In the District Court of Appeal
Second District of Florida

CASE NO. 2D15-2822

(Circuit Court Case No. 13-CA-50824)

BONNIE PEALER,

Appellant,

v.

WILMINGTON TRUST NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS TRUSTEE FOR MFRA TRUST 2014-2, et al.,

Appellees.

ON APPEAL FROM THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

I. Introduction

Bonnie Pealer ("the Homeowner"), the owner of the subject property pursuant to a homeowner's association foreclosure auction which occurred almost two years before this lawsuit was filed,[1] appeals the final judgment of foreclosure rendered in favor of the Wilmington Trust National Association, Not In Its Individual Capacity but Solely as Trustee for MFRA Trust 2014-2 ("the Bank") after a non-jury trial. The Homeowner presents two issues for this Court's review:

- Whether the trial court misapplied the Florida Evidence Code;
- Whether there was competent evidence to support the judgment.

II. Appellant's Statement of the Facts

A. The Pleadings and Pre-Trial Filings

JPMorgan Chase Bank, National Association ("Chase"), the original party-plaintiff to this action, initiated this case when it filed its verified one-count mortgage foreclosure complaint.[2] Attached to the complaint was a copy of the note which was made payable to Liberty Home Lending, Inc., a Florida Corporation

[1] Certificate of Title, Executed July 19, 2011 (R. 214).

[2] Complaint, February 20, 2013 (R. 1-30).

("Liberty Home Lending").[3] The copy of the note attached to the complaint also purported to have an allonge with a specific endorsement from Liberty Home Lending to Chase.[4]

Chase later sought to amend its complaint alleging that the interest in the note and mortgage had been transferred to U.S. Bank National Association, as Trustee for Prof-2012-S1 Holding Trust I ("U.S. Bank").[5] However, when Chase later filed the original note, the allonge with the specific endorsement to it was all that was attached.[6]

In any event, the Homeowner answered the amended complaint and pled she was without knowledge and therefore denied U.S. Bank's allegation that it was the "present" owner and holder of the note and mortgage.[7] And as affirmative

[3] Copy of Note attached to Complaint, February 20, 2013 (R. 7).

[4] Copy of Allonge attached to Complaint, February 20, 2013 (R. 10).

[5] Motion for Continuance of Trial and Motion for Leave of Court to Amend Complaint to Add Party Defendants, January 12, 2015, ¶ 7 (R. 91). This motion was granted by order of court. (Order Granting Plaintiff's Motion for Continuance of Trial and Motion for Leave to Add Party Defendants, January 23, 2015 (R. 142-143)).

[6] Notice of Filing Original Note and Attached Original Note, January 23, 2015 (R. 147-152).

[7] Answer, March 2, 2015, ¶ 5 (R. 215).

defenses, the Homeowner alleged that U.S. Bank lacked standing[8] and that it failed to join an indispensible party.[9]

Before trial, the Bank, proclaiming to be the "successor in interest to Plaintiff" Chase,[10] requested that the trial court substitute the Bank as party-plaintiff.[11] And despite the fact that the original note had been filed with the court several months earlier, the Bank attached to its motion a copy of the note with a second allonge, this time with a purportedly blank endorsement executed by Chase.[12] The trial court granted this motion[13] and the matter was set for trial.[14]

B. The Trial

The trial began with the Bank calling Eric Hughes, its first and only witness, to the stand.[15] Hughes testified that he was an employee for Fay Servicing ("the

[8] Affirmative Defenses, March 2, 2015, ¶ 41 (R. 218).

[9] Affirmative Defenses, March 2, 2015, ¶ 42 (R. 219).

[10] Ex-Parte Motion to Substitute Party Plaintiff, March 7, 2015 (R. 240).

[11] *Ex-Parte* Motion to Substitute Party Plaintiff, March 7, 2015 (R. 240-247).

[12] Copy of Allonge attached to *Ex-Parte* Motion to Substitute Party Plaintiff, March 7, 2015 (R. 247).

[13] Agreed Order Granting *Ex-Parte* Motion to Substitute Party Plaintiff, May 26, 2015 (R. 260-261).

[14] Amended Order Setting Non-Jury Trial, May 20, 2015 (R. 258-259).

[15] Transcript of Trial Before Judge James R. Thompson, May 28, 2015 (R. 344; "T. __") at 6.

Servicer"),[16] which began servicing the loan on August 15, 2014.[17] Other than to say that he was a "default specialist" and that he was "familiar" with the loan and his employer's documents,[18] he offered no testimony about what his job title entailed or even how long he had been employed by the Servicer. And other than to testify generally that entries in his employer's documents were made at or near the time of occurrence "by people employed for that purpose,"[19] he offered no other foundational testimony regarding the documents the Bank sought to introduce through him.

Through Hughes and without objection, the Bank introduced the following documents:

- The original note (Exhibit 1);[20]
- An acceleration letter purportedly written by Chase (Exhibit A);[21]
- An assignment of mortgage from Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Liberty Home Funding Inc. ("Liberty Home Funding") to Chase (Exhibit E);[22]

[16] T. 6.

