

**In the District Court of Appeal
Fourth District of Florida**

CASE NO. [REDACTED]

(Circuit Court Case No. [REDACTED])

[REDACTED]
Appellant,

v.

FANNIE MAE (“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, Fannie Mae (“Federal National Mortgage Association”), will be referred to as “Fannie Mae.”
- The Appellant, [REDACTED] will be referred to as “the Homeowner.”
- CitiMortgage, Inc., the original party-plaintiff to this action, will be referred to as “CitiMortgage.”
- Seterus, Inc., the entity which employed Fannie Mae’s trial witness, will be referred to as “the Servicer.”
- Heriberto Romero, Fannie Mae’s witness at trial, will be referred to as “Romero.”
- The Transcript of the Non Jury Trial held on May 7, 2014 will be referred to as “T. ___” followed by the transcript page number.

SUMMARY OF REPLY ARGUMENT

Initially, this Court should strike Fannie Mae's trial brief because of its wholesale failure to comply with the Rules of Appellate Procedure. Its "statement" of the case and facts is unduly argumentative and contains inadequate record citations.

And beyond the procedural problems with its brief, Fannie Mae fails to present any cognizable argument in opposition to the Homeowner. Indeed, the only argument it musters supporting Romero as a qualified witness is that the Homeowner failed to preserve this issue for appeal—an argument clearly belied by the record. And since Fannie Mae has essentially conceded that Romero was spectacularly unqualified to lay the business records exception, Fannie Mae's documents should have been excluded from evidence.

Likewise, Fannie Mae offers no real resistance to the Homeowner's argument regarding its (and CitiMortgage's) lack of standing at inception. Instead, it claims that the Homeowner waived this issue—a claim that is belied by the record.

Therefore, the judgment should be reversed with instructions that on remand the case be dismissed.

ARGUMENT

I. Fannie Mae’s answer brief should be struck because its “statement” of the case and facts is unduly argumentative and factually unsupported.

Wholly ignoring the simple guidelines set forth in Fla. R. App. P. 9.210, Fannie Mae spends the first 27 pages of its brief arguing its case, before ever arriving at the one paragraph summary of the argument on page 42. Indeed, its “Statement of the Case and of the Facts” is chockfull of citations to cases, statutes, and rules of procedure, not to mention lengthy quotations from judicial opinions.¹ But the law is clear that argument has no place in a statement of facts—and even less place in a “restatement” of the facts which should be limited to “areas of disagreement in the statement of the case and facts set forth by the appellant.” *Sabawi v. Carpentier*, 767 So. 2d 585, 586 (Fla. 5th DCA 2000).

And not only is Fannie Mae’s statement of the facts unduly argumentative, but it also fails to utilize pinpoint citations in the record when making factual assertions as required by Fla. R. App. P. 9.210(b)(3). For instance, Fannie Mae asserted that the Homeowner’s trial and appellate counsel “should have known” that cross-examination cannot be utilized to “present evidence” and then proceeded

¹ At one point, Fannie Mae’s statement of the facts recites, verbatim, three pages of this Court’s decision in *Bank of New York v. Calloway*, 157 So. 3d 1064 (Fla. 4th DCA 2015). (Answer Brief, pp. 26-29).

to quote the entire cross and re-cross examination of Romero.² No reference was made to the “evidence” the Homeowner’s lawyer tried to “present” during cross-examination (or even why this is material).

Nor do the argumentative conclusions Fannie Mae draws from the “facts” it presents even make logical sense. After declaring that it needed to make “a few observations about the three (not one) preliminary matters the trial court disposed of” since “these matters bear upon [the Homeowner’s] unrelenting actions to continue to stall and unduly delay the trial proceedings,”³ Fannie Mae lists one of these “preliminary matters” as its own request for relief from technical admissions.⁴ In other words, the Homeowner impeded the swift administration of justice because...Fannie Mae made a motion.

It would be, therefore, entirely appropriate to strike Fannie Mae’s brief. *Greenfield v. Westmoreland*, 156 So. 3d 1 (Fla. 3d DCA 2007) (striking brief because statement of the case and facts was unduly argumentative and contained inadequate citations to the record).

² Answer Brief, p. 40, n. 58.

³ Answer Brief, pp. 20-21.

⁴ Answer Brief, p. 20.

II. Fannie Mae does not present any cognizable argument refuting Romero’s lack of qualifications as a witness, an argument adequately preserved by the record.

A. Fannie Mae did not substantively challenge any of the Homeowner’s arguments on appeal.

Fannie Mae does not dispute that hearsay cannot be used to form a hearsay exception or that “training” is synonymous with hearsay or that Romero’s “boarding” testimony was, itself, based on hearsay or any of the arguments presented in the Homeowner’s first point on appeal.⁵ Rather, it made the conclusory allegation (after citing a litany of case law) that the Homeowner “failed to overcome the presumption of correctness of the trial court’s judgment” without any explanation how the Homeowner failed to do this.

