In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, et al.,

Appellees.

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

REPLY BRIEF OF APPELLANT

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Key:

- The Appellee, Federal National Mortgage Association, will be referred to as "Fannie Mae."
- The Appellant, [redacted] will be referred to as "the Homeowner."
- IBM Lender Business Services, Inc. will be referred to as "IBM."
- Seterus, Inc. will be referred to as "Seterus."
- Chase Home Finance, LLC, the assignee of the assignment of mortgage attached to Fannie Mae's complaint, will be referred to as "Chase Home Finance."
- JPMorgan Chase Bank, N.A., the original lender, will be referred to as "JPMorgan."
- William Rankin, Fannie Mae's witness at trial, will be referred to as "Rankin."
- The Transcript of the trial held on March 20, 2014 will be referred to as "T. ___" followed by the transcript page number.

SUMMARY OF THE REPLY ARGUMENT

Rather than cite to record evidence which supports the proposition that IBM had authority to verify the complaint, Fannie Mae impermissibly asks the Court to take judicial notice of a document it never bothered to submit to the trial court. But since this Court is constrained to the record before it, and since Fannie Mae failed to meet its burden of proof that its complaint was properly verified, the case should have been dismissed for improper verification.

Likewise, Fannie Mae offers no substantive argument that it had standing at inception of the action. Rather, it again asks the Court to take judicial notice of a document it did not seek to admit at trial. And its fallback argument—that its standing was proven because a copy of the note attached to the complaint contained a blank endorsement—is just as unavailing since it requires the Court to assume facts not in evidence, and thus put the horse before the cart.

Fannie Mae's witness was wholly unqualified to testify at trial and the very case upon which it relies in its brief actually supports the Homeowner. The default notice was offered to prove the truth of the matter asserted and therefore was offered for more than a "verbal act." Additionally, the sufficiency of the notice to support the judgment has not been waived since it can be raised for the first time on appeal. Therefore, the judgment must be reversed and the case dismissed.

ARGUMENT

I. There is no competent, substantial evidence to support a finding that IBM had authority to verify the complaint.

Fannie Mae does not point to a single piece of record evidence which would support a finding that IBM had authority to verify the complaint on behalf of Fannie Mae. Rather, it takes the extraordinary and categorically impermissible position that this Court should take judicial notice of evidence it never bothered to introduce at trial.[1] The motions panel has already denied Fannie Mae's request after consideration of the Homeowner's response,[2] and the merits panel should follow suit since appellate proceedings are not evidentiary proceedings and appellate judicial notice is usually limited to notice of the Court's own records—and never for documents which a party did not ask to be noticed in the trial court. *Hillsborough County Bd. of County Com'rs v. Pub. Employees Relations Com'n*, 424 So. 2d 132, 134 (Fla. 1st DCA 1982); *City of Miami v. F.O.P. Miami Lodge 20*, 571 So. 2d 1309, 1319, n. 10 (Fla. 3d DCA 1989) (disagreeing with

[1] Answer Brief, p. 11. The actual "evidence" Fannie Mae requests that the Court take judicial notice of is an affidavit—something even the trial court could not judicially notice. *See* §§ 90.201 and 90.202, Fla. Stat. Additionally, Fannie Mae's argument seeks affirmance vis-à-vis the "tipsy coachman" doctrine. But since the Court should not take judicial notice of the affidavit, this argument holds no weight.

[2] Appellee's Request for Judicial Notice, March 20, 2015; Appellant's Response to Appellee's Request for Judicial Notice; Order Denying Appellee's Request to Take Judicial Notice, April 21, 2015.

Hillsborough County, but limiting judicial notice to matters that will have no effect on the outcome of the case); *Supinski v. Omni Healthcare, P.A.*, 853 So. 2d 526, 532, n. 2. (Fla. 5th DCA 2003) ("It is elemental that appellate courts will not consider evidence that was not presented to the trial court for its consideration in making its decisions."); *Mitchell v. City of Fort Lauderdale*, 254 So. 2d 824, 827, n. * (Fla. 4th DCA 1971) ("appellate courts may not take judicial notice of municipal ordinances"). *See also Deutsche Bank Nat. Trust Co. v. Huber*, 137 So. 3d 562, 564 (Fla. 4th DCA 2014) (rejecting bank's argument that original note was in a "package" submitted to the clerk of the court because "this court does not make 'logical and equitable' leaps of faith, as it cannot (and should not) make any such determination unsupported by the record before it.") (emphasis original).