[17] T. 12.

[18] T. 7.

[19] T. 7.

[20] T. 9.

[21] T. 11.

- An assignment of mortgage from Chase to U.S. Bank (Exhibit F);[23] and
- A limited power of attorney purporting to allow the Servicer to act on the Bank's behalf (Exhibit G).[24]

Additionally, while Hughes identified the original allonge with the blank endorsement purportedly executed by Chase,[25] it is unclear whether the trial admitted this document into evidence.[26] In any event, the Bank's attorney conceded that the allonge was not attached to the original note:[27]

> MS. MOLINA (the Bank's attorney): Your Honor, we'd like to introduce the Allonge as Exhibit No. 3.
>
> THE COURT: I'm not sure that I understood. You say that – is that the original that he has?
>
> MS. MOLINA: It's the original Allonge.
>
> THE COURT: Okay. But it's not part of the Note, the original Note that was filed?
>
> MS. MOLINA: Correct.
>
> THE COURT: Okay.

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[22] T. 35.

[23] T. 39.

[24] T. 44.

[25] T. 9.

[26] The record on appeal does appear to contain this document, although it does not appear to have been marked into evidence by the trial court. (R. 288).

[27] T. 10.

The Bank also sought to introduce a payment history (Exhibit B) through Hughes. Initially, all Hughes testified was that the amounts in the Bank's proposed final judgment were the same as the amounts in the document.[28] He then admitted that Chase prepared the document and that he did not know anything about Chase's business practices.[29] The Homeowner's initial hearsay objection was sustained based on this testimony,[30] as was her follow-up hearsay objection because there was no evidence that the Servicer verified the accuracy of Chase's documents.[31] Hughes then generally explained that his employer "verified" loan information by uploading data into its system and checking this information against what was provided to it by the prior servicer (in this case, the payment history).[32] After considering this testimony, the trial court overruled the Homeowner's third hearsay objection, although it noted that "the whole thing could be stronger on the authentication."[33]

[28] T. 12.

[29] T. 13.

[30] T. 14.

[31] T. 16.

[32] T. 16-17.

[33] T. 18.

On cross-examination, Hughes admitted that the loan went from Chase to U.S. Bank to the Bank,[34] although he did not know when the allonge with the blank endorsement from Chase was executed[35] or when the allonge with the specific endorsement to from Liberty Home Lending to Chase was executed.[36] In fact, all his testimony established was his belief that Chase possessed the note because a copy of the allonge from Liberty Home Lending to Chase was included with the initial complaint.[37]

And while Hughes testified that the Servicer had a "loan boarding" department devoted to verifying prior servicer information,[38] he did not testify that he ever worked in that department. But he did admit that all the Servicer received from the prior servicer were the images of the documents admitted into evidence "as well as information loaded into Excel sheets and text files."[39]

Further, Hughes admitted that he had no idea whether the acceleration notice (Exhibit A) was actually sent.[40] And as for the initial assignment of mortgage to

[34] T. 19.

[35] T. 19-20.

[36] T. 20.

[37] T. 20.

[38] T. 24.

[39] T. 25.

[40] T. 26; T. 27.

Chase (Exhibit C), Hughes admitted that the document was executed by MERS on behalf Liberty Home Funding and not Liberty Home Lending,[41] the party which actually originated the loan. He did not know what the relationship between Liberty Home Lending and Liberty Home Funding was; whether these entities even had a business relationship; or even if Liberty Home Funding actually existed.[42]

After the Bank closed, the Homeowner moved for a directed verdict arguing that Hughes was wholly insufficient to authenticate Chase's records[43] and because the assignments were defective.[44] The trial court denied this motion.[45]

The Homeowner's case-in-chief consisted of her testimony that the original lender went out of business in 2008.[46] The Homeowner also explained that after purchasing the property she tried to contact the original lender but received no response.[47]

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[41] T. 36.

[42] T. 36-37.

[43] T. 46.

[44] T. 47.

[45] T. 47.

[46] T. 49; T. 51.

[47] T. 56.

After the close of evidence, the trial court asked the Bank's attorney how the Bank had standing.[48] Initially, the Bank's attorney argued based on the assignment that was admitted into evidence,[49] but later conceded that all of the assignments were meaningless because they did not assign the note.[50] And although the court posited that if the Bank had a valid allonge it would be entitled to enforce the note, the Homeowner argued that the allonge was not attached to the note.[51]

Although the trial court again expressed that Hughes' testimony about the payment history could have been stronger,[52] it ultimately found that the Bank had standing and sufficient evidence of amounts in default and granted foreclosure.[53] The judgment awarded the Bank, amongst other things, $4,410.00 in attorney's fees.[54]

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[48] T. 65.

[49] T. 65.

[50] T. 68.

[51] T. 67.

[52] T. 68-69.

[53] T. 69.

[54] Final Judgment, May 28, 2015 (R. 323).

