In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

US BANK NATIONAL ASSOCIATION AS TRUSTEE FOR RASC 2005KS10, et al.

Appellees.

ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

Respectfully submitted,

ICE APPELLATE
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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Key:

The Plaintiff/Appellee is US BANK NATIONAL ASSOCIATION AS TRUSTEE FOR RASC 2005KS10 ("the Bank" or "the Plaintiff Bank").

The Defendant/Appellant is [redacted] ("the Homeowner").

ARGUMENT

I. The Trial Court Erred in Admitting Compilations of the Bank's Documents and Data That Were Never Provided to the Homeowner.

A. The Homeowner preserved the argument that the Loan Summary (Exhibit 3) was an inadmissible summary.

The Bank reflexively argues that the Homeowner "waived any argument that the loan summary violates Fla. Stat. §90.956 because he did not object to the summary on that ground at trial."[1] While it is true that the court did not wait for the Homeowner to state the basis of his objection to this exhibit before announcing that it would be admitted,[2] the error was preserved for appeal because the Homeowner explicitly moved to strike it on the basis that it was an inadmissible summary:

> MR. BROTMAN [Homeowner's counsel]: I move to strike Plaintiff's 3 from evidence, as the testimony was clear this document was a summary. We can call it what we want. We can call it a summary, a compilation, a collection. I think the witness said we were getting closer to what the word was. There's no doubt that the plaintiff failed to comply with 90.956. It's clearly a collection of other entries, a collection of other exhibits, a collection of documents that the witness testified to were input by other individuals.[3]

---

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

[2] Supplemental Record ("Supp. R. ___"), p. 22.

[3] T. 82. No mere afterthought, the issue had been raised before trial. (R. 561; T. 7-8)

The court promptly denied the motion, which had also raised hearsay and Knapp's lack of personal knowledge of the Bank's record-making practices as reasons the document was inadmissible.[4]

B. Even if computer compilations were immune from § 90.956, Fla. Stat., Knapp was still not qualified to establish that they met the requirements of the business records exception.

The Bank first tells this court that "none of the documents…at trial were summaries of other evidence."[5] It brazenly makes this representation despite having titled one of its documents "Loan Summary" and having its own witness describe another as "a compilation of the amounts due and owing for this loan pulled from our computer system."[6]

Next, the Bank argues that computer generated summaries—as opposed to summaries prepared by hand, apparently—are immune from the Summaries statute (§ 90.956, Fla. Stat.) and may be admitted as a business record, without notice or disclosure of the underlying data entries.[7]

---

[4] T. 82-83.

[5] Answer Brief, p. 10.

[6] T. 25, describing Affidavit Checklist (Exhibit 5).

[7] "Courts routinely admit computer-generated business records under the business records exception to hearsay." (Answer Brief, p. 12); "[N]one of the documents on which U.S. Bank relied at trial were summaries of other evidence. Instead, each of these documents [was] properly admitted as business records…" (Answer Brief, p.

Certainly, there may be some computer summaries that fall within the definition of "business records" because they are created routinely around the time of the events being recorded and then stored as images or static pages in a database. *See U-Haul Intern., Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040 (9th Cir. 2009) (indirectly cited by the Bank). Here, however, there is no evidence that the summaries were created or stored in the ordinary course of business. Not only were these summaries created on demand, at least one of the exhibits was created specifically for the purposes of this litigation, as shown by the very title of Exhibit 5 in this case—the "Affidavit Checklist"—as well as its compilation date of April 24, 2013. Worse, the Loan Summary was used to secrete critical evidence, most notably the image of the Note upon which Knapp claims to have seen the second endorsement.

But most importantly, even if this Court were to approach the issue as involving nothing more than the application of an ordinary "business record" hearsay exception, the foundation for such an exception still must be laid by a qualified witness—which Knapp is not. The Bank itself concedes that "[t]he

---

10); and "Mr. [redacted] argument that Mr. Knapp was unqualified to testify under FLA. STAT. § 90.956, (Appellant's Br. at 30-32, 38-39), is irrelevant because the documents were properly admitted as business records under FLA. STAT. § 90.803(6)(a)." (Answer Brief, p. 17, n. 3).

witness must either be in charge of the activity constituting the usual business practice or be well enough acquainted with the activity to give the testimony."[8] Yet, the Bank points to nothing that would satisfy this requirement other than the "magic words" to which Knapp agreed on direct examination,[9] but which he contradicted on cross.

The Bank counters that Knapp "had training in all the [servicers'] systems,"[10] but does not inform the Court (nor can it from the record) what he was trained to do. Apparently, he was trained to operate a computer terminal so that he could retrieve records, much the same way as someone would be trained to open a file cabinet and locate a file. If his training consisted of something more—such as being told what to say in court about the various servicers' purported policies and procedures for creating the records—then "training" is just another word for "hearsay."

