In the District Court of Appeal
Fourth District of Florida

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

[redacted]

Appellant,

vs.

IMPERIAL-CS I, LLC

Appellee.

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

REPLY BRIEF OF APPELLANT

Respectfully submitted,

ICE LEGAL, P.A.
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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

KEY

[redacted]	The Appellant, [redacted]
IMPERIAL	The Appellee, IMPERIAL-CS I**,** LLC
T.	Trial Transcript page number
R.	Record—indexed page number

SUMMARY OF THE ARGUMENT

This appeal concerns a single document—the only evidence at trial of the amounts of indebtedness. That document, Plaintiff's Exhibit 3 (Supp. R. 1), was inadmissible, because, among other reasons, it was hearsay and had never been listed as an exhibit. IMPERIAL's claim that [redacted] did not adequately preserve his hearsay objection to this evidence is not supported by the record. Additionally, the fact that IMPERIAL did not comply with the notice requirements of Section 90.956 Fla. Stat. was preserved for review because: 1) if applicable, it is an exception to hearsay that should have been raised by IMPERIAL in response to [redacted] hearsay objection; and 2) the issue was fully developed by the motion for rehearing.

IMPERIAL's fallback argument is that [redacted] was not prejudiced by its failure to list the payment summary on its exhibit list because, although it reported a different amount of indebtedness, its format resembled that of a document attached to a motion. That claim fails because the "similar" document attached to the motion was merely a portion of the erroneously admitted payment summary and even the "similar" document was never listed as an exhibit.

The court erred in admitting the summary and there was no other evidence in the record as to the amount of damages. The judgment in this case should be reversed with instructions to enter judgment in favor of [redacted]

ARGUMENT

I. [redacted] Objections to the Summary of the Debit and Credit Records Were Well Preserved for Appellate Review.

A. [redacted] clearly articulated his objections to hearsay and the prejudice of admitting a document that was neither listed nor produced before trial.

IMPERIAL's refrain throughout its Answer Brief is that [redacted] did not adequately preserve his objections to the bank records summary for appellate review. To make this argument, however, IMPERIAL must slant and distort the record to the point of misrepresentation. For example, IMPERIAL represents to this Court that the objection to Lavergne reading from a document not in evidence was simply "predicate."[1]

In reality, IMPERIAL's counsel showed Laverge the payment summary and asked if he recognized it and whether it refreshed his memory of the amounts currently owed.[2] At that point, counsel for [redacted] interposed an objection that the protocol for refreshing recollection does not permit reading the document into evidence:[3]

[1] Answer Brief, p. 10.

[2] T. 77-78.

[3] T. 78.

MR. ICE: Objection, Your Honor. He hasn't said -- he doesn't recall, and it's just a backward attempt to try to read into the record --

THE COURT: Sustained.

MR. ICE: -- a document that's not in evidence.

The trial court sustained the objection.[4] When IMPERIAL's counsel persisted, [redacted] counsel again objected, this time including the word "predicate":[5]

MR. ICE: Your Honor, predicate. There's no basis for this. He's reading off of the servicer's records.

The trial court again sustained the objection stating, "He's clearly reading from a document."[6] Lavergne then testified that he had memorized the principal balance "last week and last year," at which point the trial court expressly rejected any further argument and overruled the objection.[7] IMPERIAL mischaracterizes this entire exchange about the proper way to refresh recollection as "a defense

[4] T. 78.

[5] T. 78.

[6] T. 79-80.

[7] T. 80.

objection based on 'predicate'" just so that it could later cite to inapplicable cases that hold that an objection to "improper predicate," without more, is insufficient.[8]

IMPERIAL also attacks [redacted] objections to admission of the payment summary[9] as an exhibit, calling them "obscure" and "unclear" and without a "definitive ruling from the trial court."[10] In reality, [redacted] counsel unmistakably objected "to this hearsay document coming into evidence."[11] The objection advised the court even more specifically that the record "was prepared in anticipation of litigation" and had none of the indicia of a business record.[12] The objection further protested that the particular document "was never produced before today."[13] [redacted] counsel also raised the issue that the document was not on the exhibit list by pointing out that the only similar document that even had the potential to "have been on the witness (sic) list"—contained different amounts allegedly due and owing.[14] As discussed below, even the "similar" document was not listed on IMPERIAL's exhibit list.