The Homeowner timely moved for rehearing, arguing that the Bank failed to establish that Chase had standing at inception.[55] After this motion was denied,[56] the Homeowner timely appealed.[57]

[55] Motion for Rehearing, June 8, 2015 (R. 327-336).

[56] Order Denying Motion for Rehearing, June 8, 2015 (R. 327-336).

[57] Notice of Appeal , June 23, 2015 (R. 415-417).

SUMMARY OF THE ARGUMENT

Initially, the trial court erred by failing to apply the provisions of the Evidence Code in this case. The Bank failed to lay a predicate for admission of its documents under the business records exception and therefore the Homeowner's hearsay objection to the payment history should have been sustained. And even if it had properly laid the predicate, the Bank's witness was wholly incompetent to do so. Therefore, the Bank's payment history should have been excluded from evidence.

Additionally, the sufficiency of the evidence, an issue which may be raised for the first time on appeal, does not support the final judgment. First, the Bank failed to produce competent evidence that Chase had standing when the lawsuit was filed or that it had standing at the time of judgment. Finally, the Bank failed to produce competent, substantial evidence to support the attorney's fee award.

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

STANDARD OF REVIEW

The *de novo* standard applies when the issue is whether the trial court erred in applying a provision of the Florida Evidence Code. *See Shands Teaching Hosp. and Clinics, Inc. v. Dunn*, 977 So. 2d 594, 598 (Fla. 1st DCA 2007); *Lucas v. State*, 67 So. 3d 332, 335 (Fla. 4th DCA 2011); *see also Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006) (question of whether evidence falls within the statutory definition of hearsay is a matter of law subject to *de novo* review).

A trial court's ruling of a motion for involuntary dismissal is also reviewed *de novo*. *Deutsche Bank Nat'l Trust Co. v. Clarke*, 87 So. 3d 58, 60 (Fla. 4th DCA 2012). Likewise, a party's standing to sue is reviewed *de novo*. *Dixon v. Express Equity Lending Grp., LLLP*, 125 So. 3d 965 (Fla. 4th DCA 2013).

Finally, in a non-jury case, sufficiency of the evidence may be raised for the first time on appeal. Fla. R. Civ. P. 1.530(e). Findings of fact by the trial court must be set aside when totally unsupported by competent, substantial evidence. *See Crawford Residences, LLC v. Banco Popular N. Am.*, 88 So. 3d 1017, 1019 (Fla. 2d DCA 2012). If a trial court's decision is manifestly against the weight of the evidence or totally without evidentiary support, it becomes the duty of the appellate court to reverse. *Randy Intern., Ltd. v. Am. Excess Corp.*, 501 So. 2d 667, 670 (Fla. 3d DCA 1987).

ARGUMENT

I. The trial court erred when it applied the Florida Evidence Code.

A. The Bank failed to lay the business records predicate for the payment history.

To properly authenticate the documents before admitting them into evidence, Hughes would have had to be sufficiently familiar with them to testify that they are what the Bank claims them to be. § 90.901, Fla. Stat. Moreover, to overcome the hearsay objections made to payment history, the Bank would have had to first lay the predicate for the "business records" exception. There are five requirements for such an exception:

1) The hearsay document was made at or near the time of the event;
2) The hearsay document was made by or from information transmitted by a person with knowledge;
3) The hearsay document was kept in the ordinary course of a regularly conducted business activity;
4) It was a regular practice of that business to make such the hearsay document; and
5) The circumstances do not show a lack of trustworthiness.

§ 90.803(6), Fla. Stat.; *Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008).

But the Bank did not even come close to laying the business records predicate for its documents, much less the payment history. Indeed, the only foundational question asked about the payment history was whether the amounts in

the Bank's proposed final judgment matched the amounts shown in the document[58] – which does not establish any prong of the exception. And even if the Court considers the two general questions the Bank asked Hughes before he even identified the payment history[59] as foundational questions for admission of the document, Hughes's answers only arguably established the exception's first prong. In short, the Bank simply failed to ask the questions necessary to move the payment history in under the business records exception to the hearsay rule.

And this should simply end the discussion about this case. *See Nat'l Car Rental Sys., Inc. v. Holland*, 269 So. 2d 407, 413 (Fla. 4th DCA 1972) ("No predicate or inquiry was made here beyond the witness stating that the certificate was part of his business records which he kept in the regular course of his business…[thus] it is certainly apparent that the certificate was not properly admitted in this case.").[60]

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[58] T. 12.

[59] T. 7.

[60] In *Holland*, the Fourth District ultimately held that inclusion of this document was harmless. *Id*. This, however, is obviously not the case here since the Bank will be unable to show that there is no reasonable possibility that the error contributed to the judgment. *Special v. West Boca Medical Center*, 160 So. 3d 1251, 1256 (Fla. 2014). Without the payment history, the Bank has no evidence of its damages.

B. Even if the Bank had attempted to lay a proper predicate, Hughes was spectacularly unqualified to do so.

Personal knowledge of how, when and why the records were created and kept is an essential requirement of due process.

