In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS INDENTURE TRUSTEE, FOR THE BENEFIT OF THE HOLDERS OF THE AAMES MORTGAGE INVESTMENT TRUST 2005-4 MORTGAGE BACKED NOTES, et al.,

Appellees.

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

REPLY BRIEF OF APPELLANTS

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Key:

- The Appellee, Deutsche Bank National Trust Company, as Indenture Trustee, for the Benefit of the Holders of Aames Mortgage Investment Trust 2005-4 Mortgage Backed Notes will be referred to as "the Bank."
- The Appellants, [redacted] and [redacted] will be referred to collectively as "the Homeowners."
- Lorraine Baggs, the Bank's witness at trial, will be referred to as "Baggs."
- Select Portfolio Servicing, Inc., Baggs' employer, will be referred to as "the Servicer."
- The power of attorney admitted as Exhibit 7 at trial will be referred to as "the POA."
- The Transcript of the trial held on May 27, 2014 will be referred to as "T. ___" followed by the transcript page number.

SUMMARY OF THE REPLY ARGUMENT

The Bank does not address the Homeowners' challenge to its standing by pointing to any evidence that the allonge was physically attached to the note before the lawsuit was filed. Rather, it merely references a date on the allonge as if this hearsay statement proves not only that physical annexation was possible, but somehow more probable than not. Because neither this nor any other evidence proved the Bank's standing, the Homeowners' motion for involuntary dismissal should have been granted.

Likewise, the Bank failed to prove compliance with Paragraph 22 of the mortgage. First, the Bank failed to prove when and how the notice was sent. Therefore, it was not entitled to the legal presumption that the notice was "delivered" because there was no evidence that it was sent by first class mail. Second, the notice does not comply with Paragraph 22, even assuming it was properly sent, because it improperly included a cured default in the cure amount and also did not inform the Homeowners of their right to reinstate after acceleration. And this too required dismissal of the lawsuit.

Finally, Baggs did not properly lay the business records foundation for the prior servicer's records. Therefore, the payment history should have been excluded from evidence.

ARGUMENT

I. There is insufficient evidence to support the judgment and therefore the judgment must be reversed and the case dismissed.

A. The Bank presented insufficient evidence that it had standing on the day the lawsuit was filed.

The Bank misinterprets the case law regarding attaching the allonge.

The Bank does not dispute that there is no evidence that the allonge was affixed to the note on the day the lawsuit was filed. Rather, it asserts that because "[t]he allonge is dated August 2, 2005" and that the complaint was filed on August 24, 2011, "the evidence demonstrated that [the Bank] had possession of the note prior to the filing of the complaint."[1]

Aside from the yawning gap in the logic of this argument, the two cases the Bank cites as support, *Taylor v. Deutsche Bank Nat. Trust Co.*, 44 So. 3d 618 (Fla. 5th DCA 2010) and *Everhome Mortgage Co. v. Janssen*, 100 So. 3d 1239 (Fla. 2d DCA 2012), have nothing to do with proving standing through an allonge. In *Taylor*, the foreclosing plaintiff proved its standing as a "nonholder in possession" of an unendorsed note through submitting an assignment of note and mortgage that predated the filing of the lawsuit. *Id*. at 623. And in *Janssen*, the issue was whether the trial court could set aside a foreclosure judgment pursuant to Fla. R.

[1] Answer Brief, p. 13.

Civ. P. 1.540(b)(4) if a foreclosing plaintiff lacked standing at inception. *Id*. at. 1239. The Second District held that a trial court could not. *Id*. at. 1240. In short, the cases cited by the Bank do not stand for the proposition the Bank claims they stand for.

Rather, the case law is clear that in order for an allonge to take effect, it must be "so firmly affixed [to the note] as to become a part thereof." *Booker v. Sarasota, Inc.*, 707 So. 2d 886, 889, n. * (Fla. 1st DCA 1998). This means that an allonge must be actually attached to the note. *See e.g. Wells Fargo Bank, N.A. v. Settoon*, 120 So. 3d 757, 761 (La. App. 1 Cir. 2013) ("We find that the requirement in Section 10:3-204(a)[2] that a paper be 'affixed' to the instrument demands that the paper be actually attached to the instrument, meaning some form of physical connection securing the paper to the instrument.").

