In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

CITIMORTGAGE, INC., et al.,

Appellees.

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

INITIAL BRIEF OF APPELLANTS

Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

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STATEMENT OF THE CASE AND FACTS

I. Introduction

[redacted] and [redacted] (collectively, "the Homeowners") appeal the final judgment of foreclosure rendered in favor of CitiMortgage, Inc. ("the Bank") after a non-jury trial.

II. Appellants' Statement of the Facts

A. The Pleadings

The Bank initiated this action when it filed its one-count mortgage foreclosure complaint.[1] According to Paragraph 22 of the subject mortgage, the lender is required to send the Homeowners written notice of default and an opportunity to cure prior to acceleration and foreclosure.[2] Paragraph 15 of the mortgage requires that such notices be sent to the Homeowners at the property address unless the Homeowners provided the lender with notice—in writing—of an alternate address.[3]

In their answer to the Bank's complaint, the Homeowners denied, among other things, that the Bank had complied with conditions precedent to

[1] Complaint, May 3, 2012 (R. 7-50).

[2] Mortgage attached to the Complaint, May 3, 2012, ¶ 22 (R. 39).

[3] Mortgage attached to the Complaint, May 3, 2012, ¶ 15 (R. 36).

foreclosure—namely, Paragraph 22 of the mortgage.[4] As an affirmative defense, the Homeowners alleged that they did not receive the notice required by Paragraph 22.[5]

In its reply, the Bank sought to avoid the Homeowners' affirmative defense of lack of notice by asserting that the required notice was provided to the Homeowners on or about November 26, 2010.[6] The notice attached to this pleading, however, indicates that the notice was sent to a P.O. Box rather than the property address as required by Paragraph 15 of the mortgage.[7]

B. The Trial

The Bank's only witness, Kathy Subosky, testified that her position with the Bank was in business operations[8] and that she had spent the past seven years doing litigation support for the Bank.[9] Over the Homeowners' objections to hearsay and

[4] Answer, ¶8, September 28, 2012 (R. 116).

[5] Second Affirmative Defense, Plaintiff Failed to Comply with Conditions Precedent, September 28, 2012 (R. 119).

[6] Plaintiff's Reply to Defendants' Affirmative Defenses, ¶4, April 4, 2013 (R. 135).

[7] Default Notice dated November 26, 2010 attached to Plaintiff's Reply, April 4, 2013 (R. 137-138).

[8] Transcript of Trial Before Lawrence Schwartz, July 30, 2014 (Supp. 1; "T. __"), at 5.

[9] T. 11.

authenticity, the court admitted all the Bank's exhibits, including the alleged default letter dated November 26, 2010 (Exhibit 4).[10]

Subosky admitted that she had never seen the actual default notice allegedly mailed to the Homeowners because no photocopy was ever made. Exhibit 4 was a mere computer regeneration of the language allegedly used in the notice.[11] Indeed, the default notice provides in capital letters that it was an INTERNET REPRINT.[12]

In any event, Subosky testified that the notice was mailed November 26, 2010,[13] although she admitted that it was sent to the post office box found on the letter rather than the property address.[14] She also admitted that she had no knowledge whether the Homeowners actually received it.[15]

On redirect, the Bank introduced its final exhibit, a single page of "collection notes" (printed two days before trial) which purportedly reflected a phone conversation on January 21, 2011—nearly two months after the default letter was allegedly sent.[16] According to Subosky, this document "indicate[d] that

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[10] T. 23.

[11] T. 22.

[12] Default Notice dated November 26, 2010, Exhibit 4.

[13] T. 20.

[14] T. 18.

[15] T. 23-24.

[16] T. 47.

there was a discussion with Mr. [redacted] that he indicated that the PO Box was much easier and that he is living in the property."[17] Over the Homeowners hearsay and completeness objection, the collection notes were admitted into evidence (Exhibit 6).[18]

After the Bank rested, the Homeowners moved for an involuntary dismissal arguing that the Bank failed to comply with the conditions precedent to foreclosure since the notice was not sent to the property address as required by the security instrument and that there was no basis to believe that the Homeowners actually received it.[19] This motion was denied.[20]

The defense case consisted of the testimony of Mr. [redacted] who testified that the first notice he received regarding a potential foreclosure of his mortgage was when he was served with the lawsuit, that he had never seen the default notice prior to the day of trial, and that he never authorized any servicer to send notices to any address other than the property address.[21]

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[17] T. 46.