The question at the core of this issue is what may constitute the "personal knowledge" required for a witness to authenticate documents and to lay the foundation for a business records exception to hearsay for those documents. Specifically, it presents the question whether the party offering those documents as evidence may convey information to its otherwise unknowledgeable witness to create a veneer of "personal knowledge" with two simple preparatory steps:

- having its witness read the documents before trial; and
- telling its witness what to say in court about its record-keeping practices.

The personal knowledge required to introduce a company's records is not familiarity with what the records say, but with the facts of how, when, and why the records were created and kept. To hold that the personal knowledge requirement for authenticity and the business records hearsay exception can be satisfied by reading the records themselves, is to make all records admissible and the hearsay rule superfluous. And to hold that a witness may be trained what magic words to say about the company's alleged record-keeping practices so as to appear to meet

the business records exception—even if the witness has no personal knowledge whether such practices actually exist—is to admit hearsay based on hearsay.

Thus, in order for Hughes to even be permitted to testify to the five prongs of the business records exception, he must be a records custodian or an otherwise "qualified" witness—that is, one who is in charge of the activity constituting the usual business practice or sufficiently experienced with the activity to give the testimony. *Hunter v. Aurora Loan Servs., LLC*, 137 So. 3d 570, 573 (Fla. 1st DCA 2014) (finding witness unqualified where the witness "lacked particular knowledge of a prior servicer's record-keeping procedures and "[a]bsent such personal knowledge, he was unable to substantiate when the records were made, whether the information they contain derived from a person with knowledge, whether [the previous servicer] regularly made such records, or, indeed, whether the records belonged to [the previous servicer] in the first place."); *Burdeshaw v. Bank of New York Mellon*, 148 So. 3d 819 (Fla. 1st DCA 2014) (reversing and remanding for dismissal because bank failed to establish any foundation qualifying the exhibit as a business record or its witness "as a records custodian or person with knowledge of the four elements required for the business records exception"); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So. 3d 152 (Fla. 1st DCA 2014) (reversing and remanding for dismissal because bank's witness was not a records custodian for

the current servicer or any of the previous servicers); *Holt v. Calchas, LLC*, 155 So. 3d 499, 506 (Fla. 4th DCA 2015) (witness was not qualified to introduce bank's payment records over hearsay objection).

See also Yang v. Sebastian Lakes Condo. Ass'n, 123 So. 3d 617, 621 (Fla. 4th DCA 2013) (holding that despite witness's use of "magic words"—the elements of a business records exception to hearsay—records were inadmissible because the witness did not have the personal knowledge required to lay a foundation for business records of an entity for whom she had never worked and about whose record-keeping practices she had no personal knowledge); *Mazine v. M & I Bank*, 67 So. 3d 1129, 1131 (Fla. 1st DCA 2011) (holding that a witness was not qualified because the witness "had no knowledge as to who prepared the documents submitted at trial by the bank as he is not involved in the preparation of documents such as the ones proffered by the bank, that he does not keep records as a records custodian, that he has no personal knowledge as to how the information…was determined…"); *Lassonde v. State*, 112 So. 3d 660, 662 (Fla. 4th DCA 2013) ("The customer service clerk's testimony does not meet the requirements of *Yisrael*. While the clerk was able to testify as to how the store re-rings merchandise stolen from the store, this was not his duty nor within his responsibilities."); *Snelling & Snelling, Inc. v. Kaplan*, 614 So. 2d 665, 666 (Fla.

2d DCA 1993) (holding that a witness who relied on ledger sheets prepared by someone else was not sufficiently familiar with the underlying transactions to testify about them or to qualify the ledger as a business record); *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980) (holding that an adjuster was not qualified to testify about the usual business practices of sales agents at other offices).

See also Specialty Linings, Inc. v. B.F. Goodrich Co., 532 So. 2d 1121, 1122 (Fla. 2d DCA 1988) (testimony was insufficient under the business records exception to hearsay because the witness was not the custodian, and was not in charge of the activity constituting the usual business practice); *Thomasson v. Money Store/Florida, Inc.*, 464 So. 2d 1309, 1310 (Fla. 4th DCA 1985) (statement that demonstrates no more than that the documents in question appear in the company's files and records is insufficient to meet the requirements of the business record hearsay exception); *Holt v. Grimes*, 261 So. 2d 528, 528 (Fla. 3d DCA 1972) (records properly excluded where there was "no testimony as to the mode of preparation of these records nor was the witness testifying in regard to the records in the relationship of 'custodian or other qualified witness'"); *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825 (Fla. 3d DCA 2014) (holding that without the proper

foundation, the documents relied upon by the professional witness were indisputably hearsay).

In this case, Hughes offered no testimony about his job other than to say that he was a "default specialist" and that he was "familiar" with the loan and his employer's documents.[61] He did not offer any insight into what his job responsibilities included or even the date when the Servicer employed him. And without even attempting to explain the nature of his job responsibilities, there is no basis to conclude that Hughes was a records custodian or other qualified witness. *See e.g.*, *Lassonde v. State*, 112 So. 3d at 662; *Martins v. PNC Bank, Nat. Ass'n*, 170 So. 3d 932, 937 (Fla. 5th DCA 2015).

