In the District Court of Appeal
Second District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] & [redacted]
Appellants,

v.

AMERICAN HOME MORTGAGE SERVICING, INC., ET AL.,
Appellees.

ON APPEAL FROM THE 20TH JUDICIAL
CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA

REPLY BRIEF OF APPELLANTS

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SUMMARY OF THE REPLY ARGUMENT

Not once during eighteen pages of ad hominem attacks on the [redacted] did the Bank identify a single line of trial testimony or a single page from its exhibits that supports the dollar amounts listed in the final judgment. The Bank's only effort to pinpoint any supporting trial evidence was a passing reference to a defense exhibit (a "payment history") that was printed over a year and a half before trial. If support for the final judgment figures could be found in that document, the Bank did not trouble itself to direct the Court to the specific pages where it was located. The judgment, therefore, is not supported by competent evidence and must be reversed.

The Bank chose not to address many of the issues raised in the Initial Brief (such as, the point that the Bank does not get a "mulligan" or "do-over" of the trial on remand or the point that there was no expert testimony to support an award of attorneys' fees). The Bank also chose not to address the key cases cited by the [redacted] (such as, the case finding that ambush tactics like those employed here had unfairly prejudiced the opposing party or this Court's opinion that a challenge to standing may be raised by means other than an affirmative defense). These unanswered points on appeal and uncontested citations to legal authority should be treated as concessions, which together, are tantamount to a confession of error.

ARGUMENT

I. There Was Not a Scintilla of Evidence to Support a Dollar Amount for the Judgment.

A. The amount of time it took the Bank to bring this case to trial is irrelevant to any issue on appeal.

No less than six times in its eighteen page brief—averaging once every third page—did the Bank[1] emphasize that the [redacted] have lived in the subject property "for over six years without making a payment."[3] This ad hominem attack is, of course, the last bastion of a litigant with no legal arguments—a scurrilous attempt to pander to the worst sort of prejudices that it hopes to find on the bench.

Moreover, the insinuation that the Bank has been financially harmed by the [redacted] because they dared oppose a lawsuit brought by a stranger to their promissory note, or demanded an accurate accounting of what is owed, is deceptively disingenuous. Unless the Bank is suggesting that the payments do not continue to accrue during the trial and appellate litigation, there is no evidence that the Bank will not be made whole should it ever prove its standing and the dollar amount that would make it whole (especially given the general rise in home prices over the last few years). Nor has there been any accounting for the resources that

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[1] American Home Mortgage Servicing, Inc. (The "Bank")

[2] [redacted] And [redacted] ("the [redacted]

[3] Answer Brief, pp. 5, 8, 10, 15 (twice), 16, not counting references in the Statement of Facts.

the [redacted] have expended to maintain the collateral (their home)—resources that the Bank would have been required to expend had the trial been sooner.

Worse, the Bank resorts to this highly improper denigration tactic to repeatedly say that any error in proving its standing, the amount of damages, or its compliance with conditions precedent was harmless.[4] Using this circular logic—that any error is harmless because the [redacted] owed somebody some undetermined amount of money—there was never a need for any evidence at all…or a trial for that matter. The Bank is actually advocating that, once the [redacted] admitting to having taken out a loan that was not paid back in full, any random person may use the courts to collect a random amount of money from them. Merely restating the Bank's argument refutes it.

B. The amounts due and owing were never put in evidence.

Despite devoting three pages of its Answer Brief to the topic, nowhere does the Bank simply cite this Court to a page in the transcript or the exhibits which contain the numbers or even the basis for the numbers in the final judgment. Instead, the Bank accuses the [redacted] of failing to rebut the "accuracy" of figures that were never in evidence.[5]

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[4] Answer Brief, pp. 10, 14-15, 16.

[5] Answer Brief, p. 9.