[18] T. 47-48.

[19] T. 48-49.

[20] T. 50.

[21] T. 52.

After the close of evidence, the Homeowners renewed their motion for involuntary dismissal but judgment was entered in the Bank's favor.[22]

This appeal followed.

[22] T. 55.

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. The Bank failed to prove that it complied with the notice provisions of the mortgage. There was no evidence that the default notice required by Paragraph 22 of the mortgage was actually mailed to the Homeowners. And even if the notice was mailed, the only evidence at trial was that it was not sent to the property address as required by Paragraph 15 of the mortgage. There was no evidence that the Homeowners changed their notice address in writing (or otherwise) before the date of the default notice. And finally, there was no evidence that the Homeowners actually received the notice, and if so, when.

The Court, therefore, should reverse the judgment in the Bank's favor and remand for entry of an involuntary dismissal.

STANDARD OF REVIEW

A trial court's ruling of a motion for involuntary dismissal is reviewed *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. 2d DCA 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. 3d DCA 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).

ARGUMENT

- **The trial court erred in denying the Homeowners' motion for involuntary dismissal because there was no evidence that the Bank complied with conditions precedent.**

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. *Valdes v. Association Ined, HMO, Inc.*, 667 So. 2d 856, 856-57 (Fla. 3dDCA 1996). Because no view of the evidence or testimony presented at trial establishes this, the trial court erred in denying the motion.

Paragraph 22 of the Homeowners' mortgage provides that the borrower must be given thirty-days' notice to cure a default before the lender may bring a foreclosure action:

> Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure

> proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure.[23]

It is black letter law that this language in the mortgage is clear, unambiguous, and creates conditions precedent to filing foreclosure. *Konsulian v. Busey Bank, N.A.*, 61 So.3d 1283 (Fla. 2d DCA 2011). Furthermore, where, as here, a mortgage contains specific requirements for the contents of the pre-acceleration notice that must be given, a plaintiff is not entitled to foreclosure unless the evidence shows that it provided notice in a form that included all of the required contents. *Kurian v. Wells Fargo Bank, N.A.*, 114 So.3d 1052, 1055 (Fla. 4th DCA 2013) (finding notice insufficient for failing to "advise of the default, provide an opportunity to cure, or provide thirty days in which to do so"); *Haberl v. 21st Mortg. Corp.*, 138 So. 3d 1192 &n.1 (Fla. 5th DCA 2014) (finding notice insufficient for failing to meet mortgage's requirements of informing the borrower of "the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or other defense of borrower to acceleration and foreclosure").

Paragraph 15 of the mortgage provides that notices, such as the default notice of Paragraph 22, be in writing and that the Borrower is deemed to have

[23] Paragraph 22 of the mortgage (R. 263).

received the notice the moment that it is sent by first class mail.[24] But it also provides that the notice be sent to the "Borrower's notice address" defined as "the Property Address unless Borrower has designated a substitute notice address by notice to Lender."[25] (That communication from the Borrower of a change of address must, by definition, be written because all notices under the mortgage must be written.) If the Bank's default notice is not mailed to the Borrower's notice address, it is not deemed to have been given until it is shown that the Borrower actually received it—at the notice address:

> 15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notices to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly required otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. …[26]

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[24] Paragraph 15 of the mortgage (R. 266).

[25] *Id.* (emphasis added).

[26] *Id.* A similar requirement is found in the subject note at Paragraph 7 (R. 250).

Therefore, when a borrower makes a specific denial that the lender has complied with Paragraph 22 of the mortgage and specifically pleads that the borrower has not received the notice, the lender must prove that it either complied with the notice provisions or the borrower actually received the notice in order to foreclose. *Ramos v. CitiMortgage, Inc.*, 146 So. 3d 126 (Fla. 3d DCA 2014) (reversing summary judgment of foreclosure where paragraph 22 notice was not sent to the property address and there was no evidence that the borrower had either provided the lender an alternate address or actually received the notice).

The Homeowners' answer specifically denied that the Bank had complied with Paragraph 22 of the mortgage.[27] And in their affirmative defenses, the Homeowners specifically pled that they did not receive the required notice.[28] Therefore, the Bank was required to prove that it either complied with the mortgage's notice provisions (i.e. Paragraphs 15 and 22), or that the Homeowners actually received the notice.

[27] Answer, ¶8, September 28, 2012 (R. 116).

