In the District Court of Appeal
Fourth District of Florida

CASE NO.

(Circuit Court Case No

and

Appellants,

v.

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

Appellees.

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

INITIAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Statutes

Rules

TABLE OF AUTHORITIES
(continued)

Other Authorities

STATEMENT OF THE CASE AND FACTS

I. Introduction

[redacted] and [redacted] (collectively, "the Homeowners") appeal the final judgment of foreclosure rendered in favor of HSBC Bank, USA as indenture trustee for Friedman, Billings, Ramsey Group, Inc. (FBR) securitization name – FBRSI 2005-2 ("the Bank") after a non-jury trial. The Homeowners present three issues for the Court's review:

- Whether the trial court erred in denying their motion for involuntary dismissal at trial when there was no evidence that the note was endorsed before the lawsuit was filed.
- Whether hearsay may be used to establish a hearsay exception.
- Whether attorneys' fees may be awarded based solely on affidavits when there is an objection to that procedure.

II. Appellants' Statement of the Facts

A. The Pleadings

The Bank initiated this action when it filed its foreclosure complaint which also sought re-establishment of a lost or destroyed promissory note.[1] The Bank did not attach a copy of the note to its pleading, representing not only that it had lost the original, but that "Plaintiff does not presently have a copy of the note, but is seeking to obtain a copy, and will file a copy with the Court when obtained."[2] The subject mortgage identified the mortgagee as Mortgage Electronic Registration Systems, Inc. ("MERS") and the lender as Finance America, LLC ("Finance America").[3]

The Bank later voluntarily dismissed its re-establishment count[4] and filed what purported to be the original note.[5] Attached to the note was an undated endorsement which contained a similarly undated blank endorsement.[6]

The Homeowners filed an answer in which they pled they were without knowledge of the Bank's allegation that it was the holder "and/or" entitled to

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[1] Complaint, March 26, 2008 (R. 1-28).

[2] Complaint, March 26, 2008, ¶ 17 (R. 3).

[3] Mortgage attached to Complaint, March 26, 2008 (R. 9).

[4] Notice of Voluntary Dismissal as to Count II, October 14, 2008 (R. 108).

[5] Notice of Filing Original Note and attached Note, May 13, 2010 (R. 192-196).

[6] Allonge, May 13, 2010 (R. 196).

enforce the note and mortgage, and therefore denied the Bank's allegation.[7] The Homeowners also asserted in their affirmative defenses that the Bank lacked standing to sue.[8] The matter was thereafter set for trial.[9]

B. The Trial

At trial, the Bank relied upon a single witness to introduce all the exhibits intended to prove its standing and the amount of damages. That witness, Jason George,[10] was an employee of the Bank's servicer, JPMorgan Chase, who had worked there for less than three years.[11] Prior to that, he was a cabinet installer and foreman with a company known as Micavisions.[12]

His job title with the servicer was "Home Loan and Research Officer" which required him to review documents and records related to loans in default and to testify at trials and depositions for as much as three or four hours a day.[13] He has some weeks where he is in trial every single day.[14]

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

[8] Third Affirmative Defense, October 8, 2013 (R. 6-7).

[9] Order Setting Trial, February 25, 2014 (R. 682-688).

[10] T. 25.

[11] T. 40.

[12] T. 94.

[13] T. 41, 90.

[14] T. 90.

He was trained for this job by both in-house and outside counsel.[15] In fact, George received "months and months['] worth of training" in order to get to the point he was at on the day of the trial.[16] The training includes role-playing the part of being a witness being questioned by defense counsel.[17]

George did not supervise anyone[18] and had never worked as a loan processer during his time with the servicer.[19] In fact, the only three departments he had worked in were all litigation related: 1) the foreclosure department; 2) the mediation department; and 3) the litigation support department.[20]

George did not work in any of the departments that created or kept the records which he identified and introduced. Specifically, he did not work in the department responsible for maintaining the Power of Attorney (Exhibit 8).[21] He did not work in the department that maintains the scanned image of the allonge (Exhibit 5).[22] He did not work in any of the three departments responsible for

[15] T. 92.
[16] T. 93.
[17] T. 91-92.
[18] T. 93.
[19] T. 96.
[20] T. 89.
[21] T. 105.
[22] T. 108, T. 118.

entering the information found on the payment history (Exhibit 4).[23] He was not in charge of maintaining payment histories or involved in inputting the data.[24]

He had not seen the case-specific documents until preparing for his testimony—probably no more than a month before trial.[25] His only interaction with the loan was with regard to litigation.[26] He had only "recently" seen the payment history, a document that he did not himself print out.[27] He could not explain why the payment history does not display the due date to which the payments are applied, which he testified is normally shown on every line.[28]

Over the Homeowners' hearsay, authenticity, summary records, and rule of completeness objections,[29] the trial court admitted the entirety of the Bank's exhibits regarding standing and the amount of its damages:

- A list of transactions labeled "Chase Detailed Transaction History" (Exhibit 4).[30]

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[23] T. 119-120.

[24] T. 120.

[25] T. 114.

[26] T. 127.

[27] T. 130.

[28] T. 149.

[29] T. 49-50, 159, 176.

[30] T. 54.

