In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

NATIONSTAR MORTGAGE, LLC, et al.,

Appellees.

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

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(Continued)

Statutes

TABLE OF AUTHORITIES
(Continued)

Rules

Key:

- The Appellee, Nationstar Mortgage, LLC will be referred to as "the Servicer."
- The Appellants, [redacted] and [redacted] will be referred to collectively as "the Homeowners."
- Fay Janati, the Servicer's witness at trial, will be referred to as "Janati."
- The Transcript of the trial held on November 20, 2013 will be referred to as "T. ___" followed by the transcript page number.

SUMMARY OF THE REPLY ARGUMENT

The Servicer argues that it complied with Paragraph 22 of the mortgage because a letter was found among the prior servicer's records and because its witness testified to a "boarding" and "auditing" process. But the Servicer's witness did not testify how or when the notice was allegedly sent, and the Servicer does not even argue this on appeal. The Servicer is therefore not entitled to the presumptions that the Homeowners received the notice and that it was instantaneously delivered the very day it was written.

And the Servicer fares no better when it argues that its documents were admissible under the business records exception. In fact, the very authorities upon which it relies support the Homeowners' position that the exhibits were merely documents "found" amongst the prior servicer's records and that its witness was unqualified to lay the business record's exception in the first instance.

The judgment should therefore be reversed and the case dismissed.

ARGUMENT

I. The evidence admitted at trial is insufficient to support the judgment and therefore the judgment must be reversed with instruction to enter an involuntary dismissal.

A. There was no competent, substantial evidence that the Servicer complied with conditions precedent to foreclosure.

The Servicer failed to point to any evidence of how or when the notice was sent.

The Servicer's answer brief does not dispute two key arguments made by the Homeowners: that there is no evidence of how the acceleration notice was sent and that there is no evidence of when the acceleration notice was sent. Rather, the Servicer argues that its witness's retelling of what she learned about "boarding" is enough to establish that it complied with the notice provisions of the mortgage.[1] But the existence of an acceleration notice in its files, even if authentic, does not entitle the Servicer to the presumption it seeks.

Specifically, the Servicer is attempting to rely on the legal fiction in Paragraph 15 of the security instrument which allows the court to "deem" that the Homeowners receive notice on the day it is mailed if the notice is sent by first-class mail to the Homeowners' notice address:

> 15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to

[1] Answer Brief, pp. 10-11.

> Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means.[2]

But the witness's "boarding" testimony does not establish that the notice was mailed first class mail. In fact, the testimony merely established that, at the time the service transfer occurred, a purported breach letter appeared in the prior servicer's records.[3] Nor did the witness introduce any documents such as a communications log or a return receipt which would prove that her employer's predecessor—a failed bank—mailed the notice to the Homeowners at all, much less that it mailed it by first class mail.

Without evidence that the notice was mailed first class, the Servicer was not entitled to the two presumptions of Paragraph 15: 1) that the letter was actually received by the Homeowners; and 2) that the letter was instantaneously delivered to the Homeowners on the same day it was mailed. First, without the presumption of receipt by the Homeowners, the Servicer was required to prove actual receipt, a necessary fact for which there was no evidence.

Second, without the presumption of same-day receipt, even if—as the Servicer claims—the letter provided a cure period of 30 days from when the letter

[2] Mortgage, Exhibit 2, ¶ 15 (R. Exh. 20-21).

[3] T. 37-38.

was written, it would not comply with Paragraph 22. This is because even first class mail takes up to three days to deliver (*see* 39 CFR 121.1). A notice, therefore, delivered just as rapidly would still not afford the guaranteed thirty days to cure. Accordingly, the absence of evidence of the manner of mailing results in a two-fold failure of proof—a complete absence of evidence that: 1) the Homeowners received the notice (i.e. no evidence of actual receipt); and 2) the Servicer provided the Homeowner thirty days to cure from actual receipt of the notice.