[28] Second Affirmative Defense, Plaintiff Failed to Comply with Conditions Precedent, September 28, 2012 (R. 119).

A. There was no evidence that the Paragraph 22 notice was sent to the Homeowners' notice address.

It is undisputed that the notice admitted into evidence was not sent to the property address.[29] Accordingly, under Paragraph 15, the notice was not given unless there is evidence that the Homeowners changed their notice address in writing. Here, the court erroneously permitted Subosky to testify over objection that the Homeowners had changed their notice address to the post office box used in the default letter. *Webster v. Chase Home Finance, LLC*, Case No. 5D14-511 (Fla. 5th DCA January 16, 2015) ("The trial court should have required [the bank] to present its business record of the written change-of-address document that it claims [the borrower] executed to change the address where notice was to be provided. The trial court abused its discretion in allowing this oral testimony over [the defendant's objection."). But even if this testimony had been admissible, Subosky never testified when the change was made or that it was in writing.[30]

On cross-examination, Subosky admitted that she was referring to a phone call that was evidenced by a document that was not in evidence.[31] On redirect, the

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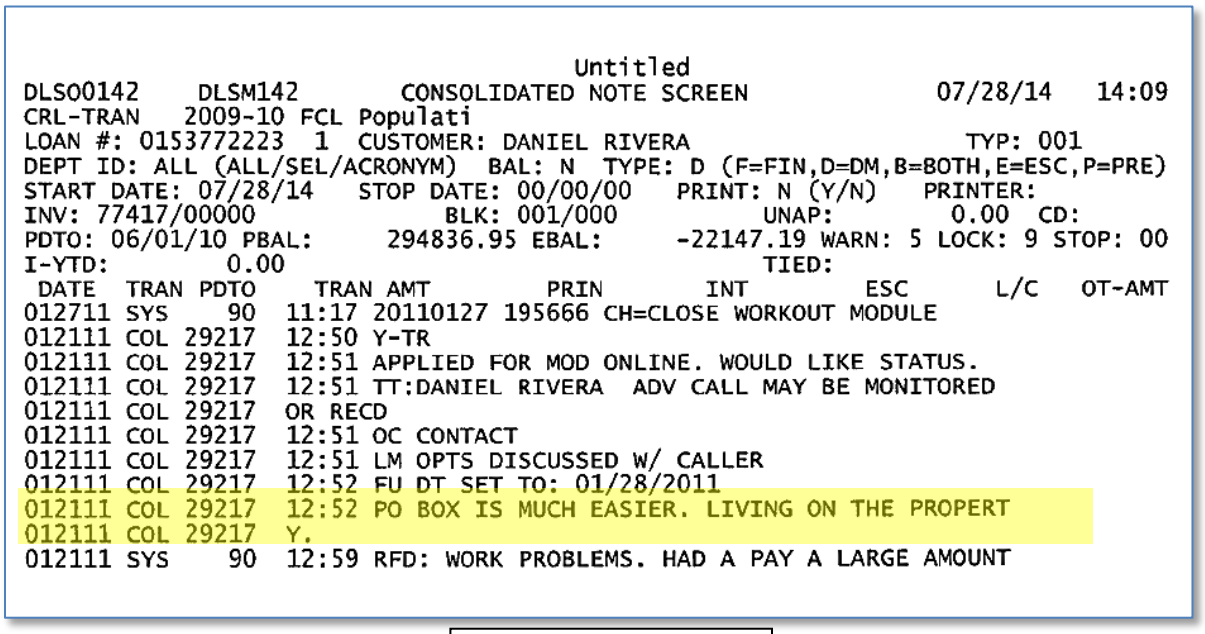
[29] Default Notice dated November 26, 2010, Exhibit 4 (indicating that property address is 1225 Egret Road Homestead, FL 33035 but that the notice was mailed to a P.O. Box; T. 18 (Subosky's testimony that the notice was addressed to the P.O. Box).

[30] T. 18-19.