And then Fannie Mae took the extraordinary leap of asserting that “the materially undeniable trial transcript shows...at no time during the trial did [the Homeowner] expressly assert an objection to [Fannie Mae’s] witness not being qualified as a witness to lay the foundation for a business records exception.”⁶ This assertion is mind-numbingly bizarre because Fannie Mae also asserted in the same paragraph that [t]he most frequent of the forty-eight evidentiary objections

⁵ Initial Brief, p. 14-34.

⁶ Answer Brief, p. 51.

[the Homeowner] asserted...were ‘hearsay’ and ‘lack of foundation’...”⁷ But it is also a preposterous assertion because the trial court transcript “shows a clear negative” (to use Fannie Mae’s term).

Indeed, the meaning of these objections was clear from the Homeowner’s repeated voir dire of the witness and argument that the witness has no personal knowledge of the facts to which he was testifying. To quote but one example:

MR. BROTMAN [Homeowner’s counsel]: Your Honor, I have to strike this from going into evidence, and object to it moving in. The witness just testified he does not know the policies and procedures for CitiMortgage, Incorporated. He cannot lay a business records foundation for CitiMortgage, Incorporated’s documents. He has to know if they were made at or near the time, he has to know if they’re made from personal knowledge, has to know if it’s made in the ordinary course of business. The witness is testifying, over and over again, he does not know the procedures of CitiMortgage, Incorporated. The boarding process that’s been alluded to, just means they try to see if it’s accurate. That is not an exception to hearsay.⁸

Nothing more was needed to preserve the issue. *Channell v. Deutsche Bank Nat. Trust Co.*, __ So. 3d __, 2015 WL 3875949, * 2, n. 1 (Fla. 2d DCA June 24, 2015) (finding defendant’s challenge to entry of payment history during

⁷ Answer Brief, p. 51.

⁸ T. 54. *See also*, T. 24, 27, 41, 48-49, 54-55, 58.

foreclosure trial preserved through an objection on hearsay and foundation grounds).⁹

B. The Homeowner's initial brief adequately preserved whether Fannie Mae complied with Paragraph 22 of the mortgage.

In his initial brief, the Homeowner argued that since the communication log (Exhibit 5) and the acceleration notice should have been excluded from the evidence, the case must be remanded for dismissal.¹⁰ This issue is therefore properly before this Court and Fannie Mae's argument that he has "abandoned that argument"¹¹ is simply wrong.

And Fannie Mae also contorts the Homeowner's appellate argument into one asserting that "the notice had to be received by the [Homeowner] on the day it was written..." Rather, the Homeowner's argument is that, without the communication log, there was no evidence how and when the notice was allegedly sent. This is

⁹ At the risk of stating the obvious, Fannie Mae's assertion that "legal authorities not raised in the lower tribunal may not be raised for the first time on appeal" (Answer Brief, p. 53) is as illogical as it is unsupported by the lengthy quote from a Fifth District case. The quoted case held only that the legal grounds argued on appeal must be the same as those argued below. "The preservation of error requirement does not demand that trial attorneys prepare arguments or objections in the trial court as if they were points in an appellate brief." Philip J. Padovano, *Florida Appellate Practice* § 8:1, p. 154 (2011 ed). The law on hearsay does not magically cease to exist on appeal simply because a litigant does not cite a specific case to the trial court.

¹⁰ Initial Brief, pp. 32-34.

¹¹ Answer Brief, p. 63.

critical because Fannie Mae is attempting to rely on the legal fiction in Paragraph 15 of the security instrument which allows the court to “deem” that the Homeowner receives notice on the day it is mailed if the notice is sent by first-class mail to the Homeowner’s notice address:

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to 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.¹²

Without evidence that the notice was mailed first class, however, Fannie Mae was not entitled to the two presumptions of Paragraph 15: 1) that the letter was actually received by the Homeowner; and 2) that the letter was instantaneously delivered to the Homeowner on the same day it was mailed. First, without the presumption of receipt by the Homeowner, Fannie Mae was required to prove actual receipt, a necessary fact for which there was no evidence. *Ramos v. Citimortgage, Inc.*, 146 So. 3d 126 (Fla. 3d DCA 2014).

Second, without the presumption of same-day receipt, the notice would not comply with Paragraph 22 because it would 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 Homeowner

¹² Original Mortgage, Composite Exhibit 3, ¶ 15 (Exh.R. 17).

received the notice (i.e. no evidence of actual receipt); and 2) Fannie Mae provided the Homeowner thirty days to cure from receipt of the notice (whether that be by way of the fictitious “same-day” receipt or by actual receipt).

C. The proper remedy on remand is dismissal.

In order for there to be sufficient evidence to support the judgment, it necessarily follows that Fannie Mae sent the Homeowner 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 this Court is persuaded that the Fifth District’s decisions in *Gorel v. Bank of New York Mellon*, 165 So. 3d 44 (Fla. 5th DCA 2015) and *Vasilevskiy v. Wachovia Bank, Nat. Ass’n*, __ So. 3d __, 2015 WL 2414502 (Fla. 5th DCA 2015 May 22, 2015) 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 the Bank 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 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 not prejudiced, Judge Palmer correctly observed that there should not be any “materiality test” with regards to Paragraph 22.