At best, Hughes was a "robo witnesses"—one of the hearsay-toting automatons, the use of which the Fourth District explicitly forbade in *Bank of New York v. Calloway*, 157 So. 3d 1064 (Fla. 4th DCA 2015). While certainly well trained in the art of giving hearsay testimony, Hughes was not a records custodian or other qualified witness since he was neither in charge of, nor (other than possibly through hearsay) acquainted with, any of the activities constituting usual business practices for creating and maintaining the payment history.

[61] T. 7.

Hughes's testimony about boarding was wholly insufficient.

In *Calloway*, the Fourth reasoned that records created by a previous servicer do not come with the traditional hallmarks of "reliability" that 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 did Hughes offer any specific evidence that his employer verified Chase's records for accuracy after receiving them. *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*, 165 So. 3d 776 (Fla. 5th DCA 2015) (specific testimony regarding current servicer's verification process is sufficient evidence of the trustworthiness of the prior servicer's records.). Rather, he generally testified that the Servicer would simply check the accuracy of the information uploaded into its computer against the information provided to it by the prior servicer.[62] Without specificity, this testimony is merely another "magic word" for skirting the due process underpinnings of the hearsay

[62] T. 112.

rule—a practice the Fourth District has already held shall not stand. *Yang v. Sebastian Lakes Condo. Ass'n*, 123 So. 3d 617, 621 (Fla. 4th DCA 2013).

Indeed, Hughes's testimony about boarding is so vague, the record is not clear whether the Servicer checked the accuracy of the underlying data or simply checked the accuracy of the copying process itself—i.e. confirming that each record was a complete and correct copy of the corresponding record in the previous servicer's system. Without demonstrating that the data in those records was checked for truth and accuracy against objectively verifiable information, the Bank has made a mockery of this alternative means of proving trustworthiness.

In contrast, an example of independent verification of the content of the records would be a comparison of expense entries with bills from insurance companies or publicly available records from taxing authorities. Verification could include a confirmation that the previous servicer applied the appropriate interest rates or charged the correct fees. The entity receiving the records could confirm whether the old servicer had timely applied the borrowers' payments to the proper accounts—or applied them all. It is apparent from Hughes's testimony that the Servicer's boarding process here did none of these things.[63]

[63] Conceivably, it would be unnecessary to perform such accuracy checks for every loan being transferred, but only for a statistically relevant sample of them to obtain

Thus, the payment history was simply a document found amongst the Servicer's records and thus inadmissible. *Landmark American Insurance Company v. Pin-Pon Corp.*, 155 So. 3d 432, 442 (Fla. 4th DCA 2015).[64]

Hughes was not even qualified to testify about boarding.

But this Court never need reach the issue of whether the boarding process was sufficient to establish the trustworthiness of the records. Hughes was not even qualified to testify about the boarding process—especially since he never testified that he was even a member of the boarding department.[65] *See WAMCO XXVIII, Ltd.*, 903 So. 2d at 233; (witness who personally participated in the process was qualified to testify about it); *Holt v. Calchas*, 155 So. 3d at 505 ("[t]he witness…did not testify he was personally familiar with any record-keeping system used by either prior note holder."). *See also Colson v. State Farm Bank, F.S.B.*, __ So. 3d __, 2015 WL 1650300, * 3, n. 2 (Fla. 2d DCA April 15, 2015) (noting that bank's witness failed to meet the requirements of the business records exception and *WAMCO*). And if Hughes was not a member of the boarding

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a reasonable level of confidence in the prior servicer's recordkeeping. There was no evidence that such a sampling occurred in this case.

[64] Notably, *Pin-Pon* and *Calloway* were decided by the Fourth District on the same day.

[65] T.

department then all his testimony regarding boarding was nothing more than a series of hearsay statements he allegedly acquired from members of the boarding department. Because Hughes never established that he was qualified to testify about the process, or even that he was employed by the Servicer at the time the boarding of this loan may have occurred, there was no admissible evidence as to what the boarding process entailed. *See Eig v. Ins. Co. of N. Am.*, 447 So. 2d 377, 379 (Fla. 3dDCA 1984) (testimony from witness who was not an employee of the company at the relevant time was incompetent to establish the routine practice of that company).

The myth that bank records are inherently trustworthy.

A typical bank argument is that bank records are commonly viewed as particularly trustworthy, and therefore, the hearsay rules should be loosened as to them.

There can be no doubt that the business records hearsay exception is conditioned upon the records being considered "trustworthy." The Florida rule itself provides that records of regularly conducted business activity are admissible "unless the sources of information or other circumstances show lack of trustworthiness." § 90.803(6)(a), Fla. Stat. Trustworthiness, therefore, is an

additional requirement for admissibility, not a shortcut that bypasses the other criteria.

