In the District Court of Appeal
Fourth District of Florida

CASE NO.
(Circuit Court Case No.

---

and

Appellants,

v.

COUNTRYWIDE BANK, FSB,

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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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

SUMMARY OF THE REPLY ARGUMENT 1

RESPONSE TO THE BANK'S STATEMENT OF FACTS 2

ARGUMENT 3

I. There Was No Admissible Evidence That the Necessary Endorsement Was Placed On the Note Before the Case Was Filed. 3

II. The Damages in the Judgment Are Not Supported by the Evidence. 6

III. The Trier of Fact May Not Consider Information in Documents Merely Because They Were Read by a Professional Testifier Who Was Not a "Qualified" Witness. 8

A. A prior servicer's records are not admissible without testimony concerning the accuracy-checking of the transferal process. 11

B. Even if a witness's familiarity with the preparation of the records can be based partly on hearsay, here, it was based completely on hearsay—hearsay which was communicated for purposes of litigation. 12

CONCLUSION 15

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD 16

CERTIFICATE OF SERVICE 17

SERVICE LIST 18

TABLE OF AUTHORITIES

Page

Cases

Alexander v. Allstate Ins. Co.,
388 So. 2d 592 (Fla. 5th DCA 1980) 4, 9

Brevard County v. Interstate Eng'g Co.,
224 So. 2d 786 (Fla. 4th DCA 1969) 8

Cayea v. CitiMortgage, Inc.,
138 So. 3d 1214 (Fla. 4th DCA 2014) 8, 9, 10

Cooper v. State,
45 So. 3d 490 (Fla. 4th DCA 2010) 11

G.M. Brod & Co., Inc. v. U.S. Home Corp.,
759 F.2d 1526 (11th Cir. 1985) 5

Glarum v. LaSalle Bank Nat. Ass'n,
83 So. 3d 780 (Fla. 4th DCA 2011) 10

Hartford Acc. & Indem. Co. v. Ocha,
472 So. 2d 1338 (Fla. 4th DCA 1985) 4

In re Sagamore Partners, Ltd.,
11-37867-BKC-AJC,
2012 WL 3564014 (Bankr. S.D. Fla. 2012) 12

J.J. v. Dep't of Children & Families,
886 So. 2d 1046 (Fla. 4th DCA 2004) 7

Lindsey v. Cadence Bank, N.A.,
135 So. 3d 1164 (Fla. 1st DCA 2014) 9, 10

Loiaconi v. Gulf Stream Seafood, Inc.,
830 So. 2d 908 (Fla. 2d DCA 2002) 7

Mastan Co. v. Am. Custom Homes, Inc.,
214 So. 2d 103 (Fla. 2d DCA 1968) 9

Nationwide Mut. Ins. Co. v. Jones,
414 So. 2d 1169 (Fla. 5th DCA 1982) 4

Pain Care First of Orlando, LLC v. Edwards,
84 So. 3d 351 (Fla. 5th DCA 2012) 7

Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Koltunovsky,
184 So. 2d 450 (Fla. 3d DCA 1966) 3

Shands Teaching Hosp. & Clinics, Inc. v. Dunn,
977 So. 2d 594 (Fla. 1st DCA 2007) 4

Strauss v. Douglas Aircraft Co.,
404 F.2d 1152 (2d Cir. 1968)...5

United States v. Franco,
874 F.2d 1136 (7th Cir. 1989) 13

Van Der Noord v. Katz,
481 So. 2d 1228 (Fla. 5th DCA 1985) 7

WAMCO XXVIII, Ltd. v. Integrated Elec. Environments, Inc.,
903 So. 2d 230 (Fla. 2d DCA 2005) 11, 12

Weisenberg v. Deutsche Bank Nat. Trust Co.,
89 So. 3d 1111 (Fla. 4th DCA 2012) 9, 10

Wilson v. Volkswagen of Am., Inc.,
561 F.2d 494 (4th Cir. 1977)..5

Statutes

§ 90.406, Fla. Stat. 3, 4

Rules

Fed. R. Evid. 406 4

Other Authorities

4 Christopher B. Mueller & Laird C. Kirkpatrick,
Federal Evidence § 8:78 (4th ed. 2014)...13

Advisory Committee Notes 1972 Proposed Rules, Fed. R. Evid. 406 5

KEY:

The conventions of the Initial Brief are continued here:

- "The Bank" refers to the plaintiff;
- "The Homeowners" refers to [redacted] and [redacted] [redacted]
- "R. __" refers to the Record on Appeal;
- "T. __" refers to the transcript of trial.