Finally, both *Gorel* and *Vasilevskiy* are distinguishable because those cases dealt with the contents of the Paragraph 22 letter, not whether the evidence was sufficient to establish that the notice was actually sent. Whether the evidence was

sufficient to establish that the notice was sent was the central issue in *Holt* which required the dismissal in that case.¹³

III. Neither Fannie Mae nor CitiMortgage had standing at inception.

A. The sufficiency of the evidence to support a finding of standing is not an issue the Homeowner can waive.

Fannie Mae’s foundation argument—that the Homeowner waived the issue of standing¹⁴—is not factually correct because it is uncontroverted that the Homeowner denied Fannie Mae’s allegation that it was entitled to enforce the note in his answer;¹⁵ raised standing as an affirmative defense;¹⁶ reiterated this point during his opening statement;¹⁷ and then specifically moved for involuntary dismissal on the grounds that the Bank failed to prove its standing.¹⁸

¹³ To the extent that Fannie Mae’s reference to *Calloway* in its statement of the facts is somehow construed as an argument that its documents were admissible based on Romero’s “boarding” testimony, the bolded portion of that testimony explaining that “[t]hose data and integrity checkpoints are to ensure that the accuracy of what we receive from the instruction, versus what we received from the electronic file, coincide and match...” (Answer Brief, p. 34) proves that the only accuracy the Servicer checked was the accuracy of its scanning. This point was clearly made in the Homeowner’s brief (Initial Brief, p. 28) and actually conceded to Fannie Mae’s brief (Answer Brief, p. 34, n. 44).

¹⁴ Answer Brief, p. 53.

¹⁵ Answer, September 20, 2013, ¶ 3 (R. 565).

¹⁶ Affirmative Defenses, September 20, 2013, ¶ 3 (R. 568-569).

¹⁷ T. 13.

¹⁸ T. 111-119.

Even if the Homeowner had not done all these things, the waiver argument fails 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. 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.”). In this sense, Rule 1.530(e) is the functional equivalent of a motion for judgment notwithstanding the verdict – except that the trial court plays the role of a jury and the appellate court plays the role of the trial judge reviewing the jury’s verdict. It would simply be redundant to argue to the trial court that the evidence is insufficient. In its factfinding capacity, the trial court has already found it sufficient. The oversight role goes to the appellate court.

For comparison purposes, Fed. R. Crim. P. 29 (motion for judgment of acquittal) is the criminal version of a judgment notwithstanding and the verdict. And the majority of the circuits “have ruled that a defendant does not have to make a Rule 29 motion in a bench trial to preserve the usual standard of review for a sufficiency of the evidence claim on appeal.” *US v. Grace*, 367 F. 3d 29, 34 (1st Cir. 2004). Thus, in the federal criminal context at least, an appellate court reviewing the sufficiency of the evidence of a convicted crime decides “whether,

after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond reasonable doubt.” *Id.*

In short, it defies logic that Fannie Mae could be put on notice that standing would be an issue, bring to trial what it thinks is evidence of its standing, 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.

B. Fannie Mae did not prove that it (or CitiMortgage) had standing at inception.

Fannie Mae does not dispute that there was insufficient evidence to warrant a finding that the allonge with the specific endorsement to CitiMortgage was affixed to the note prior to the day the lawsuit was filed or that the endorsement to CitiMortgage was not even executed by the prior holder of the note. Nor does it dispute that the loan acquisition screenshot (Exhibit 2) failed to prove that Fannie Mae owned the loan on February 1, 2005—or at all for that matter—since the document reflected an acquisition by Fannie Mae from CitiMortgage, an entity Romero did not think ever purchased the loan. And Fannie Mae also does not

dispute that the assignment of mortgage (Exhibit 8) fails to establish its standing because the assignment post-dated the filing of the complaint.

Rather, it baldly asserted that it “proved a *prima facie* case for mortgage foreclosure.”¹⁹ But the only “fact” it gleans from the record to support this self-serving conclusion is that the Homeowner did not testify at trial.²⁰ However, since, as argued *supra*, Fannie Mae had the burden of proof and persuasion on the issue of whether it was entitled to enforce the note, the fact that the Homeowner did not testify at trial is of no moment.²¹

Furthermore, the fact that CitiMortgage may have been Fannie Mae’s agent does not establish that either party had standing at inception. Rather, the issue is whether the debt was properly transferred to either party prior to the day the lawsuit was filed. The evidence is wholly insufficient to support such a finding.

¹⁹ Answer Brief, p. 57.

²⁰ Answer Brief, pp. 58-59.

²¹ This cuts back to the heart of Fannie Mae’s (incorrect) threshold argument regarding error preservation. If, at trial, Fannie Mae tendered a pizza menu instead of the original note, the Homeowner would not have to say anything about Fannie Mae’s standing to challenge the sufficiency of the pizza menu to support the judgment on appeal. Likewise, there was no affirmative duty for the Homeowner to take the stand and proclaim “Fannie Mae does not own my loan!” in order for there to be insufficient evidence to support Fannie Mae’s standing.

CONCLUSION

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

Dated: July 27, 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 July 27, 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 July 27, 2015.

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