In the District Court of Appeal
Fourth District of Florida

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

[redacted] and [redacted] [redacted]
Appellants,

v.

U.S. BANK NATIONAL ASSOCIATION, etc., et al.,

Appellee.

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

REPLY BRIEF OF APPELLANTS

Respectfully submitted,

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Record references:

R. ___= Record on Appeal

Supp. R. ___= Supplement to Record on Appeal

ARGUMENT

I. US Bank misstates facts and its statement of facts is unduly argumentative.

US Bank makes the following misstatements:

- *US Bank repeatedly claims the Vidals "admit[ted] to executing the mortgage."*[1] Mr. Vidal denied that the mortgage produced by US bank was the same as the one he executed.[2] Ms. [redacted] denied executing any mortgage.[3]
- *US Bank claims the "Appellants did not specifically deny the authenticity of the signature on the endorsement."*[4] The Vidals "specifically den[ied] the authenticity of any document presented as the original promissory note, as well as any endorsements contained thereon and any allonges attached thereto and the authority of any signatures purporting to transfer the note by way of endorsement . . . ."[5]
- *In March 2007, a pool of loans - including the Loan - was placed into a securitized trust pursuant to a Pooling and Servicing Agreement dated March 1, 2007 (the "PSA").*[6] This is stated as a fact when in reality it was one of the main disputed issues. It is unduly argumentative and should be ignored.
- *Appellants were successful in delaying trial for over two years during which time they earned rental income from the property without making payments to Appellee.*[7] This statement is offensive, unduly argumentative, and irrelevant to the issues on appeal and its only purpose is to prejudice the court. There was no evidence US bank would accept payments from the Vidals after the alleged acceleration nor is there evidence the Vidals (who were burdened with maintenance expenses) profited from this income.

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[1] Answer Brief, p. 1, 15.

[2] Tr. of Dep. of Jose Vidal, May 13, 2010, pp. 56, 59 (R. Supp. 1007-1159).

[3] Tr. of Dep. [redacted] May 13, 2010, p. 18-19 (R. Supp. 1007-1159).

[4] Answer Brief, p. 11, 17.

[5] Second Am. Answer, p. 6 (R. 617-28).

[6] Answer Brief p. 3.

[7] Answer Brief, p. 1, 4.

- *He also did not pay for insurance in connection with the Property as required by the Loan documents.*[8] This statement was not a basis of default, was not pled, and is irrelevant to the issues on appeal included to prejudice the court.

Worst of all, US Bank denies the trial judge held that Ms. Whitehead's deposition must occur in California. The court initially withheld ruling on Ms. Whitehead's deposition until the taking of a deposition of a different person.[9] The Vidals raised the issue at a later hearing and the trial judge held that the Vidals could not pick the corporate representative of their choosing and would have to fly to California to depose Ms. Whitehead in person:

> THE COURT: They get to select the corporate representative and the deposition is to be taken in the jurisdiction in which she resides. You're welcome to take the deposition in person at that location.[10]

US Bank's counsel drafted the order adding language about revisiting the issue. The Vidals immediately sought to amend the order to reflect the oral ruling.[11] At a later hearing the Vidals again requested that the deposition occur in this forum, to which the court stated, "the ruling stands as to the location of the deposition of Ms.

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[8] Answer Brief, p. 4.

[9] Hr'g before the Honorable Meenu Sasser, December 16, 2009 (R. 511-22); Order on Pl.'s Mot. for Protective Order (R. 322). In fact, the Vidals took the Deposition of US Bank's Vice President David Duclos. Mr. Duclos confirmed that Ms. Whitehead was the person to ask about the custody of documents. Tr. of Dep. of David Duclos, December 29, 2009, pp. 50-52 (R. Supp. 138-214).

[10] Tr. of Hr'g before the Honorable Meenu Sasser, January 13, 2010, p. 8 (R. 535-52).

[11] Def.'s Mot. to Am. Order to Reflect Oral Ruling, dated January 15, 2010 (R. 412).

Whitehead."[12] Despite reaffirming its ruling, the court refused to amend the order because US Bank warned that the judge's ruling would create an appellate issue.[13]

US Bank now claims the trial judge allowed the Vidals to revisit the issue but the Vidals did not try.[14] This is untrue. A review of the transcripts of January 13, 2010 and February 2, 2010 shows the trial judge never allowed the Vidals to revisit the issue. To the extent the order conflicts with the oral ruling, the oral ruling controls. *State v. Jones*, 753 So. 2d 1276, 1277 (Fla. 2000); *see also McGee v. State*, 872 So. 2d 1016 (Fla. 1st DCA 2004). US Bank's attempt to mislead the Court and its deviation from record facts are inappropriate for inclusion in its brief. *See Williams v. Winn-Dixie Stores, Inc.*, 548 So. 2d 829 (Fla. 1st DCA 1989).