Thus, the Bank asks this Court to accept the self-serving statement on the allonge itself as an accurate representation of when it was prepared (along with the unsupported notion that it was prepared and dated at the same time it was affixed) as a substitute for the requirement that it be physically attached. This hearsay declaration cannot serve as an evidentiary basis for the Bank's standing any more than a self-serving "effective date" on an assignment can, without other evidence,

[2] This statute is identical to § 673.2041, Fla. Stat. and both statutes are simply identical restatements of U.C.C. §3-204.

make it retroactive to a time prior to the initiation of the lawsuit. *See Vidal v. Liquidation Properties, Inc.*, 104 So. 3d 1274 (Fla. 4th DCA 2013). And since there was no such evidence here, the Bank failed to prove that the allonge was affixed to the note on or before the date the lawsuit was filed.

None of the other evidence admitted at trial proves the Bank's standing.

Nor does any of the other record evidence the Bank points to in its appellate brief prove that it had standing on the day the lawsuit was filed. Indeed, the Bank's evidence proves the opposite. First, the Bank admits that the acquisition screenshot (Exhibit 4) revealed that the Servicer "acquired the servicing of the loan from the [Bank] on February 1, 2009…"[3]—years before the case was filed. Furthermore, Baggs' testimony regarding the bailee letter established that the Servicer, and not the Bank, was in physical possession of the note when it was sent to the Bank's attorney.[4] And when these facts are coupled with Baggs' testimony that the Servicer, rather than the Bank, was "the holder of the note..."[5] (emphasis

[3] Answer Brief, p. 15.

[4] T. 43. In their Initial Brief, the Homeowners also pointed out that the bailee letter does not prove that the Bank had the right to enforce the note on July 20, 2009 (the date the bailee letter is dated) because the letter is silent on the issue of whether the note was endorsed on that date. (Initial Brief, pp. 18-19).

[5] T. 63.

added), the Bank has actually proven a very powerful point in favor of the Homeowners: that it was the Servicer, and not the Bank, who had standing to initiate this action. *Tremblay v. U.S. Bank, N.A.*, __ So. 3d __, 2015 WL 2089069, at * 1 (Fla. 4th DCA May 6, 2015) ("[The] Bank's only witness testified that his employer—the servicer—had been the holder of the note since August of 2005. Based on this testimony, the servicer was the proper party to initiate the action, not [the] Bank.").

Furthermore, the forbearance agreement (Exhibit 8) does not, as the Bank suggests, prove its standing. First, the self-serving statement in that document that the Bank is the holder is not proof that the allonge was affixed to the note. Second, it ignores that the POA (Exhibit 7) was not executed until two years after the forbearance was executed. Even the "effective date" of the POA was more than two months after the forbearance agreement. Finally, the POA only allowed the Servicer to modify loans to "conform same to the original intent of the parties." Since the forbearance agreement clearly did not modify the loan to do this, the Servicer acted outside the scope of the POA and the agreement is, for all intents and purposes, a legal nullity. *See e.g. Estate of Irons v. Arcadia Healthcare, L.C.*, 66 So. 3d 396, 398 (Fla. 2d DCA 2011) (holding that a POA must be strictly

construed and cannot be used to authorize that which is not expressly granted by the principal).

B. The Bank presented insufficient evidence that it complied with Paragraph 22 of the mortgage.

There is insufficient evidence of how and when the notice was sent.