Moreover, the era when banking records were considered trustworthy, at least in the context of foreclosure litigation, is long gone. Now, the banking industry's flagrant abuse of the judicial system with perjured affidavits in which the affiants falsely claimed personal knowledge (robo-signing) has become common knowledge—so much so that a definite absence of trustworthiness may well be judicially noticed. *See Pino v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011) ("…many, many mortgage foreclosures appear tainted with suspect documents."); Memorandum No. 2012-AT-1803 of the Office of the Inspector General of the Department of Housing and Urban Development, September 28, 2012 (concluding that the five largest servicers had "flawed control environments" which permitted robo-signing, the filing of improper legal documents, and, in some cases, mathematical inaccuracies in the amounts of the borrowers' indebtedness);[66] Press Release of the Department of Justice Financial Fraud Enforcement Task Force, March 12, 2012 and related court filings.[67]

[66] Available at: http://www.hudoig.gov/sites/default/files/Audit_Reports/2012-CH-1803.pdf

[67] Available at: http://www.nationalmortgagesettlement.com/.

Arguably, this well-known lack of trustworthiness is enough to hold that banks can never qualify for the business records hearsay exception in a foreclosure case. But at a minimum, the banks cannot be told that they may skip bringing a qualified witness to establish authenticity or to lay the foundation for the business-record hearsay exception because banks are somehow more worthy of the court's trust than the average litigant.

The question remains why experience has proven the unreliability of bank foreclosure records—a finding that runs counter to the experience with records from other businesses, as well as traditional dogma. As the Fourth District noted in *Calloway*, "[t]he rationale behind the business records exception is that such documents have a high degree of reliability because businesses have incentives to keep accurate records." But that incentive is driven by a profit motive—the desire to keep customers. *See generally U.S. v. McIntyre*, 997 F.2d 687, 689 (10th Cir. 1993) (providing that the underlying theory of the business records exception is "a practice and environment encouraging the making of accurate records.") (Citations omitted). For example, a dry cleaner is motivated to keep careful records of the clothes he receives for cleaning, because a pattern of losing the clothes will result in a loss of customers.

A servicer, on the other hand, has no motivation to keep accurate records for its "customers"—the borrowers—because these customers have no option to go to a different servicer if they find its recordkeeping unreliable. Servicers are motivated only to serve their principals, the owners of the loan[68] and themselves (to the extent that they profit from the generation of additional fees, such as late fees or inflated insurance payments[69]). And their principals are motivated only to maximize their return on their investment in the note which means that a servicer's recordkeeping ineptitude is acceptable so long as it is in their favor. When a note is not performing, the only check against absolute fabrication is the courts themselves.

Stated plainly, the appellate record is devoid of any suggestion that the Servicer proffering this evidence suffers any financial penalty if the records it

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[68] Paul Fitzgerald Bone, *Toward a Model of Consumer Empowerment and Welfare in Financial Markets with an Application to Mortgage Servicers*, Journal of Consumer Affairs, Vol. 42, Issue. 2, pg. 165 (2008) ("Mortgage servicers act on behalf of the investors holding the mortgage-backed security. Keeping customers satisfied generally means keeping investors, rather than homeowners, satisfied.") *Id.* at 178.

[69] *See for example*, *Plaintiffs Ask for Final Approval of Nationstar Force-Placed Class Action Settlement*, Top Class Actions, June 3, 2015 ("borrowers objected to an agreement that Nationstar, and other banks, had with … insurance companies to inflate the cost of the insurance premiums so that the banks could receive a kickback from the premium that was charged to the borrower"), available at: http://topclassactions.com/lawsuit-settlements/lawsuit-news/57422-plaintiffs-ask-for-final-approval-of-nationstar-force-placed-class-action-settlement/.

inherits or creates are inaccurate. And court rulings that give banks an evidentiary pass only increase the likelihood that their records will be even more untrustworthy in the future.

The myth that providing admissible evidence from qualified witnesses is "impractical."

Strict compliance with the hearsay exception rules is required. *Johnson v. Dep't of Health & Rehabilitative Services*, 546 So. 2d 741, 743 (Fla. 1st DCA 1989). The foreclosing banks often argue, however, that the court should excuse them from the rules because it would be impractical for the banks to comply with the Florida hearsay exception rule when the paperwork has been prepared by different entities and departments located far from the courthouse. Ignoring for the moment the impropriety of making evidentiary rulings based on the unproven impact it would have on nonparties, Florida law has already provided a practical, efficient means for foreclosing banks to introduce records from far-flung departments or corporate affiliates.

Section § 90.902(11), Fla. Stat. provides that the records custodian or qualified person need not be present in court to lay the business record foundation for documentary evidence. Instead, their testimony may be admitted through an affidavit (a "certification or declaration"). *See* § 90.902(11), Fla. Stat. *See also* §

90.803(6)(c), Fla. Stat. (providing the procedure for using such an affidavit, which includes reasonable notice before trial and, if opposed, a pre-trial motion); *Yisrael v. State*, 993 So. 2d at 957. Indeed, Florida courts have already suggested that foreclosing banks can meet the hearsay exception requirements in exactly this manner. *Holt v. Calchas*, 155 So. 3d at 506; *Mazine v. M & I Bank*, 67 So. 3d at 1132.