[31] T. 41-42.

court allowed Subosky to introduce a "collection note" (Exhibit 6) that indicated that "the PO Box was much easier."[32]



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                                    Untitled
DLS00142    DLSM142       CONSOLIDATED NOTE SCREEN              07/28/14   14:09
CRL-TRAN   2009-10 FCL Populati
LOAN #: 0153772223  1  CUSTOMER: DANIEL RIVERA                     TYP: 001
DEPT ID: ALL (ALL/SEL/ACRONYM)  BAL: N  TYPE: D (F=FIN,D=DM,B=BOTH,E=ESC,P=PRE)
START DATE: 07/28/14   STOP DATE: 00/00/00   PRINT: N (Y/N)   PRINTER:
INV: 77417/00000              BLK: 001/000          UNAP:         0.00  CD:
PDTO: 06/01/10 PBAL:     294836.95 EBAL:     -22147.19 WARN: 5 LOCK: 9 STOP: 00
I-YTD:        0.00                                TIED:
 DATE  TRAN PDTO    TRAN AMT        PRIN       INT        ESC       L/C   OT-AMT
012711 SYS    90  11:17 20110127 195666 CH=CLOSE WORKOUT MODULE
012111 COL 29217  12:50 Y-TR
012111 COL 29217  12:51 APPLIED FOR MOD ONLINE. WOULD LIKE STATUS.
012111 COL 29217  12:51 TT:DANIEL RIVERA  ADV CALL MAY BE MONITORED
012111 COL 29217  OR RECD
012111 COL 29217  12:51 OC CONTACT
012111 COL 29217  12:51 LM OPTS DISCUSSED W/ CALLER
012111 COL 29217  12:52 FU DT SET TO: 01/28/2011
012111 COL 29217  12:52 PO BOX IS MUCH EASIER. LIVING ON THE PROPERT
012111 COL 29217  Y.
012111 SYS    90  12:59 RFD: WORK PROBLEMS. HAD A PAY A LARGE AMOUNT
```

Exhibit 6

This document, however, does not say that the Homeowners were requesting a change of address or even identify what post office box should serve as the new address. Indeed, Subosky admitted that the document did not demonstrate that the Homeowners requested that notice be sent to a specific address.[33]

[32] R. 291.

[33] T. 47.

Furthermore, Subosky admitted that the document pertained to only one day—January 21, 2011.[34] That day was nearly two months after the default letter was allegedly sent. If the phone call could serve as a change of address, it did not occur until after the mailing of the Paragraph 22 letter. Additionally, Subosky admitted that there were other notes both before and after the single day placed in evidence—notes that the court refused to require the Bank to provide under the rule of completeness.[35] Those records, of course, may well have provided additional information helpful to the Homeowners regarding the alleged change of address.

Finally, and most importantly, the collection note is not a written request from the Homeowners to change their notice address. While phone calls may be sufficient to change an address for routine communications, such as billing, offers of new services, etc. (and there is no evidence that this is not what is being referred to in Exhibit 6), it is not sufficient under Paragraph 15 to change a Borrower's notice address for critical legal notices.

Because there was no evidence that the default letter was mailed to the Homeowners' notice address, Paragraph 15 required the Bank to prove that it was

[34] T. 47.

[35] T. 47-48.

actually received by them at that address and when it was received by them. Because the cure date is stated exactly thirty days after the date on the letter, it was crucial for the Homeowners to have received the letter that same day in order for the Bank to comply with Paragraph 22's thirty-day grace period to cure. If the notice is sent in accordance with Paragraph 15, then the Homeowners are "deemed" to have received the default letter on the same day it was sent. But if the notice is not sent in accordance with Paragraph 15, there needed to be proof, not only that the Homeowners actually received the letter—but that they received it on the very same day it was sent. Moreover, there needed to be proof that the Homeowners received it at the property address that day, not the post office box.

Subosky admitted, however, that she had no knowledge whether the Homeowners actually received it.[36] Mr. however, testified that the first notice he received regarding a potential foreclosure of his mortgage was when he was served with the lawsuit, that he had never seen the default notice prior to the day of trial, and that he never authorized any servicer to send notices to any address other than the property address.[37]

[36] T. 24.

[37] T. 52.

Because the Bank failed to prove that it complied with the notice provisions or that the Homeowners actually received the notice, the Homeowners' motion for involuntary dismissal should have been granted.

B. There is no admissible evidence that the default notice was sent by first class mail or sent on the date printed on the regenerated replica of the letter.

Even if the Bank had shown that the regenerated likeness of the letter bore the correct notice address, the Bank failed to present any competent, substantial evidence of the manner and date that the notice was sent.

On direct of Subosky, the Bank adduced a single document—purportedly a copy of the notice itself—to prove that it sent a notice.[38] But on a direct question from the trial court, Subosky admitted that the actual notice which was allegedly mailed was never photocopied nor had she ever seen a copy of that notice.[39] And while the witness testified (over the Homeowners' hearsay and authenticity objections) that the notice was mailed first class mail,[40] she did not testify that she