---

[8] Answer Brief, p. 22.

[9] Plaintiff's Exhibit 3 (Supp. R. 1)

[10] Answer Brief, pp. 21-22.

[11] T. 82.

[12] T. 81-82.

[13] T. 82.

[14] T. 82.

Additionally, during argument about the admissibility of the exhibit, [redacted] counsel protested that only the first page of the document was similar in format to the proffered exhibit. IMPERIAL's counsel admitted that the second page had never been provided, even in a similar format, but argued it was a merely a "breakdown" of the information on the first page.[15] It is, therefore, abundantly clear from this exchange that IMPERIAL and the court were fully aware that [redacted] objected to being ambushed by this new document.

The parties then went on to argue for nearly two pages of transcript, citing and distinguishing cases, on the issue of whether Laverne had the requisite knowledge about the documents to establish a business records exception to hearsay.[16] The court then overruled the objection and, only then, admitted the document as an exhibit. Then, and only then, did the specific amounts of indebtedness—the accrued interest, unpaid late charges, taxes and insurance—come into evidence.[17]

Asserting—as IMPERIAL has done here—that [redacted] objections were "obscure" and "unclear," or that the court never ruled upon them, is simply disingenuous.

---

[15] T. 83. Notably, this directly conflicts with IMPERIAL's position in its Answer Brief. *See*, discussion in Section II, below.

[16] T. 84-85.

[17] T. 85-87.

B. Compliance with the "Summaries" statute is an exception to hearsay that IMPERIAL must raise in response to [redacted] hearsay objection.

IMPERIAL claims that [redacted] "failed to object to the admission of Exhibit 3 [on the basis that it was a summary] at trial."[18] The "Summaries" statute, § 90.956 Fla. Stat. (2011), however, is not an independent basis for an objection. It is an exception to hearsay that IMPERIAL needed to invoke in response [redacted] timely hearsay objection. *See McKown v. State*, 46 So. 3d 174, 175 (Fla. 4th DCA 2010) (summary of bank statements erroneously admitted over hearsay objection where "'[n]o evidence was adduced identifying who had made the compilation, nor was any further predicate shown that would render it admissible as a summary pursuant to section 90.956, Florida Statutes (2001).'"), *quoting*, *Johnson v. State*, 856 So. 2d 1085, 1087 (Fla. 5th DCA 2003) (same). It is nonsensical to suggest that [redacted] must specifically argue the inapplicability of a hearsay exception never even raised by IMPERIAL.

Accordingly, if there is any waiver here, it is IMPERIAL who has waived any argument that the document was not hearsay because it had complied with the "Summaries" statute. Of course, it could not make that argument, because it never provided the notice or the underlying data required by the statute.

[18] Answer Brief, p. 21.

