion for rehearing is reviewed for an abuse of discretion. *Muth v. AIU Ins. Co.*, 982 So.2d 749, 752 (Fla. 4th DCA 2008). "The purpose of a motion for rehearing is 'to give the trial court an opportunity to consider matters which it overlooked or failed to consider ... and to correct any error if it becomes convinced that it has erred.'" *Id.* (quoting *Gaffney v. Gaffney*, 965 So. 2d 1217, 1221 (Fla. 4th DCA 2007)).

ARGUMENT

I. The trial court erred in admitting into evidence and relying upon the payment summary because it was unauthenticated hearsay.

To obtain a judgment of foreclosure, a plaintiff is required to prove not only a default on an obligation under the note, but also "the amount due." *Ernest v. Carter*, 368 So. 2d 428 (Fla. 2d DCA 1979); *see also State Rd. 7 Inv. Corp. v. Natcar Ltd. P'ship*, No. 4D09-442, 36 Fla. L. Weekly D1806 (Fla. 4th DCA Aug. 17, 2011) (reversing summary judgment due to disputed facts as to amount owed). To establish the amount owed Imperial relied on a two-page unsigned payment summary [Plaintiff's Exhibit 3].[45] The payment summary is hearsay and the trial court erred in admitting it.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. § 90.801, Fla. Stat. Hearsay evidence is inadmissible unless subject to an exception. § 90.802, Fla. Stat. The payment summary contained out-of-court statements offered to prove the amount [redacted] allegedly owed. The trial court admitted the summary under Florida's business-records exception and allowed Lavergne to testify about its contents.[46]

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[45] Trial Transcript, p. 76-80.

[46] Trial Transcript, p. 70-72, 85.

Florida's business-records exception is found in Florida Statute § 90.803(6). For a record to be admissible under this exception, it must satisfy the following four requirements for trustworthiness:

> (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); § 90.803(6)(a), Fla. Stat.[47] "If evidence is to be admitted under one of the exceptions to the hearsay rule, it must be offered in *strict* compliance with the requirements of the particular exception." *Yisrael*, 993 So. 2d at 957 (emphasis in original). Moreover, where evidence contains multiple levels of hearsay, the proponent must show that a hearsay exception exists as to each level. *See* § 90.805, Fla. Stat. (2011); *Johnson v. State*, 969 So. 2d 938, 949 (Fla. 2007).

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[47] A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness.

A. The payment summary violated the summary evidence rule.

To be admissible, a summary must comply with three requirements. First, there must be timely written notice of the intention to use a summary, second, the summary must be made available in advance to other parties, and third, the originals or duplicates of the data from which the summary is compiled must be made available in advance to other parties. § 90.956, Fla. Stat. In addition, a summary must be authenticated by the party who prepared it. *Mckown v. State*, 46 So. 3d 174, 175 (Fla. 4th DCA 2010) (rejecting as hearsay a summary of bank statements compiled by a detective and admitted using a victim's testimony at a restitution hearing); *see also Johnson v. State*, 856 So. 2d 1085, 1086-87 (Fla. 5th DCA 2003) (reversing based on hearsay where there was no evidence who made the compilation or any other predicate to render it admissible as a summary).

Here, Imperial fails all three requirements. First, it is undisputed that Imperial failed to give notice that it intended to rely on a summary of evidence prior to trial. Second, it failed to even produce the unsigned summary in advance of trial. Third, portions of the underlying records were never provided to [redacted] at all.

After being sandbagged with a summary that was never provided containing information for which the underlying records were never produced, the Senior Judge refused to allow [redacted] to cross-examine and impeach Lavergne using the

payment history that was attached to Mr. Lavergne's previous affidavit and produced in discovery.[48] Therefore, aside from not having time to adequately prepare a cross-examination regarding the summary, [redacted] was not allowed to even attempt cross-examination using the document where much of the information in the summary allegedly came from.

Cross-examination was essential because there are several issues with the payment summary. To start with, the second page titled "Loan Charges Summary Report" was never provided in any manner or form.[49] It includes sums for attorneys' fees, taxes, and insurance allegedly paid by Imperial.[50] No invoices for any those costs or other documentation were ever produced. Worse, the summary shows charges for interest on attorneys' fees and costs that were never awarded by the trial court.[51]

Aside from including the second page's roughly $12,000 in charges, a perusal of the first page raises other questions. There is no explanation for how many payments were received, the unpaid late charges and accrued late charges differ, and the unpaid interest and accrued interest also differ. Even more telling, based on the daily rate charged, either the interest rate charged was higher than

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[48] Trial Transcript, p. 114-15.