- A screenshot indicating when the servicer acquired the servicing rights to the loan (Exhibit 7).[31]
- A power of attorney purporting to establish that the servicer could sue in the Bank's name—dated four years after this case was filed (Exhibit 8).[32]
- A screenshot of a scanned image of the allonge, purportedly scanned in 2006 (Exhibit 5).[33]
- A communication between the Servicer and its "outside counsel" used to help them prepare the proposed final judgment (Exhibit 9).[34]

Recognizing that the payment history would have necessarily included information gleaned from a prior servicer, the trial court requested that George lay the foundation for admission of such records.[35] All George's testimony established on this point, however, was that the payment history reflected what George termed "the new loan setup value."[36] He had never worked for the previous servicer or read its policies and procedures.[37]

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[31] T. 59-60 (objection to exhibit); T. 60 (admission of exhibit).

[32] T. 66 (objection to exhibit); T. 67 (admission of exhibit).

[33] T. 75 (objection to exhibit and admission of exhibit).

[34] T. 80 (objection to exhibit); T. 82 (admission of exhibit).

[35] T. 51.

[36] T. 52.

[37] T. 129.

Additionally, George admitted multiple times that he did not know whether the allonge was an original or not.[38] He also admitted that he was unsure whether an employee of the servicer could actually change the scan date listed on the scanned image of the allonge (Exhibit 5).[39]

At the close of George's testimony and after the Bank rested, the Homeowners renewed each one of their evidentiary objections, all of which were overruled.[40] After a brief recess into the next morning, the Homeowners argued a motion for involuntary dismissal based on standing[41] and a reiteration of the Homeowners' evidentiary objections.[42] This motion was denied by the trial court.[43]

After the Homeowners rested, the Homeowners renewed their motion for involuntary dismissal and the court heard closing arguments.[44] The court then ruled in favor of the Bank.[45]

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[38] T. 116, T. 117.

[39] T. 110.

[40] T. 152-177.

[41] T. 187-189.

[42] T. 190.

[43] T. 195.

[44] T. 200-220.

[45] T. 220-224.

After a short recess, the Homeowners requested an evidentiary hearing on the issue of attorneys' fees.[46] The Bank's attorney argued that the Homeowners had waived this right when she made mention of attorneys' fees affidavits during her direct examination and the Homeowners made no objection.[47] The trial court agreed that the Homeowners had waived their right to an evidentiary hearing on the fee issue and entered judgment in favor of the Bank, including an award of attorneys' fees.[48]

This appeal follows.

[46] T. 224.

[47] *Id.*

[48] T. 225-226; Final Judgment of Foreclosure, April 10, 2014 (R. 730-735).

SUMMARY OF THE ARGUMENT

The trial court should have granted the Homeowners' motion for involuntary dismissal because the Bank failed to prove a *prima facie* case for foreclosure. First, there was no evidence that the Bank was the owner of the loan or in possession of an endorsed note when it filed the lawsuit. Even if had been in possession of the original note, the Bank adduced no evidence that the note was endorsed on the day it commenced this action. Specifically, there was no evidence that the allonge which contained the necessary endorsement was affixed to the note prior to the filing of the Complaint.

Additionally, the Bank's witness was wholly incompetent to lay the business records hearsay exception for the Bank's documents admitted through his testimony and therefore these exhibits (including the image that purportedly established that the allonge existed—but not that it was affixed to the note—before the case was filed) should have been excluded from evidence.

Therefore, this Court should reverse the judgment with instructions that the trial court enter an order of involuntary dismissal on remand.

Finally, the trial court impermissibly denied the Homeowners the right to an evidentiary hearing on the issue of attorneys' fees. If the Court reaches this issue, it should remand for a hearing on attorneys' fees.

STANDARD OF REVIEW

A trial court's ruling of a motion for involuntary dismissal is reviewed *de novo*. Likewise, a party's standing to bring a foreclosure action is required *de novo*. *LaFrance v. U.S. Bank Nat. Ass'n*, 141 So. 3d 754, 755 (Fla. 4th DCA 2014); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So. 3d 152 (Fla. 1st DCA 2014) ("We review the sufficiency of the evidence to prove standing to bring a foreclosure action *de novo*.").

In a non-jury case, sufficiency of the evidence may be raised for the first time on appeal. Fla. R. Civ. P. 1.530(e). Findings of fact by the trial court must be set aside when totally unsupported by competent, substantial evidence. *See Crawford Residences, LLC v. Banco Popular N. Am.*, 88 So. 3d 1017, 1019 (Fla. 2dDCA 2012). If a trial court's decision is manifestly against the weight of the evidence or totally without evidentiary support, it becomes the duty of the appellate court to reverse. *Randy Intern., Ltd. v. Am. Excess Corp.*, 501 So. 2d 667, 670 (Fla. 3dDCA 1987); *see also, Blazina v. Crane*, 670 So. 2d 981, 983 (Fla. 2dDCA 1996) (reversing where there was no record support for the trial court's findings of fact).