SUMMARY OF THE REPLY ARGUMENT

The Bank's argument that it proved that it had standing when it filed the case attempts to hang by a single thread—that its witness, Ms. Words, testified to a "routine practice" of gathering all necessary endorsements before filing. But Ms. Words did not testify about a "routine practice," but simply claimed that there existed a policy at Countrywide—a company for which she had never worked. She admitted that she was told about such a policy as part of her training to be a witness. Even if such hearsay were admissible, the existence of a policy is not evidence of a "routine practice" without evidence that the policy was ever followed or enforced.

The Court, therefore, need not reach the other issues, but it is noteworthy that the Bank effectively concedes that the judgment includes damages which cannot be computed from the evidence and requests a second bite at the proverbial apple—something to which it is not entitled (but which it will have the opportunity to do if it must refile due to its lack of standing).

Lastly, contrary to the Bank's arguments, neither this Court, nor any other court, has ever held that the foundation for a business records exception to hearsay may be laid by testimony that is itself hearsay—hearsay that was fed to the witness specifically for the purpose of regurgitating it on the stand.

RESPONSE TO THE BANK'S STATEMENT OF FACTS

The Bank makes several statements as though they are fact, but which are, in reality, merely assertions by its witness, the admissibility and probative value of which go to the heart of this appeal. For example, the Bank states "[a]ll of these indorsements were made on an Allonge to the Note before this action was filed."[1] But the Bank's only witness, Ms. Words, did not know when the endorsements were made. The Bank's reference is to her interjection on cross that she had been told that it was the "policy" (of an entity she never worked for) to have all the endorsements so that it "would have standing to be able to file a complaint..."[2]

At best, this is hearsay. At worst, it is witness coaching with a self-serving circularity: the Bank must have had the endorsements it needs, because it is the Bank's "policy" to do what it will claim to have done in its lawsuit. A comparable statement would be that of a borrower saying he must have made all his payments, because it was his "policy" to make all payments…since making all payments would help his case. (It would be even more analogous if the borrower testified that he was told to say that.) Just as this is not evidence of payments, Ms. Word's claim is not evidence of the timing of the endorsements, much less, something to state as "fact" in a Statement of Facts.

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[1] Answer Brief, p. 2, 9.

[2] T. 161-162.

ARGUMENT

I. There Was No Admissible Evidence That the Necessary Endorsement Was Placed On the Note Before the Case Was Filed.

The Bank does not dispute that, if there is no admissible evidence on the timing of the endorsements, the judgment should be reversed and judgment entered in favor of the Homeowners. The only statement that the Bank points to as admissible "evidence" is the assertion by Ms. Words—an employee of Bank of America—that Countrywide Bank, FSB had a policy and procedure that all necessary endorsements appear on the Note before foreclosure is filed.[3] She was told about this, apparently unwritten, policy as part of her training to testify in court.[4]

The Bank cites to § 90.406, Fla. Stat. which makes evidence of routine practice of an organization admissible. But evidence of routine practice cannot be established by hearsay. *See Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Koltunovsky*, 184 So. 2d 450, 452 (Fla. 3d DCA 1966) (finding no error in precluding an underwriter for another insurance company to testify concerning underwriting practices of the defendant insurance company); *Alexander v. Allstate*

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[3] Answer Brief, pp. 33-37. This professed concern over endorsements conflicts with the allegation of the original plaintiff that its right to foreclose arose from an assignment of mortgage—an assignment dated after the case was filed.

[4] T. 162.

Ins. Co., 388 So. 2d 592, 593 (Fla. 5th DCA 1980) (adjuster not qualified to testify about the usual business practices of sales agents at other offices).

Additionally, the mere statement that there existed a "policy and procedure" is not evidence of a "routine practice." There must be evidence that the intent expressed in a "policy and procedure" is actually implemented and enforced such that it has become an established custom or habit. *See* (cases cited by the Bank) *Shands Teaching Hosp. & Clinics, Inc. v. Dunn*, 977 So. 2d 594, 597 (Fla. 1st DCA 2007) (hospital's routine practice of using two nurses to check dosage levels admissible where the nurse testified that such was her "routine," that other nurses followed the "practice," and that "[o]ther nurses had checked her work many times before, and vice versa."); *Hartford Acc. & Indem. Co. v. Ocha*, 472 So. 2d 1338, 1340 (Fla. 4th DCA 1985) (involving testimony from a drivers' license examiner about her own routine in conformance with policy and that her supervisor caught and corrected the only two mistakes that she made in following the policy); *Nationwide Mut. Ins. Co. v. Jones*, 414 So. 2d 1169, 1171 (Fla. 5th DCA 1982) (testimony of agent that he "always" followed the routine).