The Bank also asserts that the error was not preserved because there was no contemporaneous objection.[6] Yet, in the absence of even a proffer of any evidence, nothing had ripened for objection. As the [redacted] pointed out in their Initial Brief, had the witness been asked to read into evidence whatever amounts were written in the judgment, a number of objections would have been applicable, such as:

- hearsay;
- the best evidence rule—i.e. reading from a document not in evidence in contravention of *Sas v. Fed. Nat. Mortg. Ass'n*, 112 So. 3d 778, 779 (Fla. 2d DCA 2013); and
- failure to comply with § 90.956, Fla. Stat. (Summaries).

But the Bank did not ask the witness to read the numbers into evidence. Similarly, had the Bank offered the final judgment itself in evidence as an exhibit, a hearsay objection would have been appropriate and well-taken. But the Bank did not do so.[7]

[6] Answer Brief, p. 9.

[7] In fact, the only thing the parties agree on is that the "[t]he final judgment was not in evidence." Answer, p. 8, n. 6.

The only record this Court is left with is that the witness was asked whether he agreed that some unspecified numbers that were not in evidence "seemed"[8] accurate when compared to some other unspecified numbers that were not in evidence. *See Correa v. U.S. Bank National Association*, 118 So. 3d 952, 957 (Fla. 2d DCA 2013) (a document that was identified, but never moved or entered into evidence as an exhibit, is not competent evidence to support a verdict). And no objection is necessary to preserve insufficiency of the evidence as an issue for appeal. Fla. R. Civ. P. 1.530 (e).

The Bank also argues that its lack of evidence was somehow cured by one of the [redacted] exhibits, a payment history dated April 20, 2011.[9] While the Bank

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[8] The Bank argues in a footnote that this Court should interpret Vent's response as answering a different question than was asked such that he testified that the figures "were" accurate, rather than "seemed" accurate:

> Q: And after your review of the business records and proprietary systems, do those figures seem accurate with regards to this loan?
>
> A: Yes, they are.

The Bank is asking this Court to fill in the missing object of the sentence with something different than that of the question—that the witness meant "they are *accurate*" rather than, for example, "they are *seemingly accurate*." This Court should respectfully refuse to supply missing testimony, just as it should refuse to supply missing evidence as to what numbers the witness was even looking at to answer the question.

[9] Answer Brief, p. 11.

asserts that it shows that a "payment is owned for September 2007,"[10] it does not identify for this Court where any of the dollar amounts on the final judgment (such as interest, taxes, property inspections, property valuations and attorney fees) are found within, or can be computed from, the April 2011 payment history. Nor did the Bank's witness identify that document as a source of any of his testimony. Indeed, since the document was printed more than a year and half before the trial, it could not possibly contain all the underlying data to support the judgment.

C. There was no evidence presented to support an award of attorneys' fees.

Given that the Answer Brief does not mention the words "attorneys' fees," the Bank appears to have conceded this point.

D. The Bank had its day in court.

Similarly, the Bank does not address the argument that, if this Court finds that the Bank's evidence was insufficient, the Bank does not get a second bite at the apple of proving its case. The Bank does not address the cases cited by the [redacted] or cite contrary authority. Nor did the Bank address the opinion from

[10] Answer Brief, p. 11, n. 8.

[11] *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.

this Court provided by a Notice of Supplemental Authority, *Correa v. U.S. Bank N.A.*, 118 So. 3d 952, 957 (Fla. 2d DCA 2013) ("There is simply no reason to afford [the bank] a second opportunity to prove its case.")[12]

Again, it appears that the Bank has tacitly conceded this point.

II. The Trial Court Abused Its Discretion in Admitting a "Breach Letter" That Had Never Been Disclosed Before Trial.

A. The BANK's mid-trial "do-over" with an assist by the court.

As to the breach letter, the Bank simply stakes out a position contrary to that of [redacted] that the trial court did not abuse its discretion in admitting a previously undisclosed document. But it does so without citation to a case that is factually similar. Nor does it attempt to distinguish the opinions from this Court suggesting that it is an abuse of discretion to allow a party to present proof of a missing element of their case, where, as here, the opposing party has already identified the deficiency.[13]

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.") [Initial Brief, pp. 14-15].