In this case, however, the Bank chose not to avail itself of this rule which seems specifically designed to simplify the procedure by which the records of modern, highly departmentalized and geographically dispersed corporations may be admitted into evidence. It is telling that the Bank chose to conduct this litigation without any certifications or declarations, despite the relative ease of doing so. Presumably, it would have been as easy—if not easier—to provide these certifications from legitimately qualified witnesses—ones who work in the relevant departments—than to attempt to train one person on all aspects of the business.

Thus, even if it were proper for the Court to concern itself with the ramifications of evidentiary rulings on the economic well-being of the litigants or non-parties, it is unnecessary to ignore binding precedent or to rewrite the rules of evidence to allay that concern.

* * *

In summary, the court erred in admitting the payment history. And without the payment history, the trial court was obligated to dismiss the case. *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 153 So. 3d 280, 283 (Fla. 2d DCA 2014).

Nor was the trial court's error in admitting the payment history harmless because the Homeowner owned the "right of redemption"—that is, the right to prevent a foreclosure sale upon payment of the amount of the debt specified in the foreclosure judgment. § 45.0315, Fla. Stat. And because the Homeowner was the owner of the right of redemption, the Homeowner had the absolute right to challenge the Bank's claim of damages. *Beauchamp v. Bank of New York*, 150 So. 3d 827 (Fla. 4th DCA 2014) (holding that mortgagor had standing to contest damages sought in foreclosure lawsuit even though he did not sign the note since he was the owner of the equity of redemption); *Clay County Land Trust No. 08-04-25-0078-014-27, Orange Park Trust Services, LLC v. JPMorgan Chase Bank National Association*, 152 So. 3d 83 (Fla. 1st DCA 2014) (holding that property owner had standing to contest damages sought in foreclosure lawsuit as owner of the equity of redemption even though the owner was not a party to the mortgage). In other words, every dollar impermissibly awarded to the Bank was a dollar impermissibly taken directly from the Homeowner's pocket.

II. The admissible evidence is insufficient to support the judgment and therefore the judgment must be reversed with instructions that the case be dismissed on remand.

When confronted with the Homeowner's motion for involuntary dismissal, the trial court was required to determine whether the Bank made a prima facie case for foreclosure. *May v. PHH Mortgage Corp.*, 150 So. 3d 247, 248 (Fla. 2d DCA 2014).[70] Because no view of the admissible establishes Chase's standing at inception or the Bank's standing at the time of judgment, and because the Bank failed to present any competent evidence in support of its attorney's fee award, the trial court was obligated to dismiss the case.

A. The Bank presented insufficient evidence of standing.

Hughes did not establish that Chase had standing at inception.

Since Chase was the original party-plaintiff, the Bank was required to prove that Chase had standing at inception in order to avoid an involuntary dismissal. *Kiefert v. Nationstar Mortgage, LLC*, 153 So. 3d 351 (Fla. 1st DCA 2014). Further, where a foreclosing plaintiff's standing hinges on an allonge, it must prove that the allonge "took effect" on or before the day the lawsuit was filed.

[70] Although the Homeowner requested a "directed verdict" at trial (T. 46), a motion for a directed verdict in a non-jury case should be equated with a motion for involuntary dismissal pursuant to Fla. R. Civ. P. 1.420(b). *See Deutsche Bank Nat. Trust Co. v. Clarke*, 87 So. 3d 58, 60, n. 1 (Fla. 4th DCA 2012).

Cutler v. U.S. Bank, 109 So. 3d 224, 226 (Fla. 2d DCA 2012). And in order for an allonge to "take effect," it must be affixed to the note it accompanies. § 673.2041(1), Fla. Stat. ("[f]or the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument").

Apparently, no Florida court has articulated what is considered a legally sufficient mode of annexing or affixing an allonge to an instrument, although a body of case law has developed on this issue in other states. *Wells Fargo Bank, N.A. v. Bohatka*, 112 So. 3d 596, 604 n. 4 (Fla. 1st DCA 2013). This body of case law is clear that, despite the exact mode of affixation, the allonge must somehow be physically made part of the note. *See e.g. Adams v. Madison Realty & Dev., Inc.*, 853 F.2d 163 (3d Cir. 1988) (mere folding of the alleged allonge around the note insufficient); *HSBC Bank USA v. Thompson*, 2010 Ohio 4158 (Ohio App. 2010) (unattached pages cannot be an allonge); *In re Weisband*, 427 B.R. 13 (Bkrtcy.D.Ariz. 2010) (same).