Even if there had been evidence that the notice was mailed by first class mail, there is still no evidence as to the date the notice was allegedly mailed. At best, the Bank's evidence showed that the letter was dated (i.e. written) November 20, 2008.[4] There is no presumption in law or logic that letters are mailed the same day they are written. And because the notice itself states that the default must be cured within 30 days of the date of the letter,[5] to give the Homeowners thirty days to cure, the Servicer needed to prove that the notice was mailed no later than the day it was written.

[4] T. 85.

[5] Default Notice, Exhibit 7 (R. Exh. 66).

The Servicer's argument that the letter provided the Homeowners thirty days to cure misinterprets its own letter, as well as the law.

In their Initial Brief, the Homeowners pointed out that the default notice provided two defaults, including one that had not yet occurred.[6] The Servicer's appellate response was simply "Obviously, only curing the past due payments but failing to make the required future payments would be unacceptable."[7] This argument, however, conflates the length of time that the loan is in default and the length of time that must be accorded a borrower to cure a particular default about which the borrower has been put on notice. Paragraph 22, unequivocally requires that the borrower be given a full thirty days after a specified default to cure that default:

> … Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument…The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; …[8]

The fact that the borrower may already be in default of the terms of the mortgage in one respect (for example, by failing to promptly notify the lender of a

[6] Initial Brief, pp. 29-32.

[7] Answer Brief, p. 27.

[8] Mortgage, Exhibit 2, ¶ 22 (R. Exh. 23). (emphasis added).

change of address or by transferring an interest in the property) would not permit the lender to give the borrower less than thirty days to cure a different default (such as nonpayment). Likewise, the fact that the Homeowners may have been in default due to nonpayment since November, did not permit the Servicer to give only twenty days to cure the "default" it chose to specify—a default that did not even exist at the time it gave notice.

In summary, the sequence guaranteed by Paragraph 22 is 1) breach; 2) notice specifying a particular breach; 3) thirty days to cure the specified breach; 4) acceleration. The notice here was not only premature in that it pre-dated the specified breach, but it impermissibly gave the Homeowner only twenty days to cure the specified breach.

The Servicer tried the issue of its compliance with Paragraph 22 by consent.

An additional argument the Servicer makes—that the Homeowners waived the issue of compliance with Paragraph 22 of the mortgage[9]—fails as a matter of law, because as the proponent of the default notice, the issue of its sufficiency (and therefore the Servicer's compliance with Paragraph 22 of the mortgage) was tried by consent. Fla. R. Civ. P. 1.190(b); *Scariti v. Sabillon*, 16 So. 3d 144, 145-46 (Fla.

[9] Answer Brief, pp. 29-32.

4th DCA 2009) ("An issue is tried by consent when there is no objection to the introduction of evidence on that issue."). *Cf. Bank of America, National Association v. Asbury*, Case No. 2D14-1965, slip op. at 8 (Fla. 2d DCA May 27, 2015), Silbermann, J., specially concurring (noting that based on bank's conduct at trial, compliance with notice provisions may have been tried by consent, but borrower failed to argue this on appeal.).

Furthermore, the demand notice was a key element of the Bank's *prima facie* foreclosure case. *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825, 826 (Fla. 3d DCA 2014) ("To establish its entitlement to foreclosure, [the bank] needed to introduce the subject note and mortgage, an acceleration letter, and some evidence regarding the [borrowers'] outstanding debt on the note.") Therefore, in order for there to be competent, substantial evidence to support the judgment (as required to withstand a motion for involuntary dismissal), it necessarily follows that the Servicer sent the Homeowners a sufficient Paragraph 22 notice.

And finally, the sufficiency of this evidence cannot be waived since it may be raised for the first time on appeal. Fla. R. Civ. P. 1.530(e); *Colson v. State Farm Bank, F.S.B.*, 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.").

The proper remedy on remand is dismissal.