[12] Appellants' Notice of Supplemental Authority, served August 26, 2013.

[13] *Burton v. State*, 596 So. 2d 733, 735 (Fla. 2d DCA 1992); *see also Lyles v. State*, 742 So. 2d 842, 843 (Fla. 2d DCA 1999) (trial court committed fundamental error by, *inter alia*, bifurcating the hearing to allow additional testimony); *Cagle v. State*, 821 So. 2d 443, 444 (Fla. 2d DCA 2002) (a court assuming the role of a litigant violates the cornerstone of due process and that "[s]uch conduct amounts to

The Bank also claims that the "pertinent inquiry" is whether the letter is relevant.[14] This is a "straw man" argument because the [redacted] never asserted the letter wasn't relevant, only that they were prejudiced in the admission of (what is actually, extremely relevant) evidence that was never listed or produced before trial.

B. The [redacted] were unfairly prejudiced by the BANK's nondisclosure of the purported breach letter.

Arguing that there was no prejudice to the [redacted] to allow the Bank to "obtain" mid-trial previously unidentified evidence, the Bank cites two Fourth District cases about the failure to list witnesses.[15] Once again, the Bank did not address the cases from this Court that were cited by the [redacted][16]

The Bank argues that it was enough that the [redacted] could cross-examine its witness about the new letter.[17] The efficacy of cross-examination, however, is severely curtailed without proper disclosure and preparation. This is precisely the

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fundamental error that may be raised for the first time on appeal.") [Initial Brief, p. 17].

[14] Answer Brief, p. 12.

[15] Answer Brief, p. 12.

[16] *Claussen v. State, Dept. of Transp.*, 750 So. 2d 79, 82 (Fla. 2d DCA 1999) (use of letter not disclosed as required in pre-trial order was a "return to the ambush method of civil litigation" and required reversal); *Southstar Equity, LLC v. Lai Chau*, 998 So. 2d 625, 630 (Fla. 2d DCA 2008) [Initial Brief, p. 18].

[17] Answer Brief, p. 13.

reason that trial by ambush is universally condemned. If simply being present to be cross-examined were the test, there would be no need to ever comply with pre-trial disclosure orders.

The Bank's next argument—that the letter qualifies as rebuttal evidence—conflicts with its argument that "[d]efault notice is at issue in nearly all mortgage foreclosure cases," and that everyone "should have known default correspondence was at issue."[18] The letter cannot be rebuttal evidence because compliance with conditions precedent is something that the Bank pled[19] and is part of its case-in-chief.

By definition, rebuttal evidence offered by a plaintiff is directed to new or surprise matters brought out by the defendant's evidence and does not consist of that which should have properly been submitted in the plaintiff's case-in-chief. *Rose v. Madden & McClure Grove Serv.*, 629 So. 2d 234, 236 (Fla. 1st DCA 1993) ("The term "rebuttal" denotes evidence introduced by a plaintiff to meet new facts brought out in his opponent's case in chief."); *Atlas v. Siso*, 188 So. 2d 344, 345 (Fla. 3d DCA 1966) (trial court did not abuse its discretion in excluding plaintiff's

[18] Answer Brief, p. 13.

[19] Complaint, ¶ 6 (R. 1).

undisclosed witness—it was apparent that testimony was not in "rebuttal" to any new or surprise testimony brought out by defendants).

Accordingly, if this Court does not reverse and remand for entry of judgment in favor of the [redacted] it should reverse and remand for a new trial on the conditions precedent issue.

III. The BANK Did Not Have Standing at the Inception of the Case.

A. The trial court erred in denying the [redacted] motion for involuntary dismissal on the issue of standing.

On appeal, the Bank abandons its own pleadings that it both "owns and holds the Note"[20] as well as "owns and holds the mortgage."[21] Having proven that some other entity owns the Note, it now seeks to enforce the Note solely as its "holder" under the Article 3 of the Uniform Commercial Code ("UCC").[22] To prove that the Bank was the holder of the Note at the time it filed the Complaint, it points to the image of the Note endorsed in blank that was attached to that pleading.