An appellate court reviews a trial court's decision to admit evidence for abuse of discretion. *Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008). However,

the *de novo* standard applies when the issue is whether the trial court erred in applying a provision of the Florida Evidence Code (here, § 90.803(6), Fla. Stat.). *See Shands Teaching Hosp. and Clinics, Inc. v. Dunn*, 977 So. 2d 594, 598 (Fla. 2d DCA 2007); *Lucas v. State*, 67 So. 3d 332, 335 (Fla. 4th DCA 2011); *see also Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006) (question of whether evidence falls within the statutory definition of hearsay is a matter of law subject to *de novo* review).

ARGUMENT

I. The trial court erred in denying the Homeowners' motion for involuntary dismissal because there was no evidence that the note was endorsed before the lawsuit was filed.

When confronted with the Homeowners' motion for involuntary dismissal, the trial court was required to determine whether the Bank had made a *prima facie* showing of foreclosure based on competent, substantial evidence. *Crowe v. Crowe*, 763 So. 2d 1183, 1183-84 (Fla. 4th DCA 2000). Because no view of the evidence or testimony presented at trial establishes this, the trial court erred in denying the motion.

It is black letter law that one must acquire standing before filing suit. *Boyd v. Wells Fargo Bank, N.A.*, 143 So.3d 1128 (Fla. 4th DCA 2014) (reversing summary judgment of foreclosure because foreclosing lender failed to produce documentation establishing that it had standing at the time it filed the foreclosure complaint); *LaFrance*, 141 So. 3d at 755 (Fla. 4th DCA 2014) ("A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose…Standing to foreclose is determined at the time the lawsuit is filed.) (Citations omitted).

If the foreclosing plaintiff is not the original lender, standing (to enforce the note[49]) may be established by submitting the promissory note with a blank or special endorsement, an assignment of the note, or an affidavit that proves the plaintiff's noteholder status. *Focht v. Wells Fargo Bank, N.A.*, 124 So.3d 308, 310 (Fla. 2dDCA 2013). Nevertheless, this status must be established on the day the foreclosure lawsuit was filed. *Id.*; *Wright v Deutsche Bank Nat'l Trust Co.*, Case No. 4D13-3221 (Fla. 4th DCA January 7, 2015) (reversing final judgment after trial because note attached to complaint was not endorsed, endorsement was not dated, and bank failed to present testimony or evidence as to date of endorsement); *Joseph v. BAC Home Loans Servicing, LP*, Case No. 4D12-4137 (Fla. 4th DCA January 7, 2015) (reversing with instructions to vacate the final judgment and enter a dismissal of the complaint after trial because "the plaintiff produced no evidence to show that it owned the note or mortgage on the date of the filing of the complaint."); *Fischer v. U.S. Bank National Ass'n*, Case No. 4D13-3798 (Fla. 4th DCA January 7, 2015) (reversing with instructions to enter final judgment in favor

[49] Many written opinions simply state, without analysis or careful draftsmanship, that establishing oneself as a holder of the note under Article 3 of the Uniform Commercial Code ("UCC") is sufficient to foreclose as if the UCC applies to non-negotiable instruments such as mortgages. In reality, the plaintiff must also prove itself to be the mortgagee to enforce the mortgage lien. Although mortgages are said to "follow the note," equity contemplates that only the owner, not the holder, of the note could be the beneficiary of such automatic transfers.

of defendant because bank failed to prove that it had standing at the time the complaint was filed); *Deutsche Bank Nat'l. Trust Co. v Boglioli*, Case No. 4D13-2323 (Fla. 4th DCA January 7, 2015) (affirming final judgment in favor of borrower because bank failed to present competent, substantial evidence at trial to prove that it had standing at time complaint was filed).

In this case, the Bank's original complaint included a lost note count, a mortgage made payable to Finance America, and did not include a copy of the note.[50] There was also no allonge attached to the complaint or otherwise incorporated into it. [51] Therefore, because the mortgage was made payable to Finance America, that party was the only entity with standing to enforce the instrument.

And while the Bank subsequently filed the original note with a blank endorsement appearing on the allonge that followed it,[52] neither the endorsement

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[50] Complaint, March 26, 2008 (R. 1-28).

[51] *Id*. An allonge is a piece of paper annexed to a promissory note on which to write an endorsement when there is no more room to write the endorsement on the note itself; this paper must be so firmly affixed to the note that it becomes a part of the instrument. *Isaac v. Deutsche Bank Nat. Trust Co.*, 74 So 3d 495, 496 n. 1 (Fla. 4th DCA 2011); *Taylor v. Deutsche Bank Nat. Trust Co.*, 44 So. 3d 618, 623 n. 2 (Fla. 5th DCA 2010). This definition, particularly that an allonge must be "affixed" to the note, is the crux of this portion of the Homeowners' argument.

[52] Promissory Note, May 7, 2010 (R. 193-196)

nor the allonge are dated.[53] Because the Bank needed to provide competent and substantial evidence that it had come into possession of a properly endorsed note prior to filing suit, a necessary element of such proof was that the allonge containing the endorsement—was affixed to the note before the lawsuit commenced.

Here, the Bank's witness had no independent knowledge of when the allonge was created. Instead, the Bank sought to have the witness introduce a document that would purportedly date the allonge: the screen print from the Bank's imaging system (Exhibit 5). Putting aside the fact that the witness was incompetent to introduce this document (which he was, *see*, Section II, *infra*), at best, it shows only that the allonge existed before the lawsuit was filed. But it fails to establish an essential fact—that the allonge was affixed to the note at the lawsuit's inception.