II. The servicer's in-house counsel, William Fogleman, was not a qualified witness and could not testify about records kept by a different department in a different state.

In Florida, a witness is not qualified to testify about records kept in a different department and office than where the witness works. *Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121, 1121 (Fla. 2d DCA 1988); *Alexander v. All State Ins. Co.*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980); *Snelling and Snelling, Inc. v. Kaplan*, 614 So. 2d 665 (Fla. 2d DCA 1993). Fogleman had no personal knowledge. He was the servicer's in-house counsel and worked in a

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[12] Tr. of Hr'g before the Honorable Meenu Sasser, February 2, 2010 p. 32 (R. 893).

[13] *Id.* at 38.

[14] Answer Brief, p. 38.

different department located in a different state than where the records were kept.[15] At the time of filing, the legal department in which Fogleman worked did not have the file for this case.[16] Fogleman is not a qualified witness under *Specialty Linings*, *Alexander*, and *Snelling*. US Bank cannot distinguish these cases but argues that Fogleman familiarized himself with the file to become a qualified witness. This position was already rejected by the court in *Snelling*.[17]

US Bank cites no case law that would permit an employee in the legal department in Louisiana to testify about records held by the servicing department in California. Its only argument is that a trial court has latitude in determining whether a *prima facie* case of authenticity has been established.[18] *See Casamassina v. U.S. Life Ins. Co. of New York*, 958 So. 2d 1093 (Fla. 4th DCA 2007). While Appellants agree a trial court has latitude, this latitude is limited by the rules of evidence. *Clark Well Drilling, Inc. v. N.-S. Supply, Inc.*, 44 So. 3d 149, 151-52 (Fla. 4th DCA 2010) *citing Castaneda v. Redlands Christian Migrant Ass'n,* 884 So. 2d 1087 (Fla. 4th DCA 2004). Further, *Casamassina* involved the admission of records at summary judgment through a certification or declaration under section 90.803(6)(c), which is not the case here.

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[15] Dep. of William Fogleman, p. 6, 206 (R. 633-800); Trial Transcript, p. 94-95.

[16] Trial Transcript, Vol. 1, p. 136-37.

[17] *See* Initial Brief, II. B., pp. 31-32 for a discussion on *Snelling*.

[18] Answer Brief, pp. 22, 25, 28.

US Bank's other cases are similarly distinguishable. In *United Auto. Ins. Co. v. Affiliated Healthcare Ctrs., Inc.*, 43 So. 3d 127, 130 (Fla. 3d DCA 2010), there was no issue of whether the affiant was the record's custodian or other qualified witness. It was reversed due to insufficient foundation. *United Auto* merely states that the person that made the record does not need to testify. It does not remove the requirement that a foundation be laid by a records custodian or other qualified witness. Presumably, all witnesses undergo some degree of "familiarization" with the documentation they hope to testify to, however, US Bank's notion of what would qualify a witness to testify vitiates all the rules and case law regarding the necessity for authentication and foundation.

Even if Fogleman could "familiarize" himself into a qualified witness, it did not happen here. He had no knowledge of the servicer's electronic records.[19] He did not know the name of the program used to input information, who inputs it, or even who runs the department that inputs the information.[20]

All the while US Bank had knowledge of an appropriate witness, Cheryl Whitehead, US Bank's Vice President and custodian under the Pooling and Servicing Agreement (the "PSA").[21] U.S. Bank identified Ms. Whitehead as a

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[19] Tr. of Dep. of William Fogleman, January 27, 2010, pp. 157-58 (R. 633-800).

[20] *Id.*

[21] PSA § 12.07(e).

person with knowledge.[22] Fogleman himself repeatedly identified Ms. Whitehead as the person he would have to see to get records.[23] She had custody of the original documents and was required to maintain written policies and procedures with respect to access and storage of mortgage files.[24] Instead of bringing Ms. Whitehead, US Bank knowingly brought a single inappropriate witness.[25]

Clearly, Fogleman did not qualify to testify about the records in this case because: 1) he had no personal knowledge of the underlying transaction; 2) he did not work in or supervise the department where the records were kept; 3) the records were kept in a different office in a different state than where Fogleman worked; and 4) he only became involved in this case six months after it was filed.