In applying the federal equivalent of § 90.406, Fla. Stat. (Fed. R. Evid. 406), the federal courts bar evidence of routine practice unless there are examples of the claimed practice—and the examples are "numerous enough to base an inference of systematic conduct." *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 511 (4th

Cir. 1977); *Strauss v. Douglas Aircraft Co.*, 404 F.2d 1152, 1158 (2d Cir. 1968). The key factors are the "adequacy of sampling" and the "uniformity of response." Advisory Committee Notes 1972 Proposed Rules, Fed. R. Evid. 406; *G.M. Brod & Co., Inc. v. U.S. Home Corp.*, 759 F.2d 1526, 1533 (11th Cir. 1985) (testimony concerning specific instances within experience of witness, when considered in light of thousands of unobserved similar instances, "falls far short of the adequacy of sampling and uniformity of response which are the controlling considerations governing admissibility").

The one sampling we do have is that, on this occasion, the Note attached to the Complaint did not have the necessary endorsements and was lost. How the Bank could have ensured that the endorsements were present on a note that was not in its possession was never explained.[5]

Ms. Words' words, therefore, were not admissible evidence of a policy and procedure of a prior plaintiff, and not evidence (admissible or otherwise) of a routine practice of that entity. There being no evidence that the necessary

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[5] In fact, what would be "all necessary endorsements" for the filer, Countrywide Bank, FSB, would be something different than that needed for Bank of America—Countrywide did not need the last endorsement in blank. (See multiple endorsements shown on page 5 of the Initial Brief). Coupled with Bank of America's allegation that it became the holder due to an unconditional transfer "prior to the commencement of the action" (Amended Complaint, ¶ 5; R. 136), Ms. Words' statement becomes nonsensical. She is suggesting that Countrywide made sure it had all the endorsements it needed even though Bank of America was the rightful plaintiff and in possession of the note.

endorsements were present to give the original plaintiff standing when it filed the lawsuit (and undisputed evidence that the note was assigned after the case was filed), the judgment must be reversed and judgment entered for the Homeowners.

II. The Damages in the Judgment Are Not Supported by the Evidence.

The Bank effectively concedes error on this point because, apparently, even the Bank itself could not calculate the amounts in the judgment from the actual exhibits in evidence. If it could, it chose not to demonstrate to this Court how to do so in the forty-one pages of its Brief and instead invited the Court to try its hand at performing the computations.[6]

Additionally, and commendably, the Bank does not seek to convince this Court that the reading of a proposed judgment constituted substantive evidence of its damages. Apparently admitting that the document's accuracy cannot be confirmed by the actual exhibits or testimony, it posits that Ms. Words read it aloud to determine that it "accurately" stated "the amounts sought by the Bank."[7]

Having made these concessions, the Bank now asks for a "do-over" on the elements of damage it failed to prove. First, it should be noted that the Bank will have its opportunity for a do-over should it be required to refile this action (due to its lack of standing at the inception of this case).

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[6] Answer Brief, p. 39 ("If the Court agrees that these amounts were not calculable…").

[7] Answer Brief, pp. 38-39.

But the notion that a party may neglect to bring evidence to prove elements of its damages and be given another bite at the evidentiary apple is not supported by any law or logic. A personal injury plaintiff, for example, cannot ask the appellate court for another chance at proving medical bills he did not bring to the trial. *See Pain Care First of Orlando, LLC v. Edwards*, 84 So. 3d 351, 355 (Fla. 5th DCA 2012) ("Having proceeded to judgment on legally insufficient proof, Appellee does not get a do-over."); *Van Der Noord v. Katz*, 481 So. 2d 1228, 1230 (Fla. 5th DCA 1985) ("Having failed to introduce competent, substantial evidence in regard to this issue, the buyer is not entitled to a second bite at the apple."); *Loiaconi v. Gulf Stream Seafood, Inc.*, 830 So. 2d 908, 910 (Fla. 2d DCA 2002) (same); *J.J. v. Dep't of Children & Families*, 886 So. 2d 1046, 1050 (Fla. 4th DCA 2004) (where Department did not seek a continuance to secure additional evidence, "[n]o statue or rule permitted the trial court to give the Department a 'do-over'…").