[49] Payment Summary [Plaintiff's Exhibit 3].

[50] Payment Summary [Plaintiff's Exhibit 3].

[51] Payment Summary [Plaintiff's Exhibit 3].

10.4% or the amount of principle to calculate the daily rate was more than $110,482.19. This is so because the daily interest amount on the principle listed would be $31.47[52] not the $34.08 that is listed. In fact, the listed $34.08 amount does not correspond or calculate to any amount on the summary.[53] In addition to the numerical issues, the payment summary appears to be two separate documents. The bottom of each page contains numbering showing page one of one.[54]

The summary was hearsay, did not comply with the summary evidence rule, and [redacted] was deprived the opportunity to cross-examine the person that actually compiled the summary. The trial court erred in admitting the summary because it failed all of the requirements for the admissibility of a summary or compilation.

Also, the addition of the previously undisclosed payment summary violated the trial order. Substantive evidence not listed as an exhibit in pretrial disclosures is inadmissible. *See Eastern Steamship Lines, Inc. v. Martial*, 380 So. 2d 1070 (Fla. 3d DCA 1980), *cited with approval* in *Binger v. King Pest Control*, 401 So. 2d 1310, n. 5 (Fla. 1981); *see also Valdes v. Valdes*, 62 So. 3d 7 (Fla. 3d DCA 2011) (reversing judgment based on admission of summary introduced in violation

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[52] The calculation would be as follows: $110,482.19 × 10.4% = $11,490.14 ÷ 365 days = $31.47 in daily interest.

[53] The calculation would be as follows: $34.08 × 365 = $12,439.20 ÷ 10.4% = $119,607.69 in hypothetical principal which is more than the amount of the original loan.

[54] Payment Summary [Plaintiff's Exhibit 3].

of trial court's trial order). In fact, not only did Imperial fail to disclose the payment summary as a trial exhibit, but it also failed to disclose that document in discovery as well. For this additional reason, the payment summary was inadmissible. *Martin v. Lea Of Broward, Inc.*, 890 So. 2d 1244 (Fla. 4th DCA 2005) (finding reversal error to admit document that was not disclosed in discovery).

The trial order required all trial exhibits to be disclosed no later than January 3, 2011.[55] The payment summary was never disclosed. In fact, the Circuit Judge had already excluded several exhibits, including customer service and collection records allowing them only for rebuttal, because the records were disclosed three weeks late."[56] Moreover, the payment summary was never listed on any exhibit list. Therefore, the payment summary would have been stricken had it been listed on the untimely filed supplemental exhibit list or on any later list. Thus, the payment summary was inadmissible due to Imperial's failure to disclose it on its exhibit list as required by the trial order as well as its failure to disclose the document in discovery.

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[55] Order Setting Non-jury Trial and Directing Pretrial and Mediation Procedures, dated December 27, 2010 (R. 870-874).

[56] Order on Motion in Limine, February 25, 2011 (R. 1255-1256).

B. The payment summary was not a business record.

The Florida Supreme Court holds that documents created for litigation are made under "circumstances [that] show lack of trustworthiness," and are *not* "kept in the ordinary course of a regularly conducted business activity":

> "When a document is made for something other than a regular business purpose, it does not fall within the business record exception," and "[w]henever a record is made for the purpose of preparing for litigation, its trustworthiness is suspect and should be closely scrutinized." Charles W. Ehrhardt, *Florida Evidence* § 803.6, at 876 n. 3, 877 (2007 ed.) (citing, *e.g., United States v. Kim,* 595 F.2d 755, 760-64 (D.C.Cir. 1979) (rejecting an argument that a document created solely for litigation purposes was admissible as a business-records summary of otherwise admissible records, which were *not* produced)).

Yisrael, 993 So. 2d at 957; *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).