A. US Bank's exhibits were unauthenticated hearsay.

Fogleman was unaware of the final certification at the time of his deposition

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[22] Pl.'s Notice of Serving Answers to Def.'s Interrogs., June 15, 2009 (R. Supp. 89); Tr. of Hr'g before the Honorable Meenu Sasser, December 16, 2009, p. 5 (R. 511-22).

[23] *Id.* at 7-8.

[24] Trial Transcript, Vol. 1, p. 136-37.

[25] Given the documents US Bank sought to admit were wide ranging, both in subject matter and geographical location, it is unlikely a single witness would have the requisite personal knowledge to lay the foundation for them all. It is flippantly disrespectful to the dignity of this court and the judicial process to suggest that a lone employee in a mammoth corporation that acts as a servicer to another nationwide corporation would know all there is to know about everything from payment records on an individual loan, to the inner workings of complex, multilayered securitization transfers.

which was over a year and a half into the case.[26] Therefore, his hearsay testimony could not be used to authenticate it. *See Snelling*, 614 So. 2d at 665-66. Furthermore, the final certification on its face certifies that the custodian had received and reviewed the applicable documents for non-MERS loans.[27] This case involved a MERS loan.[28] Therefore, it does not apply to this case. While US Bank does not dispute that this case involved a MERS loan or that the final certification does not apply to MERS loans, it asserts by footnote that the argument was waived because it was not asserted at trial.[29] US Bank's assertion is wrong. Moving for an involuntary dismissal at the close of plaintiff's case and again after the defendant rests on the grounds of sufficiency of evidence is adequate to preserve the issue for appeal. *Teca, Inc. v. WM-TAB, Inc.*, 726 So. 2d 828, 830 (Fla. 4th DCA 1999). The Vidals moved for an involuntary dismissal and as one of the grounds argued that the final certification in evidence applied only to non-MERS loans and this case involved a MERS loan.[30] Further, in non-jury cases, a party may raise the sufficiency of the evidence to support the judgment on appeal without objection or

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[26] Tr. of Dep. of William Fogleman, January 27, 2010, pp. 136-37 (R. 633-800).

[27] Final Certification (Plaintiff's Exhibit B); Non-MERS loans are loans where Mortgage Electronic Registration Systems, Inc. ("MERS") is not the original mortgagee.

[28] MERS is the original mortgagee in this case. *See* Mortgage attached to Complaint (R. 8).

[29] Answer Brief, p. 32, n. 12.

[30] Trial Transcript, Vol. II, pp. 241-48.

motion. Fla. R. Civ. P. 1.530(e). The fact that the final certification has zero weight shows Fogleman's testimony was patently false and admission of the certification was error.

Since reliance on the final certification is futile, US Bank now claims the PSA transferred the loan into the trust. The PSA, however, was unauthenticated hearsay because Fogleman never testified that his department kept or supervised the PSA.[31] Moreover, he was unfamiliar with much of the PSA and its requirements, including anything about the three certifications.[32] He also admitted the PSA did not by itself transfer any mortgage to US Bank.[33] Accordingly, aside from being unauthenticated hearsay, the PSA does not purchase, assign, or transfer any mortgage or note.

The acceleration notices were also unauthenticated hearsay. US Bank does not dispute that the re-created notices were produced by a different office in a different state than where Fogleman worked.[34] US Bank's sole argument is that Fogleman's explanation of why the notices were not originals and why they came

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[31] Trial Transcript, Vol. I, pp. 72-77.

[32] Trial Transcript, Vol. I, pp. 78, 180.

[33] Tr. of Dep. of William Fogleman, January 27, 2010, pp. 62, 82 (R. 633-800).

[34] Trial Transcript, Vol. I, pp. 122-27; the acceleration notices were never produced before trial although Fogleman testified under oath that everything had been produced. *See* Trial Transcript, Vol. I, pp. 122-27; Tr. of Dep. of William Fogleman, January 27, 2010, p. 114 (R. 633-800).

from another department in another state somehow authenticated the re-creations.[35] The explanation is insufficient to lay the proper foundation. US Bank cannot use hearsay to lay a foundation for hearsay.

It also argues that the notices are not hearsay because they were being offered only to prove that notice of default had been provided and not for the truth of the matters asserted in the notice itself.[36] The mortgage required notice of acceleration.[37] Thus, as a condition precedent to foreclosure, US Bank had to show, not only that it sent the proper notice to the Vidals, but that it was sent thirty days before the filing of foreclosure.