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

To the extent that the Servicer argues the Fifth District's decision *Gorel v. Bank of New York Mellon*, __ So. 3d __, 40 Fla. L. Weekly D1094 (Fla. 5th DCA May 8, 2015) holds otherwise, that decision 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 the Servicer did at trial), it must file a reply asserting that avoidance. Fla. R. Civ. P. 1.100(a). Failure to file a reply waives this "affirmative defense to the affirmative defense." *See e.g. Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981). This rule logically arises from the due process consideration that the Homeowners must be put on notice that prejudice is an issue to be tried.

And even if it had filed a reply to raise "prejudice" as an avoidance of the Paragraph 22 defense, the Servicer also had the burden of proving such a claim. *See Richardson v. Wilson*, 490 So. 2d 1039, 1040 (Fla. 1st DCA 1986) ("the

burden of showing that the statute of limitation comes within a statutory exception is on the plaintiff"). The Servicer adduced no evidence that the Homeowners suffered no prejudice.

Second, the Court should simply reject *Gorel* and adopt instead Judge Palmer's well-reasoned dissent in *Vasilevskiy v. Wachovia Bank, Nat. Ass'n*, __ So. 3d. __, 2015 WL 2414502 (Fla. 5th DCA 2015 May 22, 2015). Noting that the bank did not attempt to avoid the borrower's Paragraph 22 defense by providing evidence that the borrowers were not prejudiced, Judge Palmer correctly observed that there should not be any "materiality test" with regards to Paragraph 22.

B. There was no competent, substantial evidence of the measure of damages.

There was no competent, substantial evidence to support the principal and interest awards.

The Servicer admits that the payment history—the only evidence it offered of the amount of damages—begins with a forward principal balance that exceeded the principal balance reflected on the note by over $30,000.00.[10] Rather than offer some cognizable argument why this is so, the Servicer would have this Court affirm the judgment merely because the principal number is reflected on the first page of the payment history. But this ignores that the enlargement of principal

[10] Answer Brief, p. 33.

could have only been a function of "negative amortization"—or the capitalization of accrued interest left unpaid because the borrower did not make the full monthly payment. But without a full payment history showing the monthly payments for the first nine months of payments, there is no competent, substantial evidence to support a finding that the principal increased to the amount the Servicer claimed.

Likewise, there is no competent, substantial evidence supporting the interest award. As the Servicer concedes, the note had an adjustable rate—which was determined by the Current Index—and had a floor of 2.250%.[11] And even if the court was to apply this minimum rate, the resulting interest would be nearly a quarter of a million dollars less[12] than what was awarded in the judgment—far from *de minimis*.

The proper remedy on remand is dismissal.

In this case, the Servicer not only failed to present competent, substantial evidence of the interest award, but also the principal and escrow awards which distinguishes it from *Salauddin v. Bank of America, N.A.*, 150 So. 3d 1189 (Fla. 4th DCA 2014). Rather, there was a complete failure of proof to establish an evidentiary basis for the damages awarded at trial, which requires reversal for entry

[11] Answer Brief, pp. 33-34.

[12] Per diem interest would only be $83.28 for a total interest award of $158,731.68.

of an involuntary dismissal on remand. *Wolkoff v. America Home Mortg. Servicing, Inc.*, 153 So. 3d 280, 283 (Fla. 2d DCA 2014).

II. The payment history and the default notice should have been excluded from evidence on hearsay grounds.

The Servicer's reliance on Calloway supports the Homeowners' position.

The Servicer 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 payment history and default notice were admissible documents—but this decision actually supports the Homeowners' 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. And 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 since the prior servicer is a failed bank.