C. Exhibit 3 is a summary of other data not in evidence.

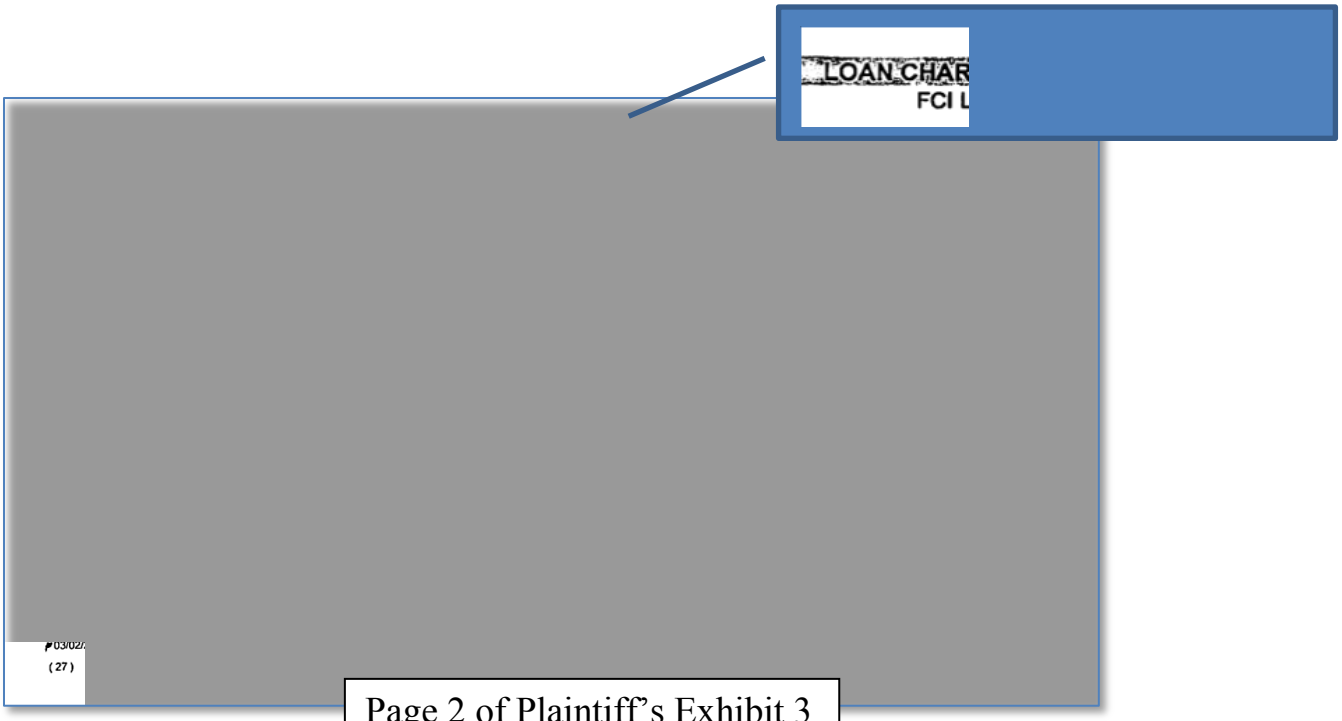
IMPERIAL makes the astonishing claim that "there is no plausible argument" that Exhibit 3 "was a summary of any kind."[19] What is implausible is that IMPERIAL would tell this Court that it sought to introduce a two page document which it claimed set forth the current indebtedness, but which was not somehow related to the years of payment and cost data that it claimed to have. If it does not summarize the history of [redacted] account, one is left to wonder what the relevance of the document would be.

Of course, IMPERIAL's repeated assertion that the second page of Exhibit 3 was a "breakdown" of the first,[20] is an admission that first page summarizes the data on the second. Even more importantly, the second page is itself a summary (or intended to masquerade as a summary) of years of payment data from two different servicers—data that was never introduced into evidence or even identified. Despite telling this Court there is no plausible argument that Exhibit 3 is a summary, it concedes that the very title of the second page—the very one that appeared for the first time at trial—is "Loan Charges Summary Report."[21]

[19] Answer Brief, p. 21, n. 4.

[20] T. 83, Answer Brief, p. 11.

[21] Answer Brief, p. 11, 12.



Page 2 of Plaintiff's Exhibit 3

Additionally, at trial, Lavergne agreed that a "[s]ummary is just as good a word as others" to describe the document.[22] He admitted that more detailed information existed as to payments and nonpayments that was not contained on Exhibit 3 and that his testimony relied upon those monthly data entries (that were not before the court) being accurate.[23] Yet, he also admitted that he would "be speculating" if he were to testify about how the data was condensed—that is, he could not say "that a hundred different data points came together for just this one."[24]

IMPERIAL's failure to provide the summary document (or to identify the underlying data) before trial, or even list these documents on its exhibit list,

[22] T. 136.

[23] T. 136-137.

[24] T. 136.

severely and unfairly prejudiced [redacted] ability to show that Exhibit 3 did not accurately condense the history of payments and expenses on this loan. This is, of course, particularly egregious with respect to the late charges, as well as the tax and insurance payments made by IMPERIAL, because [redacted] would have no records of his own to counter IMPERIAL's bald claims.