US Bank relies on *Sacred Heart Hosp. of Pensacola v. Stone*, 650 So. 2d 676, 681 (Fla. 1st DCA 1995) (dictum) and *Dorsey v. Reddy*, 931 So. 2d 259 (Fla. 5th DCA 2006). *Sacred Heart* actually supports the Vidals' position. In *Sacred Heart*, the court found that despite the claim that a report was offered to only show knowledge, based on closing argument "counsel was [actually] offering the evidence to prove the truth of the matter asserted." 650 So. 2d at 681. The Fifth District referred the parties to *Conley v. State*, 620 So. 2d 180, 183 (Fla. 1993) and *Andalora v. Lindenberger*, 576 So. 2d 354, 356 (Fla. 4th DCA 1991). Both cases demonstrate that regardless of the purpose for which the proponent claims it

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[35] Answer Brief, p. 22.

[36] Answer Brief, p. 22.

[37] Paragraphs 15 and 22 of the Mortgage attached to Complaint (R. 8).

offered the evidence, if it is *used* to prove the truth of the matter asserted it is hearsay. *Conley*, 620 So. 2d at 183 (footnote omitted); *Andalora*, 576 So. 2d at 356.

US Bank used the notices to prove that notice was given prior to filing this case.[38] Applying *Conley, Andalora*, and *Sacred Heart* it is inescapable that the recreated notices and the date on it were an out of court statement being offered for the truth of the matter—that it was sent on that date. If US Bank did not introduce the notices for the truth of the date asserted in the letter, then there is no evidence as to when the notices were sent and the judge's verdict is without factual support.

The payoff letter was also unauthenticated hearsay. The accounting department in California handles payoff figures and created the payoff letter specifically for this case which was stored electronically.[39] Fogleman was wholly unfamiliar with the electronic record keeping.[40] Therefore, Fogleman could not authenticate the payoff letter and his testimony was hearsay.

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[38] Closing argument makes this clear:

MR. MILLER: Mr. Fogleman also established, through the default notices, that the default provisions in paragraph 22 of the mortgage were satisfied.

Trial Transcript, Vol. III, p. 365.

[39] Trial Transcript, Vol. I, p. 132, Vol. II, p. 160-61.

[40] Tr. of Dep. of William Fogleman, January 27, 2010, pp. 157-58 (R. 633-800).

B. The Vidals claimed the mortgage was altered and therefore could not authenticate the mortgage.

US Bank argues that the Vidals did not prove an alteration of the mortgage so it was authenticated.[41] This is not the standard for authentication. US Bank admits it was required to prove that it owned the note and mortgage through a valid assignment, proof of purchase of debt, or evidence of an effective transfer.[42] It was US Bank's burden to prove the authenticity of the mortgage. *See* § 90.901, Fla. Stat. It failed to meet this burden because the Vidals' deposition testimony could not authenticate the mortgage. Mr. Vidal testified that the mortgage he signed at closing differed from the mortgage U.S. Bank brought to the deposition which he claimed seemed to be altered.[43] Ms. [redacted] testified that she did not recognize the mortgage.[44] The Vidals pled the mortgage was altered.[45] Therefore, admission of the mortgage was error.

C. US Bank cannot shift its burden and avoid a specific denial by failing to plead operative documents.

The note attached to the complaint did not contain an endorsement and

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[41] Answer Brief, p. 15.

[42] Answer Brief, p. 16.

[43] Tr. of Dep. of Jose Vidal, May 13, 2010, pp. 56, 59 (R. Supp. 1007-1159); US Bank mischaracterizes the Vidals' testimony and claims the Vidals "admit[ted] to executing the mortgage which secures it." Answer Brief, p. 1.

[44] Tr. of Dep. of [redacted] May 13, 2010, pp. 18-19 (R. Supp. 1007-1159).

[45] Second Am. Answer, p. 6 (R. 617-28).

differed from the later-filed note. The Vidals specifically denied the authenticity of the endorsement:

> Defendants specifically deny the authenticity of any document presented as the original promissory note, as well as any endorsements contained thereon and any allonges attached thereto and the authority of any signatures purporting to transfer the note by way of endorsement, allonge or assignment.[46]

US Bank agrees that signatures on commercial paper are not self-authenticating if authenticity is specifically denied by the pleadings:

> *If the validity of a signature is denied in the pleadings,* the burden of establishing validity is on the person claiming validity . . . . (Emphasis added).