This fact is crucial because where, as here, a foreclosing plaintiff's standing hinges on an allonge, it must prove that the allonge "took effect" on or before the day the lawsuit was filed. *Cutler v. U.S. Bank*, 109 So. 3d 224, 226 (Fla. 2d DCA 2012). And in order for an allonge to "take effect," it must be affixed to the note it accompanies. Fla. Stat. § 673.2041(1) ("[f]or the purpose of determining whether a

[53] Allonge, May 7, 2010 (R. 196).

signature is made on an instrument, a paper affixed to the instrument is a part of the instrument"); *Issac*, 74 So. 3d at 496 n. 1.

Apparently, no Florida court has articulated what is considered a legally sufficient mode of annexing or affixing an allonge to an instrument, although a body of case law has developed on this issue in other states. *Wells Fargo Bank, N.A. v. Bohatka*, 112 So. 3d 596, 604 n. 4 (Fla. 1st DCA 2013). This body of case law is clear that, despite the exact mode of affixation, the allonge must somehow be physically made part of the note. *See e.g. Adams v. Madison Realty & Dev., Inc.*, 853 F.2d 163 (3d Cir. 1988) (mere folding of the alleged allonge around the note insufficient); *HSBC Bank USA v. Thompson*, 2010 Ohio 4158 (Ohio App. 2010) (unattached pages cannot be an allonge); *In re Weisband*, 427 B.R. 13 (Bkrtcy.D.Ariz. 2010) (same).

The common law actually required gluing. ALI, Comments & Notes to Tentative Draft No. 1 – Article III 114 (1946), reprinted in 2 Elizabeth Slusser Kelly, Uniform Commercial Code Drafts 311, 424 (1984) ("[t]he indorsement must be written on the instrument itself or an allonge, which, as defined in Section _____, is a strip of paper so firmly pasted, stapled or otherwise affixed to the instrument as to become part of it.") Modern courts have equated stapling with gluing. *Lamson v. Commercial Credit Corp.*, 531 P. 2d 966, 968 (Co. 1975)

("Stapling is the modern equivalent of gluing or pasting. Certainly as a physical matter it is just as easy to cut by scissors a document pasted or glued to another as it is to detach the two by unstapling"); *accord Southwestern Resolution Corp. v. Watson*, 964 S.W.2d 262, 263 (Tex.1997). In any event, the law appears well-settled on the issue: the allonge must somehow be physically attached to the note in order for it to be affixed and it must be affixed to have legal effect.

At trial, the Bank failed to prove that the allonge in question had any more legal effect than any other stray piece of paper. First, the screen print (Exhibit 5) did not establish that the original note and allonge were in the possession of the plaintiff Bank (HSBC) even when the scan was made, much less when it filed suit. Indeed, the screen print indicates that the owner of the note was "CMMC"—presumably a reference to Chase Manhattan Mortgage Corporation, a subsidiary of the servicer, JPMorgan Chase. Because the record was purportedly created on the scan date of January 3, 2006, this suggests that the note was owned by CMMC at a time after the closing date of the plaintiff's trust (which according to the name of the trust, would have been in 2005). In fact, the only documentary evidence that the servicer, JPMorgan Chase, was an agent of HSBC is the Limited Power of Attorney signed more than four years after the complaint was filed. Even if these inferences, which tend to disprove the Bank's standing, could somehow be

explained away, they elucidate why this single screen print of a scanned image does not establish that HSBC owned or possessed the note (along with the allonge) when the complaint was filed two years later in 2008.

Perhaps more importantly, there was no testimony or other evidence that the original allonge was attached to the note when it was scanned. The screen print itself states that the allonge is "Page No. 1" of the image—not page 4, as it would be numbered had it been scanned with the note. The scan, therefore, suggests that the allonge was, at that time, a document separate from the note.

Notably, when it filed this case, the Bank represented that, not only had it lost the original note, it could not even produce a copy of the note.[54] Surely, if the note itself had been scanned in 2006 when the allonge was scanned—or at any time before the suit was initiated—the Bank would have had access to a copy and would never have represented otherwise to the court. This too, therefore, is evidence that the allonge was not attached to, or even together with, the note when the allonge was scanned. *See Carvell v. Kinsey*, 87 So. 2d 577, 579 (Fla. 1956) ("…parties-litigant are bound by the allegations of their pleadings and … admissions contained in the pleadings … are accepted as facts without the necessity of supporting evidence").

[54] Complaint, March 26, 2008, ¶ 17 (R. 3).

And tellingly, the witness admitted that he did not know whether the allonge presented with the note as Exhibit 1 was an original or not.[55] This admission is particularly critical because, if it could be a copy, it means the original was never permanently affixed as required—and the witness was fully aware of that shortcoming.[56]

In short, the witness failed to testify that the allonge was affixed to the note on or before the day the lawsuit was filed and, in effect, conceded that it was not. The witness also did not testify that the Bank—or the servicer on behalf of the Bank (rather than CMMC, for example)—possessed the original of the fully endorsed note. Involuntary dismissal, therefore, was appropriate on this issue alone. *Kiefert v. Nationstar Mortg., LLC*, 39 Fla. L. Weekly D2591 (Fla. 1st DCA Dec. 16, 2014); *Sosa v. U.S. Bank National Association*, ___ So. 3d ___, 39 Fla. L. Weekly D2554 (Fla. 4th DCA December 10, 2014) (judgment reversed and case remanded for involuntary dismissal where bank failed to prove date of endorsement).