First, the existence of an endorsement in blank on an image of the Note is insufficient to establish that the Bank was its holder when the case was filed. At best, it means only that the note had become bearer paper and whoever was the

[20] Complaint, ¶ 3 (R. 1).

[21] Complaint, ¶ 11 (R. 2).

[22] Answer Brief, p. 16.

"bearer" (in possession) of the actual Note (not just a photocopy) was the "holder." But the Bank did not prove or even allege that it had possession of the actual Note at the time it filed the Complaint. In fact, it alleged the opposite—that the Note was lost and not in its possession.[23]

Stated another way, the UCC requires that there be a "negotiation" (i.e. a "transfer") of the endorsed instrument before one becomes a holder. § 673.2011, Fla. Stat. If one endorses a note, but never transfers possession to the intended recipient, the latter never becomes a holder. Thus, one cannot leap to the conclusion that just because the Bank was able to produce an image of a note endorsed in blank—an image whose origin was never proven or even mentioned at trial—that the Bank was the holder of the Note at that time. Even if there was a glimmer of an inference to be had from the existence of the endorsement alone, that tiny flicker was definitively extinguished by the Bank's own allegation that the Note was not in its possession.

Second, it has never been the law that standing to foreclose may be shown merely by proving that one has standing to enforce a note (i.e. obtain a money judgment) as its holder under Article III of the UCC. Because enforcement of a note under the UCC does not trigger the court's equitable jurisdiction—indeed,

[23] Complaint, Count III, pp. 3-4 (R. 3-4).

even a thief can enforce a note—such a holding would eviscerate decades of law that foreclosure is an equitable remedy subject to equitable defenses. *Royal Palm Corporate Ctr. Ass'n, Ltd. v. PNC Bank, NA*, 89 So. 3d 923, 927 (Fla. 4th DCA 2012) (recognizing that the legal right to collect on a money judgment and the equitable right to foreclose are separate remedies in the same case); *Swan Landing Dev., LLC v. Florida Capital Bank, N.A.*, 19 So. 3d 1068, 1072 (Fla. 2d DCA 2009) ("Foreclosure of a mortgage is an equitable remedy."). Thus, a plaintiff with "unclean hands"—such as one in wrongful possession of a note—may get a money judgment, but cannot take a home as payment for that debt—even if it is admitted that the homeowner owes the debt to someone.[24]

The same conclusion is reached when one considers that a transferee bank's right to enforce the lien as the mortgagee (where there is no mortgage assignment) is based upon the principle that "the mortgage follows the note." This aphorism

[24] *Knight Energy Services, Inc. v. Amoco Oil Co.*, 660 So. 2d 786, 789 (Fla. 4th DCA 1995). Equity will intervene even when the wrongful conduct complained of harms someone other than the defendant. *Quality Roof Services, Inc. v. Intervest Nat. Bank*, 21 So. 3d 883, 885 (Fla. 4th DCA 2009) ("Unclean hands may be asserted by a defendant who claims that the plaintiff acted toward a third party with unclean hands with respect to the matter in litigation."); *see also Yost v. Rieve Enters., Inc.*, 461 So.2d 178 (Fla. 1st DCA 1984) ("There is no bar to applying the doctrine of unclean hands to a case in which both the plaintiff and the defendant are parties to a fraudulent transaction perpetrated on a third party."); *Hauer v. Thum*, 67 So.2d 643, 645 (Fla.1953) ("It would matter not that the [defendants] were parties to the fraudulent transaction nor that the fraud was perpetrated upon a third party.").