Contrary to the Bank's argument, the Homeowner does not suggest that Knapp needs personal knowledge of the information in the exhibits.[11] Knapp

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

[9] Answer Brief, pp. 11, 16.

[10] Answer Brief, p. 15.

[11] Answer Brief, p. 15.

needed to have personal knowledge of the facts required to establish a business records exception—i.e. personal knowledge (not hearsay knowledge) of the companies' practices for creating and maintaining documents and data.[12] See *Lassonde v. State*, 112 So. 3d 660, 663 (Fla. 4th DCA 2013) (because a store clerk "had no responsibilities regarding the business practices of the [store]" he was not qualified to introduce a receipt as a business record—"the rules of evidence must be observed").

Nor does the Homeowner suggest that the records may only be admitted through "a records custodian who entered or created the data" or that the witness must "identify who entered the data."[13] Again, the requirement is only that the witness be in charge of the record-making, or sufficiently acquainted by experience (not hearsay "training") with the record-making, to testify from personal

[12] In a footnote, the Bank cites to an unreported federal trial court opinion that, at summary judgment, the court may infer that a corporate officer or a records custodian (Knapp is neither) has personal knowledge of a fact contained in the corporation's records (Answer Brief, p. 15, n. 2, citing *F.T.C. v. Home Assure, LLC*, 8:09-CV-547-T-23TBM, 2010 WL 1708777 (M.D. Fla. 2010)). Unlike a summary judgment affiant, Knapp was cross-examined at trial and revealed he did not have the requisite personal knowledge. According to this case, the "personal knowledge standard" is not met "if the witness could not have actually perceived or observed that which is testified to." *Id*. Here, Knapp did not actually perceive or observe the business practices to which he testified.

[13] Answer Brief, p. 16.

knowledge about the business practices. While this threshold is not overly high, Knapp did not meet it.

C. The Bank did not address the Florida precedent cited by the Homeowner.

The Bank did not distinguish—or even mention—the very similar case cited by the Homeowner, *Yang v. Sebastian Lakes Condo. Ass'n, Inc.*, 123 So.3d 617 (Fla. 4th DCA 2013) (it is insufficient to simply say the "magic words" of the business records exception—witness needed actual personal knowledge of practices of prior management company that created the records). Nor did the Bank address the other cases cited by the Homeowner, such as *Mazine v. M & I Bank*, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011); *Snelling & Snelling, Inc. v. Kaplan*, 614 So. 2d 665, 666 (Fla. 2d DCA 1993); *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980); *Thomasson v. Money Store/Florida, Inc.*, 464 So. 2d 1309, 1310 (Fla. 4th DCA 1985); or *Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121 (Fla. 2d DCA 1988).[14]

The Bank also did not address the recent case from which this panel may not deviate, *Kelsey v. SunTrust Mortg., Inc.*, 3D12-2994, 2013 WL 6246461 (Fla. 3d DCA 2013). *Kelsey* was a foreclosure case that also involved a single document

[14] Initial Brief, pp. 37-38.

reader who, like Knapp, had no personal knowledge of the company's record-making practices. Unlike the Bank here, the bank in *Kelsey* confessed error (as was "proper," according to this Court), admitting that the documents were inadmissible hearsay. This Court specifically agreed that the trial court committed error and reversed the judgment.

D. To the extent the Bank's cases are instructive, they support the Homeowner.

The Bank is silent as to these Florida cases, and instead, cites a handful of cases from outside Florida, such as the unpublished trial court opinion of *U-Haul Intern., Inc. v. Lumbermens Mut. Cas. Co.*, CV04-0662 PHXDGC, 2007 WL 809989 (D. Ariz. 2007).[15] That decision was affirmed in *U-Haul Intern., Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040 (9th Cir. 2009) which held that the summaries themselves constituted the business records and thus the proponent of the evidence did not need to comply with the federal equivalent of § 90.956 Fla. Stat. *Id*. at 1046.

But unlike this case, there was specific testimony that the summaries themselves were made at or near the time of the events by a person with knowledge and that the summaries were "routinely run" as part of its business

[15] Answer Brief, p. 13.

practice. *Id*. at 1044. Moreover, the witness who introduced the exhibits, unlike Knapp in this case, "was qualified to testify about the business practices and procedures for inputting the underlying data." *Id*. at 1044.