Here, the Servicer never established that it 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.*

Moreover, Janati failed to provide any specific testimony that the Servicer verified the payment history and demand notice for accuracy after receiving it from the prior servicer. *Cf. WAMCO XXVIII, Ltd. v. Integrated Electronic Environments, Inc.*, 903 So. 2d 230, 233 (Fla. 2d DCA 2005) (witness personally verified accuracy of prior servicer's records before boarding information into current servicer's records); *Le v. U.S. Bank*, ___ So.3d ___, 2015 WL 2414456 * 1 (Fla. 5th DCA May 22, 2015) (specific testimony regarding current servicer's verification process is sufficient evidence of the trustworthiness of the prior servicer's records.). Rather, Janati gave general testimony about "checkpoints"[13] and "checks and balances"[14]—without explaining what these checkpoints (other than allegedly talking to the borrower about what their unpaid principal balance is) and checks and balances are.

Most probably, "checks and balances" are simply data integrity checks to determine whether the Servicer accurately and precisely duplicated the previous servicer's information…warts and all. It is the high-tech version of making sure

[13] T. 38.

[14] T. 40.

that a photocopier has produced perfect copies, but it does nothing to insure that the original servicer input the information correctly. As such, the payment history and demand notice were simply documents incorporated into the Servicer's records. *See*, *Landmark American Insurance Company v. Pin-Pon Corp.*, 155 So. 3d 432, 442 (Fla. 4th DCA 2015) (documents which were merely incorporated into a subsequent business's records do not fall within the business records exception). They should have been excluded from evidence.

Janati was not an "other qualified witness."

The Servicer also cites to *Cooper v. State*, 45 So. 3d 490 (Fla. 4th DCA 2010) for the proposition that Janati was "well enough acquainted" to testify about the prior servicer's records. But Janati here bears no resemblance to the witness in *Cooper*. The "otherwise qualified witness" in that case was a Verizon store manager for multiple retail stores, with actual experience (not just training for purposes of providing testimony) in data servicing, and records processing, as well as customer, billing, and technical support. *Cooper*, therefore, validates the Homeowners' position, because, unlike Janati, the witness introducing the phone records in *Cooper* testified about his own company's records and gained his familiarity with the records through business-related (not litigation-related) duties.

In reality, the "well enough acquainted" standard is a rigorous one that originated with the Fifth District's opinion in *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592 (Fla. 5th DCA 1980), which held that an adjuster from one insurance company was not qualified to testify about the business practices of another insurance company. *Alexander* 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. *Alexander* does not suggest, as the Servicer claims, that a witness may meet the "well enough acquainted" standard simply by reviewing a company's practices and procedures. In fact, it suggests the opposite.

But even if Janati's parroted testimony regarding the practice and procedures for boarding and auditing were sufficient to qualify Janati as an "other qualified witness," the mere existence of "policy and procedure" manuals 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 Shands Teaching Hosp. & Clinics, Inc. v. Dunn*, 977 So. 2d 594, 597 (Fla. 1st DCA 2007); *Hartford Acc. & Indem. Co. v. Ocha*, 472 So. 2d 1338, 1340 (Fla. 4th DCA 1985); *Nationwide Mut. Ins. Co. v. Jones*, 414 So. 2d 1169, 1171 (Fla. 5th DCA 1982).

The demand notice was offered to prove that it was sent.

The Servicer also argues that the demand notice was admissible as a "verbal act"[15] but, in the same breath, also asserts that "[a]s a business record of [the Servicer], the face of the Default Letter dated November 20, 2008 demonstrated it was generated and sent to [the Homeowners]."[16] The Servicer cannot have it both ways. Either the default notice was simply admissible as a verbal act and therefore established nothing more than there was a piece of paper in the Servicer's file which had three dates on it, or it was a hearsay document offered to prove that the notice was sent to the Homeowners on November 20, 2008. And if the notice was merely a document found in the prior servicer's records, it contained no evidentiary weight; on the other hand, if it was offered to prove it was sent, it should have been excluded from evidence.

CONCLUSION

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

[15] Answer Brief, p. 19.

[16] Answer Brief, p. 11.

Dated: June 1, 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 1, 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 1, 2015.

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