And Fannie Mae's second argument—that the Homeowner "provided no evidence in support" of her affirmative defense regarding the verification[3]—also falls flat because nothing in the law or the rule requires that a challenge to the verification of the complaint must be raised by affirmative defense. More importantly, even if the Homeowner should bear some burden of pleading so as to put the plaintiff on notice of the defense (which was met here), there is nothing to suggest that the Homeowner should also bear the burden of proof (either the

[3] Answer Brief, p. 11.

burden of providing evidence or the burden of persuasion) on the issue. Placing a burden of proof on the Homeowner makes little sense here since: 1) it was Fannie Mae's affirmative duty to verify the Complaint by way of an authorized representative (such that the defense merely negates the implied allegation that the Bank complied with its duty); and 2) Fannie Mae is the party with a nearly exclusive access to proof. *See generally*, Dworkin, Roger B., *Easy Cases, Bad Law, and the Burdens of Proof*, 25 Vanderbilt Law Review 1151, at 1161 (1972).[4] Notably, while the Second District in *Plageman* suggested that the verification challenge may be addressed by mechanisms other than a motion to dismiss, "such as an affirmative defense," it specifically declared that it was not addressing the burden of proof to resolve the issue. *Deutsche Bank Nat. Trust Co. v. Plageman*, 133 So. 3d 1199, 1202, n. 3 (Fla. 2d DCA 2014).

And even if the Homeowner bore the burden of proof, she met that burden by showing that the Complaint was verified by a stranger to the litigation. *See*

[4] Available at: the Maurer School of Law: Indiana University Digital Repository. Burden allocation is often tied to access to proof. *See e.g.*, Uniform Commercial Code 3-308 cmt. 1 (2002) (§ 673.3081, Fla. Stat. Ann. (2012)) (allocating presumption of authenticity of an instrument to its maker because such evidence would normally be "within the control of, or more accessible to" the maker); *Koulisis v. Rivers*, 730 So. 2d 289, 292 (Fla. 4th DCA 1999) (allocating burden of proof of proving that an allegedly conflicted attorney had confidential client information to that attorney because "[t]his allocation of the burden acknowledges the difficulty of proving what someone knows…").

Carvell v. Kinsey, 87 So. 2d 577, 579 (Fla. 1956) ("…parties-litigant are bound by the allegations of their pleadings and … admissions contained in the pleadings … are accepted as facts without the necessity of supporting evidence"). This was the "*prima facie* case" for the affirmative defense. The burden then shifted to Fannie Mae to prove that IBM was an authorized agent for that purpose. The Homeowner could not be expected to prove a negative—that IBM was not an authorized agent of the bank.[5]

Finally, Fannie Mae's argument that it "cannot be faulted for failing to present evidence related to the verification in its case-in-chief"[6] is a red herring. First, the Homeowner's attorney simply stated that he thought that the issue had been previously raised by a motion to dismiss to which Fannie Mae's counsel responded: "and the dismissal was obviously denied."[7] So, if anyone was responsible for this misdirection (thereby leading itself and the trial court into error), it was Fannie Mae. But more to the point, the case law is clear that improper verification cannot be raised on a motion to dismiss. *Plageman*, 133 So.

[5] Further, the evidence adduced at trial (by Fannie Mae's own witness) established that Seterus (not IBM) became the servicer of the loan in August, 2010 (T. 21; 109; 135). This was five months before the lawsuit was filed. (Complaint, January 19, 2011 (R. 1-34)).

[6] Answer Brief, p. 11-12.

[7] T. 18.

3d at 1202 (and cases cited therein). Therefore, it is irrelevant whether a motion had been filed or not.

II. Likewise, there is no competent, substantial evidence to support a finding that Fannie Mae had standing at inception of the action.

The copy of the note attached to the complaint is not sufficient evidence of Fannie Mae's standing at inception.