[38] T. 23 (Subosky testified that "once it [the notice] shows in our system it's mailed; that's my record?...Once I see in the system, it's been mailed.")

[39] T. 22.

[40] T. 45.

had any independent knowledge of this nor did she produce any document proving this claim.[41]

And this testimony was critical because Paragraph 15 of the mortgage requires that all notices sent pursuant to the mortgage are deemed to have been given either when mailed by first class mail or when actually delivered to the Homeowners.[42] Here, there was no evidence to find that the conditions had been satisfied for the notice to "be deemed to have been given" because there was no admissible evidence (other than Subosky's hearsay testimony)[43] that the letter was

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[41] Notably, the court also erred in preventing any cross-examination intended to establish that Subosky was not qualified to testify about the routine mailing procedures of the company:

> MR. ACKLEY [Homeowners' attorney]: You don't supervise anybody in the mailroom that generates these letters, do you?
>
> MS. HILLIS [Bank's lawyer]: Objection, relevance.
>
> THE COURT: Sustained.
>
> MR. ACKLEY: Have you ever been involved with generating these letters.
>
> MS. HILLIS: Objection, relevance.
>
> THE COURT: Sustained.

T. 22-23.

[42]Mortgage, pg. 13, ¶15, Exhibit 2.

[43] Overruling the Homeowners' objection to this testimony was an independent error which is subsumed within this argument.

sent by first class mail. In fact, the notice itself does not say anything about the manner in which it might have been sent.

The Bank could have tried to offer such proof that the notice was mailed by first class mail (and on the same day that the letter was dated) by way of testimony that it was the Bank's normal routine practice to immediately send such letters by first class mail. *See Brown v. Giffen Indus., Inc.*, 281 So. 2d 897, 900 (Fla. 1973) (the requirement of showing proper mailing satisfied by proof of general office practice); *Berwick v. Prudential Prop.&Cas. Ins. Co.*, 436 So. 2d 239, 240 (Fla. 3dDCA 1983) (same). But the Bank did not offer this testimony—nor was Subosky qualified to give such testimony—and therefore failed to establish this practice.

Finding that the Bank actually sent a notice in accordance with the mortgage requires more than the mere existence of some piece of paper that the Bank re-created for litigation purposes. There must be proof that the notice was actually sent as required by Paragraph 15 of the mortgage. Since the Bank failed to present any competent testimony or evidence indicating that the notice was sent as required, and because Mr. [redacted] testimony clearly established that the Homeowners did not receive the notice, there is no competent, substantial evidence

that the Bank complied with the mortgage's notice provisions. The Homeowners' motion for involuntary dismissal should therefore have been granted.

C. The proper remedy on remand is involuntary dismissal.

The default letter was a key element of the Bank's *prima facie* foreclosure case. *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825, 826 (Fla. 3d DCA 2014) ("To establish its entitlement to foreclosure, [the bank] needed to introduce the subject note and mortgage, an acceleration letter, and some evidence regarding the [borrowers'] outstanding debt on the note.") Therefore, in order for there to be sufficient evidence to support the judgment, there needed to be competent evidence that the Bank sent the Homeowners a notice that complies with Paragraph 22. Short of this, involuntary dismissal must be entered on remand. *Rashid v. Newberry Fed. S & L Ass'n.*, 526 So. 2d 772 (Fla. 3d DCA 1988) (holding that implicit in a prior decision by this Court reversing summary judgment of foreclosure for failure to give the required notice of default prior to instituting the foreclosure proceeding was that the case be dismissed on remand.)

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.

CONCLUSION

The Court should reverse the judgment and remand for entry of dismissal of the case with prejudice.

Dated: January 19, 2015

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

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.

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: 

THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this January 19, 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 19, 2015.

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: 
THOMAS ERSKINE ICE
Florida Bar No. 0521655

SERVICE LIST

Nancy M. Wallace, Esq.
William P. Heller, Esq.
AKERMAN LLP
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301
Las Olas Centre II, Suite 1600
350 East Las Olas Boulevard
Fort Lauderdale, Florida 33301
nancy.wallace@akerman.com;
[redacted]miller@akerman.com;
michele.rowe@akerman.com;
william.heller@akerman.com;
lorraine.corsaro@akerman.com
Counsel for Appellee