The cases cited by the Bank do not hold that a party may try its case again and again until they manage to bring admissible evidence of their damages. While they remand for "further proceedings," these cases are easily reconciled with the no-"do-over" cases by recognizing that, in admitting inadmissible evidence, the trial court may have dissuaded the plaintiff from adducing admissible evidence it was prepared to present. Thus, these cases are not remanded for new trials, but for

the narrow determination whether plaintiff had brought other evidence on the day of trial that it would have offered had the trial court excluded the inadmissible evidence. To hold otherwise is to reward the plaintiff for having successfully led the trial judge into error.

Here, it is unnecessary to remand for such a determination, because there are no damage exhibits listed by the Bank that were not admitted into evidence and the only witness properly listed by name was permitted to testify.[8] Accordingly, if the judgment is not reversed for lack of standing, the amounts of damages for interest and title search expenses should be reversed, and the case remanded for entry of a judgment that does not include those items.

III. The Trier of Fact May Not Consider Information in Documents Merely Because They Were Read by a Professional Testifier Who Was Not a "Qualified" Witness.

The Bank relies heavily on this Court's opinion in *Cayea v. CitiMortgage, Inc.*, 138 So. 3d 1214 (Fla. 4th DCA 2014)[9] which focused on whether summaries are admissible as business records—which is not applicable here. The case does not say, as the Bank contends, that any person can become a "records custodian or otherwise qualified witness" by being told what to say about records. It does not

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[8] Plaintiff's Second Amended Trial Witness and Exhibit List, August 19, 2013 (R. 417); *Brevard County v. Interstate Eng'g Co.*, 224 So. 2d 786, 788 (Fla. 4th DCA 1969) (court has discretion to exclude witness not specifically listed by name as required by trial order).

[9] Answer Brief, pp. 17-19.

say that hearsay can be used as the basis for establishing a hearsay exception. (It is an understatement to say that such a ruling would have been surprising since it would completely eviscerate the hearsay objection to records.)

Cayea is not helpful here precisely because the opinion does not say how the witness, Mr. Windsor, obtained his "familiarity" with CitiMortgage's records—whether, for example, he had ever worked in the relevant departments or whether, on the other hand, his "familiarity" was artificially created for purposes of litigation. In short, it does not say whether this foundational testimony (for the hearsay exception) was itself hearsay, and if so, whether a hearsay objection was raised.[10] The same may be said for the other cases cited by the Bank: *Weisenberg v. Deutsche Bank Nat. Trust Co.*, 89 So. 3d 1111 (Fla. 4th DCA 2012) and *Lindsey v. Cadence Bank, N.A.*, 135 So. 3d 1164 (Fla. 1st DCA 2014).

Even when looking strictly at the quantity of a witness's knowledge, rather than its source, *Cayea* favors the Homeowners. *Cayea* specifically distinguished

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[10] Notably, dicta in *Cayea* has the deceptive appearance of endorsing a low threshold for the qualifications of a witness—the statement that "the witness just need be well enough acquainted with the activity to provide testimony." *Id.* at 1217. In reality, the "well enough acquainted" standard is a rigorous one that originated with *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592 (Fla. 5th DCA 1980), which held that an adjuster from one insurance company was <u>not</u> qualified to testify about the business practices of another insurance company. That case cited to *Mastan Co. v. Am. Custom Homes, Inc.*, 214 So. 2d 103 (Fla. 2d DCA 1968) which upheld the exclusion of bookkeeping records because the witness was not qualified, despite being one of three bookkeepers making entries.

Glarum v. LaSalle Bank Nat. Ass'n, 83 So. 3d 780 (Fla. 4th DCA 2011) because the witness there "did not know who entered the data into the computer and he could not verify that the entries were correct at the time they were made. *Cayea*, at 1218. He also relied on data supplied by the prior servicer with which he was even "less familiar" *Id*.

Here, Ms. Words' professed familiarity was identical. She did not know who entered the data into the computer, could not verify that the entries were correct when made, and relied on data supplied by a prior servicer with which she was even less familiar. Just as *Cayea* distinguished *Glarum*, this case must be distinguished from *Cayea*.

In each of the *Cayea*, *Weisenberg*, and *Lindsey* cases, the witness worked for the same company that produced the data and knew what department was responsible for collecting and applying payments. In contrast, Ms. Words was could not identify the group within the Bank who would be notified if a loan payment was missed, was uncertain as to which department that group belonged, and was unsure how the group is notified of overdue payments.[11] She admitted she did not know whether her employer had done anything to verify that the previous servicer's records were accurate.[12] In fact, her claim that Bank of America used

[11] T. 76-77.

[12] T. 136.

"the exact same system" implies there was no error checking—that the system would contain the "exact same errors."