Fannie Mae relies heavily on a copy of the note attached to the complaint to establish its standing at the inception of the action.[8] Its argument is unavailing.

Indeed, Fannie Mae's burden at trial was to prove not only that the note was endorsed in blank, but that either it (or its agent) was in physical possession of the original note. *Kiefert v. Nationstar Mortgage, LLC*, 153 So. 3d 351, 352 (Fla. 1st DCA 2014); § 673.2011(2), Fla. Stat. Leaving aside that attachments to complaints are not evidence,[9] Fannie Mae is asking this Court to leap over a gap in its logic—to simply assume that Fannie Mae itself made the copy from an original

[8] Answer Brief, p. 13.

[9] *See e.g. Coggan v. Coggan*, 239 So. 2d 17, 19 (Fla. 1970) ("The claim of the defendant was manifested for the first time in his unsworn answer to the complaint for partition wherein he denied the existence of any cotenancy. This pleading cannot be considered as evidence."); *Turtle Lake Associates, Ltd. V. Third Federal Services, Inc.*, 518 So. 2d 959, 961 (Fla. 1st DCA 1988) ("Pleadings are not evidence, and since appellants never admitted the authenticity or veracity of the alleged mortgages, the trial court erred in relying on the provisions of documents not in evidence.").

in its possession. But there are many ways that Fannie Mae could have come by a photocopy, which is why transfer of an original instrument is required for an alleged holder to be entitled to enforce its terms. This Court should reject Fannie Mae's proffer of a photocopy of a note as evidence—just as Fannie Mae itself would reject an attempt to pay this debt with a photocopy of a check. This is especially true here where Rankin's own testimony could not establish the day Fannie Mae came into possession of the note[10] or when or why the mortgage was transferred from Chase Home Finance to Fannie Mae.[11]

The Court cannot take judicial notice of the assignment annexed as Appendix B.

Fannie Mae also requests that the Court take judicial notice of an assignment annexed as Appendix B to its brief.[12] Again, the motions panel has already denied this request and the merits panel should follow suit for the reasons stated in Argument I, *infra*.[13]

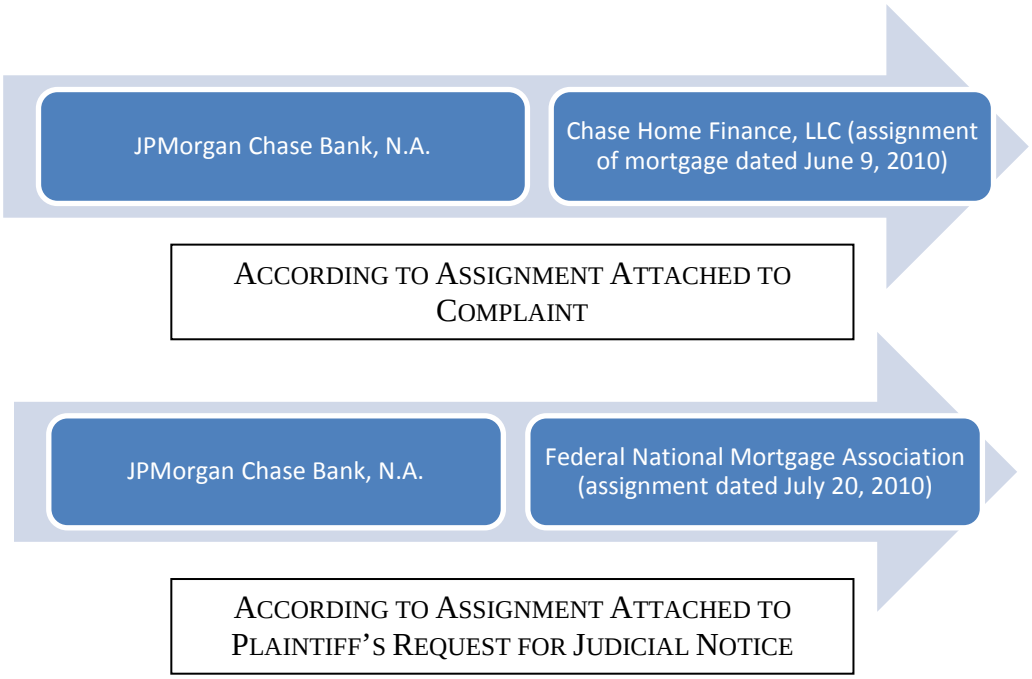
[10] T. 109.