In *SFJV 2005, L.L.C. v. Ream*, 933 N.E.2d 819, 829 (Ohio Ct. App. 2010),[16] an Ohio court held that a witness could establish a business record exception even without the "magic words" by simply saying that she reviewed the records of the loan and that the exhibit was among those records. Leaving aside that this conclusion is utterly contrary to Florida law, there is nothing in the opinion to suggest that the witness revealed on cross-examination that she, like Knapp, had no personal knowledge of the company's business practices for inputting and maintaining data.

The Bank also cites a federal embezzlement case, *United States v. Glasser*, 773 F.2d 1553, 1558-59 (11th Cir. 1985),[17] which actually supports the Homeowner's position. The court in *Glasser* recognized that, to admit computer records into evidence, they must be kept pursuant to some routine procedure designed to assure their accuracy, must be created for motives unconnected with litigation, and must not themselves be "mere accumulations of hearsay." *Id*. at

[16] Answer Brief, p. 12.

[17] Answer Brief, p. 12.

1559. Furthermore, the court reviewed the record to ensure that the bank's witness had provided this foundation. *Id*. The opinion does not say what testimony or qualifications satisfied the court that the foundation had been properly laid in that case.

Potamkin Cadillac Corp. v. B.R.I. Coverage Corp., 38 F.3d 627 (2d Cir. 1994)[18] is even more supportive of the Homeowner's position. There, the court affirmed the trial court's decision not to admit an accounting history because the party offering the evidence "had not met its burden of showing that the History was prepared from original computer data compiled in accordance with regular business practice" *Id*. at 633. Furthermore, the trial court was entitled to take into account that party's "refusal, despite discovery requests, to produce the computer tapes from which [the witness] asserted the History had been compiled." *Id*.[19]

Finally, the Bank cites one Florida case, *Jackson v. State*, 877 So. 2d 816 (Fla. 4th DCA 2004).[20] This case, however, is the last of a trilogy of opinions that starts with *Jackson v. State*, 738 So. 2d 382 (Fla. 4th DCA 1999). That opinion relates how the trial court admitted phone records from a BellSouth employee who,

[18] Answer Brief, p. 12.

[19] *See*, Initial Brief, p. 24 regarding the Bank's failure to disclose source documents in discovery.

[20] Answer Brief, p. 12.

like Knapp, merely gathered the records for trial. The court considered this testimony insufficient to meet the criteria of the business record exception because it had never been established that the BellSouth employee was a "qualified witness." *Id.* at 386. However, the error was waived because the defendant's attorney failed to specifically object on that ground. *Id.*

The Court later ruled (in the context of a claim that defense counsel was ineffective) that the parties were entitled to a post-conviction evidentiary hearing to determine whether the State could have corrected the deficiency "by asking additional questions…or calling another witness" if defense counsel had made the proper objection. *Jackson v. State*, 831 So. 2d 722 (Fla. 4th DCA 2002). After this additional hearing, the court found that a witness who testified at that hearing was a "qualified witness," but the court does not say what testimony satisfied that requirement. *Jackson v. State*, 877 So. 2d 816, 817 (Fla. 4th DCA 2004). However, the court emphasized that, because BellSouth was not a party to the litigation (unlike the Bank here), it had "'absolutely no reason' to provide false or incorrect information." *Id.*

And while this opinion states that data compiled into printouts may be admissible under the business records exception (provided the witness is "qualified"), the operation of the Summaries rule (§ 90.956, Fla. Stat.) was neither

raised nor discussed. It does not hold that computer compilations are immune from the Summaries rule—i.e. that digital records may be abridged by a litigant at will, without providing notice or producing the source documents.

E. The proposed judgment was the ultimate "summary" or "compilation."

The Homeowner pointed out that reading from the proposed judgment was error, not only because the document was not in evidence, but because it was the ultimate summary prepared for litigation.[21] The Bank responds that it was "duplicative [of] previous testimony" about the amounts due on the loan.[22] The testimony to which the Bank refers, however, is Knapp reading the principal and interest amounts from the equally inadmissible Affidavit Checklist (Exhibit 5).[23] More importantly, there is no testimony about any of the other dollar amounts that appear in the judgment (totaling over $41,000). And, some judgment figures, such as the attorneys' fees, are not to be found even in an inadmissible exhibit.[24]

---

[21] Initial Brief, pp. 27-30.

[22] Answer Brief, pp. 17-18, identifying Supp. R. 21-28 (T. 21-28).

[23] The interest figure to which he testifies differs from that in the judgment because it was calculated to an earlier date. Notably, he did not testify to the amount of the additional interest found in the judgment or how it was calculated.