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[55] T. 116-17.

[56] The Bank also introduced (over objection) a printout of the "MAS1/AQN1" screen (Exhibit 7) which the witness at first described as showing "how and when we acquired the rights to the loan." (T. 57). "We," however, refers to his employer, the servicer, because the document shows a servicing transfer on September 15, 2005 (T. 60). It does not show a transfer of the note to the plaintiff Bank.

The Bank had it day in court.

Where a foreclosing plaintiff fails to establish its standing at the inception of the lawsuit, reversal of the final judgment and entry of an involuntary dismissal on remand is appropriate. *See Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So. 3d 152 (Fla. 1st DCA 2014); *Correa v. U.S. Bank, N.A.*, 118 So. 3d 952, 955 (Fla. 2d DCA 2013); *cf. Guerrero v. Chase Home Fin., LLC*, 83 So. 3d 970, 973 (Fla. 3d DCA 2012) (remanding with specific directions to allow the plaintiff to properly reestablish the note upon a proper pleading—but only because the evidence "confirmed the current owner/holder's entitlement to foreclose the mortgage attached to the complaint").

Litigants are not permitted "mulligans" or "do-overs" when it comes to trial. *See Pain Care First of Orlando, LLC v. Edwards*, 84 So. 3d 351, 355 (Fla. 5th DCA 2012) (Reversing damages award but finding new trial unwarranted because "[h]aving proceeded to judgment on legally insufficient proof, Appellee does not get a do-over."); *J.J. v. Dep't of Children & Families*, 886 So. 2d 1046, 1050 (Fla. 4th DCA 2004) ("No statute or rule permitted the trial court to give the [plaintiff] a "do-over" after a three and a half-day trial."); *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, ___So. 3d. ___, 39 Fla. L. Weekly D1159, at *3 (Fla. 2d DCA May 30, 2014) (reversing for entry of order of dismissal because "[a]ppellate courts do

not generally provide parties with an opportunity to retry their case upon a failure of proof." [internal quotation omitted]). Accordingly, upon reversal of the judgment, this Court should also instruct the trial court to enter an involuntary dismissal of the case.

II. The witness was not qualified to lay the foundation for a business records exception for the exhibits because hearsay cannot be used to establish a hearsay exception.

Personal knowledge of how, when and why the records were created and kept is an essential requirement of due process.

The question at the core of this issue is what may constitute the "personal knowledge" required for a witness to authenticate documents and to lay the foundation for a business records exception to hearsay for those documents. Specifically, it presents the question whether the party offering those documents as evidence may convey information to its otherwise unknowledgeable witness to create a veneer of "personal knowledge" with two simple preparatory steps:

- having its witness read the documents before trial; and
- telling its witness what to say in court about its record-keeping practices.

The personal knowledge required to introduce a company's records is not familiarity with what the records say, but with the facts of how, when, and why the records were created and kept. To hold that the personal knowledge requirement

for authenticity and the business records hearsay exception can be satisfied by reading the records themselves, is to make all records admissible and the hearsay rule superfluous. And to hold that a witness may be trained what magic words to say about the company's alleged recordkeeping practices so as to appear to meet the business records exception—even if the witness has no personal knowledge whether such practices actually exist—is to admit hearsay based on hearsay.

To properly authenticate the documents before admitting them into evidence, George would have had to be sufficiently familiar with them to testify that they are what the Bank claims them to be. § 90.901, Fla. Stat. Moreover, to overcome the hearsay objections made to each and every exhibit, the Bank would have had to first lay the predicate for the "business records" exception. There are five requirements for such an exception:

1) The hearsay document was made at or near the time of the event;
2) The hearsay document was made by or from information transmitted by a person with knowledge;
3) The hearsay document was kept in the ordinary course of a regularly conducted business activity;
4) It was a regular practice of that business to make such the hearsay document; and
5) The circumstances do not show a lack of trustworthiness.

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

But to even be permitted to testify to these threshold facts, the witness must be a records custodian or an otherwise "qualified" witness—that is, one who is in charge of the activity constituting the usual business practice or sufficiently experienced with the activity to give the testimony. *Hunter v. Aurora Loan Servs., LLC*, 137 So. 3d 570, 573 (Fla. 1st DCA 2014) (finding witness unqualified where the witness "lacked particular knowledge of a prior servicer's record-keeping procedures and "[a]bsent such personal knowledge, he was unable to substantiate when the records were made, whether the information they contain derived from a person with knowledge, whether [the previous servicer] regularly made such records, or, indeed, whether the records belonged to [the previous servicer] in the first place."); *Burdeshaw v. Bank of New York Mellon*, 148 So. 3d 819 (Fla. 1st DCA Oct. 13, 2014) (reversing and remanding for dismissal because bank failed to establish any foundation qualifying the exhibit as a business record or its witness "as a records custodian or person with knowledge of the four elements required for the business records exception"); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So. 3d 152 (Fla. 1st DCA 2014) (reversing and remanding for dismissal because bank's witness was not a records custodian for the current servicer or any of the previous servicers); *Holt v. Calchas, LLC*, 39 Fla. L. Weekly D2305 (Fla. 4th DCA

November 5, 2014) (witness was not qualified to introduce bank's payment records over hearsay objection).