[11] T. 117-118.

[12] Answer Brief, pp. 13-14.

[13] Like the affidavit annexed as Appendix A, the assignment is also not a document judicially noticeable simply because it has been publicly recorded. *Bull v. Jacksonville Federal S. & L. Ass'n*, 576 So. 2d 755, 756 (Fla. 1st DCA 1991) ("[P]ublicly recorded documents such as deeds and mortgages are not included in

But even if the assignment was judicially noticeable, and putting aside the fact that Fannie Mae should be estopped from presenting a new theory of standing for the first time on appeal, its theory does not even hold true. Specifically, the original lender JPMorgan did not have anything to assign to Fannie Mae on the day of the assignment since it had already assigned its interest to Chase Home Finance:



Thus, judicial notice of the facts Fannie Mae seeks to present does not resolve the appeal and only creates further doubt regarding Fannie Mae's standing.

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the list of matters which must or may be judicially noticed, set out in sections 90.201 and 90.202, Florida Statutes.").

The proper remedy on remand is involuntary dismissal.

Because the Homeowner's answer denied Fannie Mae's allegation that it owned and held the note,[14] this was a fact that Fannie Mae had to prove. *Gee v. US Bank Nat. Ass'n*, 72 So. 3d 211, 214 (Fla. 5th DCA 2011) ("When Ms. Gee denied that U.S. Bank had an interest in the Mortgage, ownership became an issue that U.S. Bank, as the plaintiff, was required to prove."). *See also Berg v. Bridle Path Homeowners Association, Inc.*, 809 So. 2d 32, 34 (Fla. 4th DCA 2002) ("It is well-settled in Florida law that the plaintiff is required to prove every material allegation of its complaint which is denied by the party defending against the claim.").

Since Fannie Mae failed to do this, reversal of the final judgment and entry of an involuntary dismissal is appropriate. *See Lloyd v. Bank of New York Mellon*, 160 So. 3d 513 (Fla. 4th DCA 2014); *Joseph v. BAC Home Loans Servicing, LP*, 155 So. 3d 444 (Fla. 4th DCA 2015); *Fischer v. U.S. Bank National Association*, 152 So. 3d 1289 (Fla. 4th DCA 2015).

III. Fannie Mae's exhibits should have been excluded from evidence.

Fannie Mae's reliance on Calloway supports the Homeowner's position.

Fannie Mae relies heavily on this Court's decision in *Bank of New York v. Calloway*, 157 So. 3d 1064 (Fla. 4th DCA 2015) for the proposition that the

[14] Amended Answer, April 29, 2013, ¶ 6 (R. 282).

payment history and default notice were admissible documents—but this decision actually supports the Homeowner's argument that these documents should have been excluded from evidence.

Indeed, as this Court noted in *Calloway*, documents that are created by a previous servicer do not come with the traditional hallmarks of "reliability" a 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 here nor even argued in Fannie Mae's brief.

Additionally, on the same day that this Court decided *Calloway* it also held that documents which were merely incorporated 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). But Rankin never established that Seterus relied upon the accuracy of the prior servicer's records for a business purpose. And without this business reliance—as opposed to a litigation reliance—there is no "substantial incentive for accuracy" that is free from any litigation self-interest as required by *Calloway* and *Pin Pon*.

Moreover, Rankin failed to provide any specific testimony that Seterus actually verified the payment history and default notices 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); *Le v. U.S. Bank*, __ So.3d __, 2015 WL 2414456 * 1 (Fla. 5th DCA May 22, 2015). In fact, all Rankin's self-serving testimony "boarding" testimony established was that Seterus checked the accuracy of paper documents it received from the prior servicer against digital documents it uploaded onto its system.[15]

An equivalent statement in the era of paper documents would have been: "the photocopier made extremely accurate copies or each and every document that the previous servicer had, even if they were false and erroneous." But this Court has already expressly rejected this contention in *Pin-Pon*, which makes sense because holding otherwise would allow Fannie Mae free reign to admit any document Seterus simply uploaded into its servicing records. *Id*. at 442.[16]

[15] T. 33-34; T. 66-69.