[24] The Bank did not dispute that "there is no evidence to support any award of attorney's fees." (Initial Brief, p. 30) or identify where in the record the fees might be found. While the "Fee 40 FB Transactions" found on the second page of the

F. The court abused its discretion in denying the deposition of the Bank's witness.

The Bank makes much ado about the Homeowner having failed to do the impossible: comply with the trial order by deposing Knapp fifteen days before trial—even before he was identified as a witness.[25] Given that the Bank had not decided who, among its fourteen "potential" witnesses, would testify until three days before trial—and that Knapp, even then, was too busy to be deposed—there is nothing in the record to suggest that an earlier request would have been availing.

G. The Homeowner's motion for involuntary dismissal should have been granted because there was no admissible evidence to support standing or the amount of damages.

1. The Bank's own evidence established it did not have standing at the inception of the case.

Knapp's claim to have seen an image of a fully endorsed note that had been made before the Complaint was filed was self-serving, inadmissible hearsay—a point the Bank does not counter. Instead, the Bank argues that its standing at

---

Affidavit Checklist (Exhibit 5) may include attorneys' fees (as well as two filing fees and "preservation fees") they total only $ 3,595.00, not the $ 5,075.00 in the judgment. The Bank also did not dispute that there was no expert testimony that the fees were reasonable.

[25] Answer Brief, pp. 1-3, 7-9.

inception was shown by the copy of the Note attached to the Complaint because it was endorsed in blank.[26]

The Bank appears to have missed the point that the endorsement changes that appeared over a year after it filed the Complaint include a change to the open (or "blank") endorsement making it a special endorsement…to another entity. Thus, the endorsement change proves that the Note was first negotiated to Residential Funding Corporation and that the Plaintiff Bank was never in possession of the Note when it was endorsed only in blank.

The Bank's only hope of proving it was the holder of the Note when it filed the Complaint was to show that the second endorsement (the special endorsement to U.S. Bank) predated the lawsuit. The only "evidence" of that, was Knapp's inadmissible claim that he had seen the second endorsement on a document not in evidence. Thus, the trial court should have granted involuntary dismissal on the issue of standing.

2. The assignment is relevant.

The Bank relegates to a footnote its contention that the assignment of mortgage—which contradicts Knapp's testimony—is "irrelevant because the mortgage follows the note and U.S. Bank had standing to foreclose as the holder of

[26] Answer Brief, p. 19.

the note specially endorsed to U.S. Bank."[27] The Bank has apparently forgotten that the old adage "the mortgage follows the note" applies in the absence of a written assignment. It is the legal fiction of an "equitable transfer" of the mortgage when no written transfer exists. *See Johns v. Gillian*, 184 So. 140, 143 (Fla. 1938). This equitable theory does not invalidate or override a written assignment.

Moreover, the Homeowner does not "challenge the validity of the assignment" as claimed by the Bank, but quite the opposite. The Homeowner challenges the trustworthiness of Knapp's testimony because it conflicts with the transfer date shown in the assignment. Therefore, the Bank's comments about *Harvey v. Deutsche Bank Nat. Trust Co.*, 69 So. 3d 300 (Fla. 4th DCA 2011) are misplaced.[28]

---

[27] Answer Brief, p. 20, n. 4.

[28] In any event, the court's *dicta* in *Harvey* that a fraudulent assignment between two banks would be of no concern to the borrower is simply incorrect. Because foreclosure is an equitable remedy, unclean hands may be raised as a defense, even if the borrower was not the target of the fraud. *Knight Energy Services, Inc. v. Amoco Oil Co.*, 660 So. 2d 786, 789 (Fla. 4th DCA 1995); *Quality Roof Services, Inc. v. Intervest Nat. Bank*, 21 So. 3d 883, 885 (Fla. 4th DCA 2009) ("Unclean hands may be asserted by a defendant who claims that the plaintiff acted toward a third party with unclean hands with respect to the matter in litigation."); *see also Yost v. Rieve Enters., Inc.*, 461 So.2d 178 (Fla. 1st DCA 1984) (unclean hands applies where both the plaintiff and the defendant are parties to a fraudulent transaction perpetrated on a third party); *Hauer v. Thum*, 67 So.2d 643, 645 (Fla. 1953) ("It would matter not that the [defendants] were parties to the fraudulent transaction nor that the fraud was perpetrated upon a third party.").

CONCLUSION

The case should be remanded for entry of an order granting involuntary dismissal.

Dated: December 16, 2013

ICE APPELLATE
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

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

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 APPELLATE
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

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this December 16, 2013 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 APPELLATE
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

By: 

THOMAS ERSKINE ICE
Florida Bar No. 0521655

SERVICE LIST

Marc James Ayers, Esq.
Mary Ann Couch, Esq.
Bradley Arant Boult Cummings, LLP
One Federal Place 1819 Fifth Avenue North
Birmingham, AL 35203-2104
mayers@babc.com
acockrell@babc.com
macouch@babc.com
Appellee's counsel