See also Yang v. Sebastian Lakes Condo. Ass'n, 123 So. 3d 617, 621 (Fla. 4th DCA 2013) (holding that despite witness's use of "magic words"—the elements of a business records exception to hearsay—records were inadmissible because the witness did not have the personal knowledge required to lay a foundation for business records of an entity for whom she had never worked and about whose record-keeping practices she had no personal knowledge); *Mazine v. M & I Bank*, 67 So. 3d 1129, 1131 (Fla. 1st DCA2011) (holding that a witness was not qualified because the witness "had no knowledge as to who prepared the documents submitted at trial by the bank as he is not involved in the preparation of documents such as the ones proffered by the bank, that he does not keep records as a records custodian, that he has no personal knowledge as to how the information…was determined…"); *Lassonde v. State*, 112 So. 3d 660, 662 (Fla. 4th DCA 2013) ("The customer service clerk's testimony does not meet the requirements of *Yisrael*. While the clerk was able to testify as to how the store re-rings merchandise stolen from the store, this was not his duty nor within his responsibilities."); *Snelling & Snelling, Inc. v. Kaplan*, 614 So. 2d 665, 666 (Fla. 2dDCA 1993) (holding that a witness who relied on ledger sheets prepared by

someone else was not sufficiently familiar with the underlying transactions to testify about them or to qualify the ledger as a business record); *Alexander v. Allstate Ins. Co.*, 388 So.2d 592, 593 (Fla. 5th DCA 1980) (holding that an adjuster was not qualified to testify about the usual business practices of sales agents at other offices).

See also Specialty Linings, Inc. v. B.F. Goodrich Co., 532 So. 2d 1121, 1122 (Fla. 2dDCA 1988) (testimony was insufficient under the business records exception to hearsay because the witness was not the custodian, and was not in charge of the activity constituting the usual business practice); [redacted] *v. Money Store/Florida, Inc.*, 464 So. 2d 1309, 1310 (Fla. 4th DCA 1985) (statement that demonstrates no more than that the documents in question appear in the company's files and records is insufficient to meet the requirements of the business record hearsay exception); *Holt v. Grimes*, 261 So. 2d 528, 528 (Fla. 3d DCA 1972) (records properly excluded where there was "no testimony as to the mode of preparation of these records nor was the witness testifying in regard to the records in the relationship of 'custodian or other qualified witness'"); *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825 (Fla. 3dDCA 2014) (holding that without the proper foundation, the documents relied upon by the professional witness were indisputably hearsay.)

Here, the Bank's witness, Jason George,[57] was employed by the Bank's servicer, JPMorgan Chase, for less than three years.[58] Prior to that, he was a cabinet installer and foreman with a company known as Micavisions.[59]

His job title with the servicer was "Home Loan and Research Officer" which required him to review documents and records related to loans in default and to testify at trials and depositions for as much as three or four hours a day.[60] He has some weeks where he is in trial every single day.[61]

He was trained for this job by both in-house and outside counsel.[62] In fact, George received "months and months['] worth of training."[63] The training includes role-playing the part of being a witness being questioned by defense counsel.[64]

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[57] T. 25.

[58] T. 40.

[59] T. 94.

[60] T. 41, 90.

[61] T. 90.

[62] T. 92.

[63] T. 93.

[64] T. 91-92.

George did not supervise anyone[65] and had never worked as a loan processer during his time with the servicer.[66] In fact, the only three departments he had worked in were all litigation related: 1) the foreclosure department; 2) the mediation department; and 3) the litigation support department.[67]

George did not work in any of the departments that created or kept the records which he identified and introduced. Specifically, he did not work in the department responsible for maintaining the Power of Attorney (Exhibit 8).[68] He did not work in the department that maintains the scanned image of the allonge (Exhibit 5).[69] He did not work in any of the three departments responsible for entering the information found on the payment history (Exhibit 4).[70] He was not in charge of maintaining payment histories or involved in inputting the data.[71]

He had not seen the case-specific documents until preparing for his testimony—probably no more than a month before trial.[72] His only interaction

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[65] T. 93.

[66] T. 96.

[67] T. 89.

[68] T. 105.

[69] T. 108, T. 118.

[70] T. 119-120.

[71] T. 120.

[72] T. 114.

with the loan was with regard to litigation.[73] He had only "recently" seen the payment history, a document that he did not himself print out.[74] He could not explain why the payment history does not display the due date to which the payments are applied, which he testified is normally shown on every line.

George's testimony was also clear that the payment history encompassed records from the prior servicer. Recognizing this, the trial court requested that George lay the foundation for admission of such records.[75] All George's testimony established on this point, however, was that the payment history reflected what George termed "the new loan setup value."[76] He had never worked for the previous servicer or read its policies and procedures.[77]

Without testimony that the servicer had checked the accuracy of the prior servicer's records, George could not lay the predicate for admission of the "New Loan Set Up" value which was based entirely on the prior servicer's records. *See Bank of New York v. Calloway*, Case No. 4D13-2224 (Fla. 4th DCA January 7, 2015) (holding that prior servicers' records were admissible where there is

[73] T. 127.