[16] This very issue is also before this Court in two other appeals involving Fannie Mae and Seterus which the Homeowner's attorney is counsel of record. *See Braga v. Fannie Mae*, Case No. 4D14-1809; *Barnsdale v. Fannie Mae*, Case No. 4D14-4000.

The default notice was offered to prove the truth of the matter asserted.

Fannie Mae also argues that the demand notice was admissible as a "verbal act"[17] but, in the same breath, also asserts that "[w]hen the subject loan went into default, [the prior servicer] sent the notice of acceleration to the [Homeowner]."[18] Fannie Mae cannot have it both ways. Either the default notice was simply admissible as a verbal act and therefore established nothing more than the mere utterance of words of legal significance, or it was a hearsay document offered to prove that the notice was sent to the Homeowner and that it was sent on the date reflected on the notice. Because Fannie Mae proffered the document to establish the truth of a matter that Fannie Mae claims the letter asserts—that it was sent by first class mail on March 1, 2010— it is not, cannot be, a verbal act.

The sufficiency of the default notice may be raised on appeal.

Finally, Fannie Mae's argument that the Homeowner's argument whether the default notice was sent by first class mail was not preserved for appellate purposes[19] fails as a matter of law because it is black letter law that the sufficiency of the evidence to support the judgment may be raised for the first time on appeal.

[17] Answer Brief, p. 27.

[18] Answer Brief, p. 16.

[19] Answer Brief, p. 27.

Fla. R. Civ. P. 1.530(e); *Colson v. State Farm Bank, F.S.B.*, __ So. 3d __, 2015 WL 1650300, * 1 (Fla. 2d DCA April 15, 2015) ("As has been consistently stated in foreclosure cases, a sufficiency of the evidence claim may be raised for the first time on appeal.").

But even more fundamentally, Fannie Mae's argument misses the mark because issues are what must be preserved for appellate review, not arguments about why the evidence is insufficient. And it is uncontroverted that the Homeowner preserved the issue of the compliance with the notice provisions of the mortgage by specifically denying conditions precedent in her answer; raising it as an affirmative defense; reiterating this point during her opening statement; and then arguing in her motion for involuntary dismissal that Fannie Mae did not "overcome the defenses that have been raised in this case."[20]

In short, it defies logic that a litigant could be put on notice of an issue, bring to trial what it claims to be evidence on that issue, and then act on appeal as if the issue does not exist. The no-waiver provision incorporated into Rule 1.530(e) means Fannie Mae, as the party bearing the burden of proof and persuasion, must be sure to adduce competent evidence of the allegations the Homeowner denied. If, as in this case, it fails to do so, it bears the risk of reversal on appeal.

[20] Amended Answer, April 29, 2013, ¶ 9 (R. 282); Affirmative Defenses, April 29, 2013, ¶ 2 (R. 286-287); T. 16; T. 182.

In summary, the court erred in admitting Fannie Mae's exhibits, the predicate for which Rankin attempted to lay. The most egregious of these was the acceleration notice and the payment history. Because the acceleration letter was not admissible through this witness, the case must be remanded for dismissal. *Holt v. Calchas, LLC,* 155 So. 3d 499, 506 (Fla. 4th DCA 2015). Likewise, without the payment history, there was no evidence of Fannie Mae's damages and the trial court was likewise obligated to dismiss. *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 153 So. 3d 280, 283 (Fla. 2d DCA 2014).

While 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) may be read to hold otherwise, those decisions should be distinguished or outright rejected by this Court. First, "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 Fannie Mae did at trial when it presented the default notice), 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 Homeowner 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, Fannie Mae 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"). Fannie Mae adduced no evidence that the Homeowner suffered no prejudice.

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 <u>not</u> prejudiced, Judge Palmer correctly observed that there should not be any "materiality test" with regards to Paragraph 22.

CONCLUSION

The Court should reverse the judgment and remand for entry of dismissal of the case.

Dated: June 10, 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 Roman, 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 June 10, 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 June 10, 2015.

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