D. The hearsay argument regarding IMPERIAL's improper use of a data summary was crystalized for the trial court by the motion for rehearing.

While the hearsay objection was properly preserved at trial, the inapplicability of the summary exception was crystalized for the trial judge in [redacted] Motion for Rehearing and Motion to Alter or Amend Judgment[25] and again at the hearing on that motion.[26] Likewise, if the trial court had not fully appreciated that [redacted] objection to Exhibit 3 was also based on the fact that IMPERIAL never produced the document before trial or listed it on its exhibit list, that point was also reiterated in the Motion for Rehearing. There can be no question but that the trial court understood [redacted] position and rejected it before [redacted] asked this Court to review that decision.

A court, on rehearing, may consider evidence it had erroneously excluded. *Allstate Ins. Co. v. Greyhound Rent-A-Car, Inc.*, 586 So. 2d 482, 483 (Fla. 4th

[25] R. 1449.

[26] Transcript of Hearing Before the Honorable Susan Lubitz, May 12, 2011, pp. 3-5, 10-15 (R. 6-8, 13-18).

DCA 1991). Conversely, on rehearing, it may choose to disregard evidence that it decides was erroneously admitted. *See Carollo v. Carollo,* 920 So. 2d 16, 19 (Fla. 3d DCA 2004) (the purpose of rehearing is "to give the trial court an opportunity to…correct any error if it becomes convinced that it has erred.") Thus, not only did the lower court err at trial by admitting Exhibit 3 (and allowing it to be read into evidence) over objection, but it abused its discretion by failing to correct its error on rehearing. The trial court should have corrected the error by disregarding the document—the only evidence of the amounts due and owing.

II. That IMPERIAL's Summary Judgment Affidavit Included a Page With a Similar Format to One of the Pages of Exhibit 3 is Irrelevant Because Neither Was Listed as an Exhibit.

IMPERIAL makes much of the fact that the first page of Exhibit 3 resembles another document from the same servicer (FCI Trust Services) which had been attached to Lavergne's Affidavit in Support of Motion for Final Summary Judgment.[27] Leaving aside that the resemblance would only be relevant if the

[27] Answer Brief, p. 13. Appellant was unable to locate this particular affidavit (plaintiff's second) in the record or even the trial court docket, but does not dispute that a document with a similar format (but different numbers) was attached to an affidavit served January 14, 2011. Appellant specifically disputes that the document attached to the affidavit as Exhibit F, however, included a second page. IMPERIAL's statement to the contrary (Answer Brief, p. 13) is unsupported by the record.

numbers (not merely the format) had been the same, it bears emphasis that even this earlier document was not listed as a trial exhibit.[28]

IMPERIAL also asserts that Exhibit 3 was merely an "updating" of the financial figures on the affidavit exhibit.[29] Yet, neither IMPERIAL nor Lavergne has ever explained the process by which that was done or how the two documents could display two different per diem rates even though the interest rate never changed.[30]

III. Establishing a Business Records Exception to Hearsay was IMPERIAL's Burden.

Section 90.956 Fla. Stat. pertains to the hearsay inherent in one document (the summary) reporting what is allegedly contained in another group of documents. If this Court agrees that IMPERIAL did not comply with the notice requirements of this statute, then it may reverse the judgment without addressing the first level of hearsay presented here. That first level of hearsay is inherent in the phantom underlying documentation—the computer records that were constantly referenced,[31] but never offered in evidence.

---

[28] *See*, discussion in Motion for Rehearing and Motion to Alter or Amend Judgment, p. 3 (R. 1451).

[29] *Id*.

[30] T. 138-40.

[31] T. 24, 36, 51, 55, 85, 101.

Notably, although the trial court had already permitted Laverne to testify about the amounts due that were calculated from the servicer's computer records, IMPERIAL eschewed offering them into evidence. IMPERIAL even objected to any cross-examination about them, an objection that the trial court sustained.[32] In any event, to the extent that the information contained in the servicer's computer records was in evidence by way of the summary, these computer records were themselves hearsay and IMPERIAL failed to establish an exception.