refers to the legal fiction that there is an "equitable transfer" of the mortgage to the new, rightful owner of the note. *Johns v. Gillian*, 184 So. 140, 143-144 (Fla. 1938) (where there is no written assignment of the mortgage, the plaintiff "would be entitled to foreclose in equity upon proof of his purchase of the debt." (emphasis added)). In short, equity requires that a mortgage follows the owner of the note, not a mere holder of the note.[25]

The UCC itself compels this inevitable conclusion because the common-law concept that the lien faithfully tags along after the note is found in Article 9,[26] not Article 3. Notably, while possession is a means of perfection under Article 9, enforcement of the security interest requires proof that the buyer gave value to purchase the mortgage loan from a seller entitled to sell it—i.e. ownership.[27]

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[25] The Fifth District recently issued an opinion (subject to a rehearing that is pending as of this writing) that a bank may foreclose simply by showing that it is a UCC holder. *Wells Fargo Bank, N.A. v. Morcom*, 38 Fla. L. Weekly D2148 (Fla. 5th DCA 2013). Aside from ignoring the Supreme Court's foreclosure complaint form that requires that plaintiff plead that it owns and holds the loan (Fla. R. Civ. P. Form 1.944), the court concludes that Article 3 of the UCC—which does not mention foreclosure—somehow trumps foreclosure cases dating back to the 1800s. *Id*. at *2. The opinion makes no mention of the fact that it jettisons years of binding authority that foreclosure is an equitable remedy. For these reasons, this Court should simply reject the *Morcom* decision as wrongly decided.

[26] §§ 9-203(g) and 9-308(e) UCC; §§ 679.2031(7) and 679.3081(5), Fla. Stat.

[27] § 9-203(b) UCC; § 679.2031(2), Fla. Stat.

B. The trial court abused its discretion in denying [redacted] motion to amend his answer three weeks prior to trial and excluding their expert.

Lastly, the Bank falls back on the argument that standing was waived because it was not included as an affirmative defense in the [redacted] Answer.[28] It relegates to a footnote its disputation of the fact that [redacted] were wrongly denied their request to amend the answer to raise the issue. There they cite to two cases that address leave to amend to assert counterclaims, not affirmative defenses.[29] Nor does the Bank discuss the case cited by the [redacted] *Laurencio v. Deutsche Bank Nat. Trust Co.*, 65 So. 3d 1190, 1193 (Fla. 2d DCA 2011) (In a foreclosure case, it was error to deny the homeowner's motion to amend the answer even though the motion was filed two days before the summary judgment hearing.)

C. It was unnecessary to amend the Answer to admit the expert testimony, because the issue of standing does not have to be raised by affirmative defense.

As to whether lack of standing may only be preserved by an affirmative defense, the Bank again cites this court to cases from other districts, and fails to explain why the panel considering this appeal is not bound by this Court's opinion

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[28] Answer Brief, p. 18.

[29] *Zikofsky v. Robby Vapor Sys., Inc.*, 846 So. 2d 684 (Fla. 4th DCA 2003); *Randle v. Randle*, 274 So. 2d 557 (Fla. 3d DCA 1973) [Answer Brief, p. 18, n. 11].

in *Maynard v. Florida Bd. of Educ. ex rel. Univ. of S. Florida*, 998 So. 2d 1201, 1206 (Fla. 2d DCA 2009).

Accordingly, if this Court finds that the BANK made a *prima facie* showing of standing (despite having conceded that the debt was owned by another entity), then the trial court abused its discretion in excluding the testimony of the [redacted] expert. In that event, the case should be reversed for a new trial on standing.

CONCLUSION

Due to: 1) the complete absence of any evidence of amounts due and owing; 2) the complete absence of any evidence that the BANK satisfied conditions precedent (when it rested its case); and 3) the BANK's concession that another entity owned the note (in contradiction of its own pleadings), the trial court should have granted an involuntary dismissal. This Court, therefore, should reverse and remand with instructions to enter judgment in favor of the [redacted][30]

[30] Short of that, for the other reasons discussed in the brief, the Court should reverse and remand for a new trial.

Dated: November 19, 2013

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this November 19, 2013 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.

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