The Bank's answer brief also does not dispute a key argument made by the Homeowners: that there is no evidence of how the acceleration notice (Exhibit 5) was sent. Rather, the Bank flippantly refers to Baggs' "testimony" that the notice was mailed[6] without acknowledging that Baggs was simply parroting what was allegedly in a document that was withdrawn by the Bank's attorney and stricken from the record.[7] Thus, the Bank is merely left with a dated letter—a date, which Baggs would testify, is actually six days after she claimed the notice was mailed.[8] But the existence of an acceleration notice in the Bank's files, even if authentic, does not entitle the Bank to the presumption it seeks.

Specifically, the Bank is attempting to rely on the legal fiction in Paragraph 15 of the security instrument which allows the court to "deem" that the

[6] Answer Brief, pp. 16.

[7] T. 51.

[8] T. 49.

Homeowners receive notice on the day it is mailed if the notice is sent by first-class mail to the Homeowners' 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.[9]

But the witness's testimony does not establish that the notice was mailed first class mail. And again, the witness did not introduce any documents such as a communications log or a return receipt which would prove that the Servicer sent the notice to the Homeowners at all, much less that it mailed it by first class mail.

Without evidence that the notice was mailed first class, the Bank was not entitled to the two presumptions of Paragraph 15: 1) that the letter was actually received by the Homeowners; and 2) that the letter was instantaneously delivered to the Homeowners on the same day it was mailed. First, without the presumption of receipt by the Homeowners, the Bank was required to prove actual receipt, a necessary fact for which there was no evidence. *Ramos v. Citimortgage, Inc.*, 146 So. 3d 126 (Fla. 3d DCA 2014). Indeed, the unconverted evidence was that the Homeowners did not receive the letter as shown by Ms. [redacted] testimony that

[9] Mortgage, Exhibit 2, ¶ 15.

she had never seen the notice mailed to her house[10] and Mr. [redacted] proffer that he too never received the notice.[11]

Second, without the presumption of same-day receipt, even if—as the Bank claims—the letter provided a cure period of 30 days from when the letter was written, it would not comply with Paragraph 22. This is because even first class mail takes up to three days to deliver (*see* 39 CFR 121.1). A notice, therefore, delivered just as rapidly would still not afford the guaranteed thirty days to cure. Accordingly, the absence of evidence of the manner of mailing results in a two-fold failure of proof—a complete absence of evidence that: 1) the Homeowners received the notice (i.e. no evidence of actual receipt); and 2) the Bank provided the Homeowners thirty days to cure from actual receipt of the notice.

The Bank's argument that the notice complies with Paragraph 22 misinterprets its own letter, as well as the law.

In their Initial Brief, the Homeowners pointed out that the default notice did not inform them of their right to reinstate after acceleration and that it improperly included a default which had been cured.[12] The Bank's appellate response implicitly concedes the Homeowners' first argument because it acknowledges that

[10] T. 136.

[11] T. 145.

[12] Initial Brief, pp. 29-33.

the notice "informs the [Homeowners] that the [S]ervicer's acceptance of one or more payments for less than the amount required to cure the default shall not be deemed to reinstate the loan…"[13] This admission should end the discussion because, as the Fifth District has held, "[t]his in no way suggests the right to reinstate after acceleration." *Samaroo v. Wells Fargo Bank*, 137 So. 3d 1127, 1129 (Fla. 5th DCA 2014).[14]

And as to the Homeowners' second argument—that the notice improperly included defaulted months which had been cured—the Bank argues that since the parties to the loan had agreed to a modification, "the date which the loan was due and owing changed prior to the time this case was tried."[15] But if the loan was modified after the acceleration notice was sent out such that the Homeowners' payments cured the prior default, then the Bank should have sent out a new default notice specifying the new default of January 1, 2009. While the Bank might argue that the modification was provisional, such that payments would be accepted and even credited to the Homeowners without disturbing the default date (i.e. without

[13] Answer Brief, p. 18.

[14] Rather than acknowledge *Samaroo* in its brief, the Bank instead points to three trial court orders in support of its blanket contention that the notice "was substantially compliant with the requirements of the mortgage." (Answer Brief, p. 19). This, of course, also ignores *Samaroo's* second holding rejecting the plaintiff's "substantial compliance" argument in that case. *Id*. at 1129.