§ 673.3081(1), Fla. Stat.; *Riggs v. Aurora Loan Servs., LLC*, 36 So. 3d 932 (Fla. 4th DCA 2010) (deeming endorsement admitted when "nothing in the pleadings placed the authenticity of [the endorser's] signature at issue."). Nevertheless, U.S. Bank now claims the Vidals did not specifically deny the authenticity of the endorsement because the denial did not specifically reference the notice of filing of the later-filed note. This argument flies in the face of the pleading requirements. US Bank was required to attach the note it sought to enforce to its pleadings. *See* Fla. R. Civ. P. 1.130(a). It would have been improper for the Vidals to reference a notice of filing that was outside the pleadings. US Bank cannot turn its own pleading deficiency against the Vidals. Furthermore, there simply is no

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[46] Second Am. Answer, p. 6 (R. 617-28).

requirement that a denial of the validity or authority of an endorsement be "specific."[47]

In any event, the Vidals' denial of the endorsement signatures is specifically directed to endorsements on any document presented as the original note.[48] Therefore, U.S. Bank had the burden to establish the validity of the endorsement. US Bank, however, argues that the Vidals had the initial burden of disproving the endorsement and cites to the official comment of section 673.3081. The official comment, however, relates to a maker's specific denial of his own signature. Meaning, that section applies to a borrower that specifically denies the authenticity of his own signature:

> The presumption rests upon the fact that in ordinary experience forged or authorized signatures are very uncommon, and normally any evidence is within the control of, or more accessible to, the defendant.

Official Comment to § 673.3081, Fla. Stat. (emphasis added). This case does not involve a defendant's denial of his own signature, it involves a denial of authenticity of an endorser's signature. The evidence would be within the control of US Bank—not the Vidals—and therefore it has the burden of proving authenticity, including a prior holder's endorsement. Moreover, when properly put

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[47] If local rules of pleading permit, the denial may be on information and belief, or it may be a denial of knowledge or information sufficient to form a belief. Official Comment to § 673.3081, Fla. Stat.

[48] Second Am. Answer, p. 6 (R. 617-28).

in issue by the pleadings, the party seeking to establish the status of holder must prove the validity of those endorsements. *Ederer v. Fisher*, 183 So. 2d 39, 41 (Fla. 2d DCA 1965).

US Bank attempts to distinguish *Ederer* by arguing in a footnote that evidence was adduced in that case but not here.[49] This misses the point. The main point of *Ederer* is that when the pleadings put at issue the endorsement, there is no presumption. Meaning, the burden shifts to the bank to prove the authenticity. The *Ederer* court held that the plaintiffs "failed to sustain their burden of establishing a genuine endorsement." *Id.* This reading is consistent with the plain language of the statute which deems signatures on notes admitted unless specifically denied in the pleadings. *See* § 673.3081(1), Fla. Stat.

Moreover, there was evidence which indicated the endorsement was suspect, starting with the fact that the endorsement did not appear on the note attached to the complaint. Fogleman had never seen the later-filed note.[50] He had no idea it differed from the note attached to the Complaint.[51] He admitted the appearance of the endorsement did not comport with that mandated by the PSA and its forms.[52] Additionally, it was not signed by the lender but by a different company—and

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[49] Answer Brief, pp. 12-13, n. 5.

[50] Trial Transcript, Vol. I, pp. 112-13.

[51] Trial Transcript, Vol. I, pp. 112-14.

[52] Exhibit B-4 of the PSA; Trial Transcript, Vol. II, pp. 197-98.

there was no evidence that the other company was actually a general partner authorized to endorse this note. Fogleman did not know the person whose signature appeared on the endorsement.[53] Therefore, the endorsement on the note was not self-authenticating.

Even assuming the later-filed note was admissible, nothing in the record established the endorsement was valid and already on the note at the time the complaint was filed. Since the later appearing endorsement is undated, it does not establish that there was a transfer prior to the filing of the case. Therefore, US Bank was required to prove the chain of ownership and the dates of transfers, which it failed to do.

CONCLUSION

US Bank's theory that it can transform unqualified witnesses into records custodians for the purpose of litigation is not supported by law. Since the court erred in admitting these exhibits, it was error to deny the Vidals' motions for involuntary dismissal. The judgment should be reversed with instructions to enter judgment in favor of the Vidals. *See Morgan Stanley & Co. v. Coleman (Parent) Holdings Inc.*, 955 So. 2d 1124, 1131 (Fla. 4th DCA 2007) (finding a plaintiff is not entitled to a second "bite at the apple" when there has been no proof at trial concerning the correct measure of damages) *quoting Teca, Inc.*, 726 So. 2d at 830.

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[53] Tr. of Dep. of William Fogleman, January 27, 2010, pp. 171-72 (R. 633-800).

Dated August 26, 2011

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this August 26, 2011 on all parties on the attached service list.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

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