[74] T. 130.

[75] T. 51.

[76] T. 52.

[77] T. 129.

testimony that the new servicer reviewed the accuracy of all information transferred to it upon acquiring a loan, so long as the testimony is not from a "'robo' witness").

In short, George was the sort of "robo" witness this Court warned of in *Calloway*. While certainly well trained in the art of giving hearsay testimony, he was not a records custodian or other qualified witness since he was neither in charge of, nor (other than through hearsay) acquainted with, any of the activity constituting usual business practices for creating and maintaining the payment history, the scanned image of the allonge, and the Power of Attorney. George's only connection to the documents were that he had read them and, through his "months and months" of training, had been coached what to say when a lawyer asked a business records foundation question.

Thus, the Homeowners' objections to these exhibits should have been sustained. The witness's testimony is legally insufficient to support the judgment.

The myth that bank records are inherently trustworthy.

Another typical bank argument is that bank records are commonly viewed as particularly trustworthy, and therefore, the hearsay rules should be loosened as to them.

There can be no doubt that the business records hearsay exception is conditioned upon the records being considered "trustworthy." The Florida rule itself provides that records of regularly conducted business activity are admissible "unless the sources of information or other circumstances show lack of trustworthiness." § 90.803(6)(a), Fla. Stat. Trustworthiness, therefore, is an additional requirement for admissibility, not a shortcut that bypasses the other criteria.

Moreover, the era when banking records were considered trustworthy, at least in the context of foreclosure litigation, is long gone. Now, the banking industry's flagrant abuse of the judicial system with perjured affidavits in which the affiants falsely claimed personal knowledge (robo-signing) has become common knowledge—so much so that a definite absence of trustworthiness may well be judicially noticed. *See Pino v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011) ("…many, many mortgage foreclosures appear tainted with suspect documents."); Memorandum No. 2012-AT-1803 of the Office of the Inspector General of the Department of Housing and Urban Development, September 28, 2012 (concluding that the five largest servicers had "flawed control environments" which permitted robo-signing, the filing of improper legal documents, and, in some cases, mathematical inaccuracies in the amounts of the

borrowers' indebtedness);[78] Press Release of the Department of Justice Financial Fraud Enforcement Task Force, March 12, 2012 and related court filings.[79]

Arguably, this well-known lack of trustworthiness is enough to hold that banks can never qualify for the business records hearsay exception in a foreclosure case. But at a minimum, the banks cannot be told that they may skip bringing a qualified witness to establish authenticity or to lay the foundation for the business-record hearsay exception because banks are somehow more worthy of the court's trust than the average litigant.

The question remains why experience has proven the unreliability of bank foreclosure records—a finding that runs counter to the experience with records from other businesses, as well as traditional dogma. As this Court noted in *Calloway*, "[t]he rationale behind the business records exception is that such documents have a high degree of reliability because businesses have incentives to keep accurate records." But that incentive is driven by a profit motive—the desire to keep customers. For example, a dry cleaner is motivated to keep careful records of the clothes he receives for cleaning, because a pattern of losing the clothes will result in a loss of customers.

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[78] Available at: http://www.hudoig.gov/sites/default/files/Audit_Reports/2012-CH-1803.pdf

[79] Available at: http://www.nationalmortgagesettlement.com/.

A servicer, on the other hand, has no motivation to keep accurate records for its "customers"—the borrowers—because these customers have no option to go to a different servicer if they find its recordkeeping unreliable. Servicers are motivated only to serve their principals, the owners of the loan and themselves (to the extent that they profit from the generation of additional fees, such as late fees or inflated insurance payments[80]). And their principals are motivated only to maximize their return on their investment in the note which means that a servicer's unreliability is acceptable so long as it is in their favor. When a note is not performing, the only check against absolute fabrication is the courts themselves.

Stated plainly, the appellate record is devoid of any suggestion that the servicer proffering this evidence suffers any financial penalty if the records it inherits are inaccurate. And court opinions that give banks an evidentiary pass only increase the likelihood that their records are untrustworthy.

The myth that providing admissible evidence from qualified witnesses is "impractical."

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

[80] *See for example, JPMorgan $300M Settlement Over Force-Placed Insurance Approved*, Insurance Journal, March 3, 2014, available at, http://www.insurancejournal.com /news/national/2014/03/03/321966.htm.

1989). The foreclosing banks often argue, however, that the court should excuse them from the rules because it would be impractical for the banks to comply with the Florida hearsay exception rule when the paperwork has been prepared by different entities and departments located far from the courthouse. Ignoring for the moment the impropriety of making evidentiary rulings based on the unproven impact it would have on nonparties, Florida law has already provided a practical, efficient means for foreclosing banks to introduce records from far-flung departments or corporate affiliates.