In *Yisrael*, the trial judge relied on a release date letter prepared by the Department of Corrections from other records in the defendant's sentencing hearing. *Yisrael*, 993 So. 2d at 955-58. In finding the release date letter was not admissible as a business record, the court specifically noted that it was "drafted . . . upon the prosecutor's request, exclusively for purpose of the instant prosecution,

not a part of regularly conducted activity." *Id.* at 958. Thus, the Supreme Court held that the DOC letter could not be admitted as a business record under § 90.803(6). *Id.*

Here, Lavergne requested a payment summary from FCI specifically for this litigation:

> [IMPERIAL'S COUNSEL]: Did you ask FCI to put together for you a current status of the loan?
>
> [LAVERGNE]: Yes.[57]

Like the release date letter in *Yisrael*, the payment summary was requested solely for litigation and therefore was not kept in the regular course of business. Even further, it is undisputed that Lavergne and his employer did not make the summary. Lavergne's testimony was merely that FCI prepared the summary based on SLS's records. The payment summary is unsigned. As such, Lavergne of Imperial testified to FCI's summary which was a compilation of SLS's records.

Further, in a case similar to this one, the First District recently reached a similar conclusion regarding an affidavit of indebtedness offered at trial by a bank to evidence the amount owed. *Mazine*, 67 So. 3d at 1131. Because it was created for the litigation, the bank's witness "did not testify and, indeed, could not testify, that the affidavit as to the amounts owed was actually kept in the regular course of business," so it was not admissible as a business record. *Id.* at 1132.

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[57] Trial Transcript, p. 76.

The payment summary here, like the affidavit in *Mazine* and the release date letter in *Yisrael*, is not admissible as a business record because it is not kept in the regular course of business. Also like the *Mazine* and *Yisrael* records, the payment summary incorporates information contained in other documents, namely SLS's underlying records, which were not offered into evidence.[58] In *Yisrael*, the Supreme Court held that a document cannot be admitted as a business record in such circumstances:

> Similar to the telefax at issue in *Kim,* the release-date letter cannot be admitted as a summary of otherwise admissible records, which were *not* produced. *See also Thompson v. State,* 705 So.2d 1046, 1048 (Fla. 4th DCA 1998) ("[T]he business-records exception to the hearsay rule ... does not authorize hearsay *testimony* concerning the contents of business records which have not been admitted into evidence."); *United States v. Marshall,* 762 F.2d 419, 423-28 (5th Cir. 1985) (substantially similar).

Yisrael, 993 So. 2d at 957.

Thus, since FCI's payment summary was a summary of SLS's records that were not admitted into evidence in *strict* compliance, with § 90.803(6), it was triple hearsay and inadmissible as a business record. The error was compounded because the Senior Judge refused to allow [redacted] to cross-examine Lavergne using any of the underlying records which were not admitted in evidence.[59]

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[58] Trial Transcript, p. 136-37.

[59] Trial Transcript, p. 114-15.

C. Lavergne was not qualified or competent to testify about the payment summary.

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, it is undisputed that Lavergne had no personal knowledge about the underlying transaction.[60] Lavergne is the Vice President of Imperial.[61] He admitted that SLS handled the collection of payments on [redacted] loan at the time

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

[61] Trial Transcript, p. 42.

the case was filed.[62] FCI only became the servicer after the case was filed.[63] Lavergne admitted that FCI created the payment summary from records that had been kept by SLS.[64] Lavergne was never an employee of either SLS or FCI and never officially supervised any of their record keeping.[65]

Since Lavergne had no personal knowledge and was not a records custodian of the servicers SLS and FCI (which kept payment records), he needed to be a qualified witness. The record, however, shows Lavergne was not qualified to testify about the servicing records. First, he lacked knowledge concerning the payment summary as a whole. Lavergne relies on FCI for all information about taxes, insurance, late charges and interest of amounts allegedly owed.[66] He had no personal knowledge of how the amount owed reflected on the payment summary was calculated.[67] Nor did he know how the late charges on the summary were calculated.[68] He was unable to explain the discrepancy between the per diem interest rate he previously swore to and the higher per diem rate stated in the

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[62] Trial Transcript, p. 30.

[63] Trial Transcript, p. 30.

[64] Trial Transcript, p. 110-11.

[65] Trial Transcript, p. 103, 107-08.

[66] Trial Transcript, p. 120-22.