To bolster its claim that Lavergne had sufficient knowledge about the computer records to establish the criteria for a business record exception, IMPERIAL's Answer Brief seeks to conflate the two very different relationships Lavergne had with the servicers in this case—Specialized Loan Servicing ("SLS") and FCI Trust Services. The servicer at the time of the default in this case (around June of 2008)[33] and the filing of this action was SLS.[34] Lavergne's employment with IMPERIAL did not begin in earnest until November 2008 around the same time as FCI became the servicer.[35]

As a result, Lavergne never even claimed to have enjoyed the close relationship with SLS that he claimed to have had with FCI. In the end, he

[32] T. 114.

[33] T. 67.

[34] T. 30, 107.

[35] T. 30, 42.

admitted that he did not supervise recordkeeping at SLS[36] and that any errors in the SLS records would have carried over to the FCI computer records.[37] This latter admission is all the more powerful precisely because of his purported "extensive involvement" in the process of transferring loan records from SLS to FCI.[38] If there had been any error checking or data confirmation in the process, he surely would have known about it and testified accordingly.

IMPERIAL also points to Lavergne's testimony that it was IMPERIAL who paid the insurance and taxes directly, not the servicer, as proof that Lavergne was a "qualified witness" on that subject.[39] IMPERIAL, however, did not mention to this Court that Lavergne could not say what the amounts were without checking IMPERIAL's records, which he did not bring to trial.[40]

And finally, IMPERIAL claims that "[o]nce the trial court determined that Exhibit 3 could be admitted, the burden shifted to [redacted] to prove the evidence was untrustworthy."[41] This would only have been true if the admission of the evidence had not been in error. IMPERIAL has cited no case that suggests errors in the

[36] T. 108.

[37] T. 110.

[38] Answer Brief, p. 28.

[39] Answer Brief, p. 27.

[40] T. 119-210.

[41] Answer Brief, p. 31.

admission of evidence are harmless if the aggrieved party does not adduce counter-evidence.

IMPERIAL's reliance on the summary judgment case of *770 PPR, LLC v. TJCV Land Trust*, 30 So. 3d 613 (Fla. 4th DCA 2010) is misplaced, because the issue there was whether mere allegations of the borrower, even when placed in an affidavit, are sufficient to create an issue of fact. *Id*. at 619. In *770 PPR*, the admissibility of the bank's summary judgment "evidence" was apparently unchallenged—its affidavit being sufficient to prove a *prima facie* case. Had the borrower shown that the bank's affidavits were defective because the affiant lacked personal knowledge, then there would have been no need for a counter-affidavit from the borrower. In fact, that is precisely what happened in *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780 (Fla. 4th DCA 2011), where summary judgment was reversed without any counter-affidavit from the borrower.

The same is true for trial. If a plaintiff in a non-jury trial fails to prove a *prima facie* case, the court must grant an involuntary dismissal. *Robinson v. Wright*, 425 So. 2d 589 (Fla. 3d DCA 1982). Where the plaintiff fails to prove its case, there is no obligation that the defendant adduce a scrap of evidence. Here, without the inadmissible figures from the hearsay summary, IMPERIAL introduced no evidence of the amount of indebtedness. [redacted] was entitled to an involuntary dismissal.

CONCLUSION

The payment summary was unmitigated hearsay. The court erred in admitting the summary and there was no other evidence in the record as to the amount of damages. The judgment in this case should be reversed with instructions to enter judgment in favor of [redacted]

Dated November 20, 2012

ICE LEGAL, P.A.
Counsel for Appellant
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. 521655

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.

ICE LEGAL, P.A.
Counsel for Appellant
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. 521655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this November 20, 2012, 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.

ICE LEGAL, P.A.
Counsel for Appellant
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. 521655

SERVICE LIST

Ileen Cantor, Esq.
SHAPIRO & FISHMAN, LLP
2424 North Federal Highway, Suite 360
Boca Raton, FL 33431
(561) 998-6700
icantor@logs.com
Plaintiff's counsel