Section § 90.902(11), Fla. Stat. provides that the records custodian or qualified person need not be present in court to lay the business record foundation for documentary evidence. Instead, their testimony may be admitted through an affidavit (a "certification or declaration"):

> (11) An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another qualified person certifying or declaring that the record:
>
> (a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;
>
> (b) Was kept in the course of the regularly conducted activity; and
>
> (c) Was made as a regular practice in the course of the regularly conducted activity,
>
> provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed.
>
> § 90.902, Fla. Stat.

See also § 90.803(6)(c), Fla. Stat. (providing the procedure for using such an affidavit, which includes reasonable notice before trial and, if opposed, a pre-trial motion); *Yisrael v. State*, 993 So. 2d at 957. Indeed, the courts have already suggested that foreclosing banks can meet the hearsay exception requirements in exactly this manner. *Mazine v. M & I Bank*, 67 So. 3d at 1132.

In this case, however, the Bank chose not to avail itself of this rule which seems specifically designed to simplify the procedure by which the records of modern, highly departmentalized and geographically dispersed corporations may be admitted into evidence. It is telling that the Bank chose to conduct this

litigation without any certifications or declarations, despite the relative ease of doing so. Presumably, it would have been as easy—if not easier—to provide these certifications from legitimately qualified witnesses—ones who work in the relevant departments—than to attempt to train one person on all aspects of the Bank's business.

Thus, even if it were proper for the Court to concern itself with the ramifications of evidentiary rulings on the economic well-being of the litigants or non-parties, it is unnecessary to ignore binding precedent or to rewrite the rules of evidence to allay that concern.

III. The Bank should not have been awarded attorneys' fees solely on the basis of the affidavits over the Homeowners' objection.

Finally, the final judgment found the Homeowners liable for $3,893.00 in attorneys' fees.[81] However, the Bank's attorney did not testify as to the number of hours spent on the case nor was there any expert witness testimony as to the reasonableness of the fee. Rather, the trial court based the award solely on affidavits[82] even though the Homeowners objected to the use of affidavits in lieu of live testimony[83] which the court was not at liberty to do. *Dhondy v. Schimpeler*,

[81] Final Judgment, pg. 2, April 10, 2014 (R. 731).

[82] T. 225-26.

[83] T. 224.

528 So.2d 484 (Fla. 3d DCA 1988) (reversing fee award and remanding for an evidentiary hearing on the issue where defendant objected to the use of affidavit in awarding the fee); *Demaso v. Demaso*, 345 So. 2d 391 (Fla. 3d DCA 1977). *See also Geraci v. Kozloski*, 377 So.2d 811, 812 (Fla. 4th DCA 1979) ("In an adversary proceeding such as this the determination of an attorneys['] fee for the mortgagee based upon affidavits over objection of the mortgagor is improper. Evidence should be adduced so that the full range of cross examination will be afforded both parties."); S*oundcrafters, Inc. v. Laird*, 467 So. 2d 480, 481 (Fla. 5th DCA 1985) ("the trial court erred in permitting Laird's sole expert to testify by way of affidavit over Soundcrafters' objection").[84]

The trial court apparently found that the Homeowners had waived the right to an evidentiary hearing on the attorneys' fee award because the Bank's attorney had remarked that an affidavit had been filed.[85] But the Bank never marked or proffered the affidavit as an exhibit, nor did the Homeowners ever treat the affidavit as if it had been submitted into evidence. The Homeowners, therefore,

[84] Moreover, the amount awarded in the judgment exceeds, albeit minimally, that which was stated in the affidavit (Affidavit of Attorneys' Fees and Costs, R. 708) and that which was said to be reasonable in the expert's affidavit (Affidavit as to Reasonable Attorneys Fees, R. 705).

[85] T. 76 (statement from the Bank's attorney that an affidavit of attorney's fees and costs had been filed); T. 225-226 (argument that the issue had been waived and the trial court's decision that the issue had in fact been waived).

never waived their right to an evidentiary hearing on the issue. *Cf. State v. Caldwell*, 388 So.2d 640, 641 (Fla. 1st DCA 1980) (finding court did not err in considering affidavit not in evidence where the parties treated it as though it was entered into evidence and the testimony regarding attorneys' fees was based on the affidavit).

The trial court therefore erred in awarding attorneys' fees without testimony of the attorney as to the number of hours spent on the case or testimony from an expert witness as to the reasonableness of the fee. *Miller v. The Bank of New York Mellon*, Case No. 4D13-3576 (Fla. 4th DCA November 5, 2014) (reversing final judgment of foreclosure because the attorneys' fee award was not supported by expert testimony); *Raza v. Deutsche Bank Nat. Trust Co.*, 100 So. 3d 121 (Fla. 2d DCA 2012) (affirming denial of motion for attorneys' fees in foreclosure action because attorney failed to present evidence of number of hours spent); *Saussy v. Saussy*, 560 So. 2d 1385, 186 (Fla. 2d DCA 1990) ("To support a fee award, there must be the following: 1) evidence detailing the services performed and 2) expert testimony as to the reasonableness of the fee.").

If the Court reaches this issue, it should reverse and remand for a hearing on attorneys' fees.

CONCLUSION

The Court should reverse the judgment and remand for entry of dismissal of the case with prejudice. If, however, the Court should not reverse on either of the first two issues, it should reverse and remand for a hearing on attorneys' fees.

Dated: January 14, 2015

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this January 14, 2015 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this January 14, 2015.

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