Lastly, the Bank likens its witness to that in *Cooper v. State*, 45 So. 3d 490 (Fla. 4th DCA 2010)—a Verizon store manager for multiple retail stores, with experience (not just training for purposes of providing testimony) in phone servicing, the transmission process of phone calls through Verizon's network, records maintenance, data servicing, and customer, billing, and technical support. This Court found these qualifications sufficient for the introduction of wireless phone records. Again, unlike Ms. Words, the witness in *Cooper* testified about his own company's records and gained his familiarity with the records through business-related (not litigation-related) duties.

A. A prior servicer's records are not admissible without testimony concerning the accuracy-checking of the transferal process.

As mentioned in the Initial Brief, the case cited by the Bank, *WAMCO XXVIII, Ltd. v. Integrated Elec. Environments, Inc.*, 903 So. 2d 230, 232 (Fla. 2d DCA 2005), is inapplicable because, unlike Ms. Words, the witness there was personally involved in the transfer process and described the steps used to verify the accuracy of information received.[13]

The Bank also relies upon a federal trial court decision in which a judge denied a motion to strike a summary judgment affidavit. *In re Sagamore Partners,*

[13] Initial Brief, p. 24.

Ltd., 11-37867-BKC-AJC, 2012 WL 3564014 (Bankr. S.D. Fla. 2012)[14] Although the judge in *Sagamore* cited *WAMCO* (despite the absence of the critical testimony that the transferred records had been checked for accuracy), the passage quoted by the Bank in its Brief is not from *WAMCO* or any Florida case. The quoted passage opines that a prior servicer's records are admissible because banks: 1) maintain accurate records; and 2) often rely on their predecessor's records.

The myth that bank records used in foreclosures are particularly trustworthy was discussed in the Initial Brief (pp. 28-29). And the fact that banks choose to absorb the risk that the inaccuracy of their predecessor's records will be uncovered is hardly a legal basis for discarding time-honored evidentiary rules. In any event, unlike *WAMCO* (at 233), there was no evidence in this case that Bank of America relied upon the accuracy of the prior servicer's records (as opposed to building in a discount for known inaccuracies, for example).

B. Even if a witness's familiarity with the preparation of the records can be based <u>partly</u> on hearsay, here, it was based <u>completely</u> on hearsay—hearsay which was communicated for purposes of litigation.

The Bank also urges this Court to adopt, as a new standard in Florida, a hornbook description of federal law such that hearsay may be used, in part, to lay the foundation for a hearsay exception.[15] Even if this were the standard reported

[14] Answer Brief, p. 23.

[15] Answer Brief, p. 26, *citing*, 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:78 (4th ed. 2014) ("*Fed. Evid.* §8:78").

by the hornbook, it would not be applicable here since Ms. Words' knowledge—particularly of the prior servicer's records—is not based "in part" on hearsay, but rather completely on hearsay.

Upon a closer reading, however, the hornbook separates knowledge about the recordkeeping processes of the business (which it says must be "firsthand") and knowledge about the preparation of the particular documents being offered (which may be a "mix" of hearsay and firsthand observations). *Fed. Evid.* §8:78, citing *United States v. Franco*, 874 F.2d 1136 (7th Cir. 1989) (a criminal case usually cited as holding that a law enforcement agent can be a qualified witness to introduce the business records of an accused). Thus, even if the Court were to adopt this new standard it would not avail the Bank because Ms. Words had no firsthand knowledge of the recordkeeping processes, especially those of the prior servicer.

Most importantly, neither the hornbook, nor any case found by either party to this appeal, suggests that, if hearsay is permitted in the "mix," it may be hearsay imparted to the witness solely for purposes of parroting those very words in a court of law.

* * *

In summary, the Homeowners do not contend that a witness is unqualified to introduce business records unless he or she actually created the records or knows who did. To be qualified, however, the witnesses must have, at a minimum, firsthand familiarity with the processes for creating and maintaining the records—not just familiarity with what they say. Nor is it sufficient for the witness to know how to access computerized records, any more than knowledge of how to open a file cabinet qualifies one to testify about how the records inside were created.

And for purposes of satisfying the trustworthiness criterion in the business records exception to hearsay, that familiarity must be developed by way of firsthand experience in performing, supervising, or implementing the recordkeeping processes as part of the business of that entity. To permit "familiarity" to be gained by way of training for the job of testifying would be too susceptible to abuse.

CONCLUSION

The judgment should be reversed and remanded with instructions for entry of judgment in favor of the Homeowners.

Dated September 29, 2014

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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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this September 29, 2014 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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