[15] Answer Brief, p. 20.

actually curing the default for those payments), in reality, the second modification agreement (marked for identification purposes as Exhibit 1-J and admitted as part of composite Exhibit 6) belies that argument. It reflects that the loan was due for November 1, 2008, not August 1, 2008 as specified in the acceleration notice.[16]

And Baggs actually testified that pursuant to this agreement, three payments "were made, that moved the due date from 08-01-2008 to January 1, 2009."[17] Together, these facts unequivocally show that the Bank had never accelerated based on any of the payments before January 1, 2009 and continued to accept payments. Before the Bank resorted to the draconian solution of foreclosure, the Homeowners were entitled to know that: 1) the Bank now intended to actually accelerate even though it had not done so before; and 2) that a different cure amount would stop the acceleration—one which included far fewer months of missed payments. The Bank was therefore obligated to send the Homeowners a new notice, specifying the default as the failure to make only those payments between January and May of 2009. *See Amerifirst Fed. Sav. & Loan Ass'n of Miami v. Century 21 Commodore Plaza, Inc.*, 416 So. 2d 45 (Fla. 3d DCA 1982) (conduct of mortgagee in accepting payments after an election to accelerate can

[16] Forbearance to Modification Agreement, Composite Exhibit 6.

[17] T. 85.

justify a court of equity in refusing to foreclose even if mortgagee never explicitly waived its election to accelerate); *CJ Restaurant v. FMS Management Systems*, 699 So. 2d 252, 255 (Fla. 3d DCA 1997) ("If FMS sought to alter or halt this pattern of [late mortgage] payment by CJ, at the very minimum, FMS had a duty to provide notice of the same to FMS prior to seeking an *ex parte* final judgment pursuant to the terms of the stipulation."); *Smith v. Landy*, 402 So. 2d 441 (Fla. 3d DCA 1981) (mortgagee's acceptance's of late payments estopped them from "from asserting their right to acceleration and foreclosure without first giving the Landys notice of their intention to declare a default.").

Therefore the notice does not comply with Paragraph 22 of the mortgage even if the Bank could have proven when the notice was actually sent.

The proper remedy on remand is involuntary dismissal.

In order for there to be sufficient evidence to support the judgment, it necessarily follows that the Servicer sent the Homeowners a sufficient Paragraph 22 notice. Short of this, involuntary dismissal must be entered on remand. *Holt v. Calchas, LLC*, 155 So. 3d 499, 507 (Fla. 4th DCA 2015); *Blum v. Deutsche Bank Trust Co.*, 159 So. 3d 920 (Fla. 4th DCA 2015).

To the extent that this Court is persuaded that the Fifth District's decisions in *Gorel v. Bank of New York Mellon*, __ So. 3d __, 40 Fla. L. Weekly D1094 (Fla.

5th DCA May 8, 2015) and *Vasilevskiy v. Wachovia Bank, Nat. Ass'n*, __ So. 3d. __, 2015 WL 2414502 (Fla. 5th DCA 2015 May 22, 2015) hold otherwise, those decisions should be distinguished or outright rejected by this Court. First, and as explained by the majority in *Vasilevskiy*, this case involves a notice which "omitted an entire element from the list of required contents, and the mortgagor raised the issue promptly after the lawsuit was filed." *Id*. at * 1.

Second, "prejudice," or the idea that a breach must be material, is an affirmative defense. And when a plaintiff seeks to avoid an affirmative defense (like the Bank did at trial), it must file a reply asserting that avoidance. Fla. R. Civ. P. 1.100(a). Failure to file a reply waives this "affirmative defense to the affirmative defense." *See e.g. Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981). This rule logically arises from the due process consideration that the Homeowners must be put on notice that prejudice is an issue to be tried.