[67] Trial Transcript, p. 165-66.

[68] Trial Transcript, p. 157-58.

payment summary.[69] Lavergne's lack of knowledge of the information and the process of summarizing such information shows that he was not qualified to testify about the payment summary. *See Glarum v. LaSalle Bank N.A.*, No. 4D10-1372, 36 Fla. L. Weekly D2526 (Fla. 4th DCA Nov. 17, 2011).

Despite his lack of knowledge, Lavergne testified that he had personal knowledge of the amounts owed.[70] Lavergne, however, was simply parroting the amounts stated in summaries provided to him by FCI.[71] In fact, he admitted that before trial he had simply memorized the amounts stated in the FCI's payment summary.[72] This was also apparent when Senior Judge Lubitz recognized that Lavergne was "clearly reading from a document [payment summary]."[73] Lavergne himself admits his only knowledge about payments and fees comes from the servicers' records.[74] Accordingly, its trustworthiness is suspect and should be closely scrutinized. *Stambor*, 465 So. 2d at 1297-98.

Lavergne's lack of knowledge demonstrates that Lavergne is not qualified or competent to testify about servicing records for either servicer. Accordingly, the trial court erred in admitting the payment summary.

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[69] Trial Transcript, p. 138-39.

[70] Trial Transcript, p. 121-22.

[71] Trial Transcript, p. 131-32.

[72] Trial Transcript, p. 180-81.

[73] Trial Transcript, p. 79-80.

[74] Trial Transcript, p. 103.

II. There is no evidence to support the judgment.

It was error to deny [redacted] motion 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, the trial court's erroneous admission of a hearsay document requires that its judgment in favor of Imperial be reversed. The record shows that Judge Lubitz relied solely on the payment summary in finding damages for Imperial:

> [P]laintiff is entitled to foreclose on the property in the amount contained in Plaintiff's Exhibit 3.[75]

The record also shows that the payment summary (and Lavergne's derivative testimony of the amounts stated on that document) was the only evidence presented to prove the amount allegedly owed to Imperial.

When a trial judge in a bench trial erroneously admits evidence over objection, it cannot be presumed to have disregarded the evidence in reaching its decision. *Petion v. State*, 48 So. 3d 726 (Fla. 2010). This is especially true where the record contains an explicit statement that the trial judge relied on that evidence in reaching its decision. *Id.* An error is harmful when it is more likely than not

[75] Trial Transcript, p. 217.

that it had an "effect on the fact finder." *Special v. Baux*, No. 4D08-2511, 2011 WL 5554531 (Fla. 4th DCA Nov. 16, 2011) (en banc).

Further, without that inadmissible evidence, Imperial did not establish a prima facie case of entitlement to foreclose because it did not introduce any evidence of the "amount owed" element of its claim. *Boca Golf View,* 843 So. 2d at 993. Therefore, the trial court erred in denying [redacted] motion for involuntary dismissal. *See Mazine*, 67 So. 3d at 1132 (reversing trial court's denial of motion for directed verdict due to bank's failure to submit admissible evidence of its standing). As such, this Court should reverse the trial court's decision to deny [redacted] motion for involuntary dismissal. Moreover, because the judgment was entered in reliance on the payment summary, the trial court abused its discretion in denying [redacted] motion for rehearing, and the judgment should be reversed.

The erroneous admission of (and reliance on) the payment summary compels reversal of the trial court's judgment. There simply was no evidence of the amount of damages to support the judgment.

CONCLUSION

The payment summary was inadmissible for several reasons:

(1) It violated the summary evidence rule in that there was no advance notice a summary would be used, the summary was not provided in advance, and portions of the underlying records were never produced at all,

(2) It was a summary of records prepared by a third party, from records of another third party, that were not introduced as evidence,

(3) It was never disclosed and was not listed on any exhibit list,

(4) It was created specifically for litigation and not a record kept regularly in the course of business, and

(5) Lavergne was not a qualified witness because he had no personal knowledge of how the numbers were calculated or even what each number includes.

Therefore, the payment summary was unauthenticated hearsay. Since the court erred in admitting the summary there is no evidence in the record as to damages. The judgment in this case should be reversed with instructions to enter judgment in favor of Celise.

Dated January 27, 2012

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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 January 27, 2012 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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