And even if it had filed a reply to raise "prejudice" as an avoidance of the Paragraph 22 defense, the Bank also had the burden of proving such a claim. *See Richardson v. Wilson*, 490 So. 2d 1039, 1040 (Fla. 1st DCA 1986) ("the burden of showing that the statute of limitation comes within a statutory exception is on the

plaintiff"). The Bank adduced no evidence that the Homeowners suffered no prejudice.[18]

Second, the Court should simply reject *Gorel* and the majority's decision in *Vasilevskiy* and adopt instead Judge Palmer's well-reasoned dissent in *Vasilevskiy.* Noting that the bank did not attempt to avoid the borrower's Paragraph 22 defense by providing evidence that the borrowers were not prejudiced, Judge Palmer correctly observed that there should not be any "materiality test" with regards to Paragraph 22.

II. The payment history should have been excluded from evidence on hearsay grounds.

The Bank relies heavily on the Fourth District's decision in *Bank of New York v. Calloway*, 157 So. 3d 1064 (Fla. 4th DCA 2015) for the proposition that the payment history was an admissible document—but this decision actually supports the Homeowners' argument that this document should have been excluded from evidence.

Indeed, as the Fourth District noted in *Calloway*, documents that are created by a previous servicer do not come with the traditional hallmarks of "reliability" a

[18] In fact, the evidence was such that the Homeowners were prejudiced by the Bank's failure to comply with Paragraph 22 since the notice improperly included in the cure amount five months of "missed" payments which the Homeowners had, in fact, paid.

normal record might have. *Id*. at 1071. *Calloway* goes on to say that mere reliance by the business adopting the records is insufficient by itself to establish trustworthiness. *Id* There must be evidence of a continuing business relationship between the two entities (*Id*.)—which is not present (or even argued) here.[19]

Moreover, Baggs failed to provide any specific testimony that the Servicer verified the payment history for accuracy after receiving it from the prior servicer. *Cf. WAMCO XXVIII, Ltd. v. Integrated Electronic Environments, Inc.*, 903 So. 2d 230, 233 (Fla. 2d DCA 2005) (witness personally verified accuracy of prior servicer's records before boarding information into current servicer's records); *Le v. U.S. Bank*, ___ So.3d ___, 2015 WL 2414456 * 1 (Fla. 5th DCA May 22, 2015) (specific testimony regarding current servicer's verification process sufficient evidence of the trustworthiness of the prior servicer's records.). Rather, Baggs gave testimony about the Servicer's "copying" process.[20]

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[19] And for this reason, the Bank's baseless argument that "trustworthiness" is not before this Court fails since, as *Calloway* makes clear, the onus is on the successor servicer to prove the trustworthiness of the prior servicer's documents. *See also Nationstar Mortg., LLC v. Berdecia*, __ So. 3d __, 2015 WL 3903568 (Fla. 5th DCA June 26, 2015) ("[A] mortgage servicer enforcing a note it has acquired from another entity can lay the proper predicate under section 90.803(6) for admitting the records of the previous entity, so long as all the requirements of the business records exception are satisfied, the witness can testify that the successor business relies upon those records, and the circumstances indicate the records are trustworthy.") (emphasis added).

[20] T. 116.

An equivalent statement in the era of paper documents would have been: "the photocopier ran smoothly and made extremely accurate copies of each and every document that the previous servicer had, even if they were false and erroneous." But the Fourth District has already expressly held that documents which were only incorporated (or "uploaded") into a subsequent business's records do not fall within the business records exception. *Landmark American Insurance Company v. Pin-Pon Corp.*, 155 So. 3d 432, 442 (Fla. 4th DCA 2015).[21] And this makes sense because holding otherwise would allow the Servicer free reign to admit any document it simply uploaded into its servicing records for the sole purpose of "proving" the truth of the document's contents. *Id*.

As such, the payment history was simply a document "copied" (i.e. incorporated) into the Servicer's records. It should have been excluded from evidence.

CONCLUSION

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

[21] Notably, *Pin-Pon* and *Calloway* were decided by this Court on the same day.

Dated: July 9, 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 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 July 9, 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 July 9, 2015.

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