The common law actually required gluing. ALI, Comments & Notes to Tentative Draft No. 1 – Article III 114 (1946), reprinted in 2 Elizabeth Slusser Kelly, Uniform Commercial Code Drafts 311, 424 (1984) ("[t]he indorsement must be written on the instrument itself or an allonge, which, as defined in Section

_____, is a strip of paper so firmly pasted, stapled or otherwise affixed to the instrument as to become part of it.") Modern courts have equated stapling with gluing. *Lamson v. Commercial Credit Corp.*, 531 P. 2d 966, 968 (Co. 1975) ("Stapling is the modern equivalent of gluing or pasting. Certainly as a physical matter it is just as easy to cut by scissors a document pasted or glued to another as it is to detach the two by unstapling"); *accord Southwestern Resolution Corp. v. Watson*, 964 S.W.2d 262, 263 (Tex.1997). In any event, the law appears well-settled on the issue: the allonge must somehow be physically attached to the note in order for it to be affixed. Otherwise, it is just a useless piece of paper.

Thus, the Bank's burden at trial was to prove not only that the note was endorsed in blank, but that either Chase (or Chase's agent) was in physical possession of the instrument and that the allonge was physically attached to it. *Eagles Master Ass'n, Inc. v. Bank of Am., N.A.*, 40 Fla. L. Weekly D1510 (Fla. 2d DCA June 26, 2015).[71] This comports with the requirements under Article 3 of the

[71] Notably, this case states that "[h]ad the note with the blank endorsement been filed with the original complaint, that would have been sufficient to show standing." Conspicuous by its absence is the word "copy" in front of the word "note." This case does not hold, therefore, that possession of a copy is proof of possession of an original. The same is true for *AS Lily LLC v Morgan*, 164 So. 3d 124 (Fla. 2d DCA 2015). In *AS Lily*, this Court noted that "[w]ith its complaint, the plaintiff attached the adjustable rate note, the mortgage, and the allonge with the blank endorsement." (*Id*. at 125). Again, this is at best ambiguous whether the Court meant the <u>original</u> note was attached to the complaint. Neither case

Uniform Commercial Code ("UCC") that in order for an instrument to be negotiated, it must be both endorsed and delivered to the transferee. § 673.2011(2) Fla. Stat.

At trial, the only evidence of Chase's standing was Hughes testimony that the original complaint included a copy of the allonge with the specific endorsement from Liberty Home Lending.[72] Leaving aside the fact that attachments to complaints are not evidence,[73] Hughes testimony asked the trial court to leap over a gaping lacuna in his logic—to simply assume that Chase (or its agent) made the copy from an original in its possession and that the allonge was physically attached to that original. But there are many ways that Chase could come by a photocopy of both the note and the allonge, which is why transfer of an original instrument is required for the recipient to be entitled to enforce its terms. This Court should

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addresses the Homeowner's point here: that a copy of an endorsed note attached to the complaint may be evidence of the existence of the endorsement, but is not evidence of possession of an original note.

[72] T. 20.

[73] *See 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."). It is worth mentioning that the trial court itself declared that it did not believe that the complaint was admissible to prove anything. (T. 30-31).

reject Hughes's proffer of a photocopy of a note as evidence—just as the Bank itself would reject an attempt to pay this debt with a photocopy of a check.

Simply put, Hughes was guessing that Chase had possession of the note (and that the allonge was physically attached to the instrument) because of what was found in the complaint. But guesses and assumptions are not competent, substantial evidence of anything. *Perez v. Perez*, 11 So. 3d 470, 472 (Fla. 2d DCA 2009) ("guesses and assumptions about facts cannot constitute evidence that would reasonably support a factual conclusion.").

Hughes did not establish that the Bank had standing at the time of judgment.

But even if the Bank had established that Chase had standing at inception, it was also required to prove that it had standing at the time of judgment. *Creadon v. U.S. Bank, N.A.*, 166 So. 3d 952 (Fla. 2d DCA 2015). This it fell woefully short of doing.

Indeed, the only evidence it proffered that it had standing at the time of judgment was the floating allonge from Chase with the blank endorsement.[74] But it is unclear from the record whether this document was even admitted into evidence. And "[a] document that was identified but never admitted into evidence

[74] R. 288.

as an exhibit is not competent evidence to support a judgment." *Wolkoff*, 153 So. 3d at 281-282.

But even if the document had been admitted into evidence, it would not be competent, substantial evidence to support a finding that the Bank had standing as a holder of the instrument since it is undisputed that the allonge was not physically attached to the note.[75] Indeed, the record is clear that the original note was filed with the court before even a copy of the allonge was produced.[76]

None of the other admissible evidence established either Chase or the Bank's standing.

Finally, none of the remaining admissible evidence proves either Chase's standing at inception or the Bank's standing at the time of judgment. First, and as the Bank's attorney appropriately conceded to the trial court,[77] all of the assignments were meaningless since none purported to transfer the note. *Tilus v. AS Michai, LLC*, 161 So. 3d 1284, 1284 (Fla. 4th DCA 2015) ("[A]n assignment of mortgage, even if executed before the foreclosure action commenced, is

[75] T. 10 (concession from the Bank's attorney that the allonge was not a part of the note).

[76] *Cf.* Notice of Filing Original Note and Attached Original Note, January 23, 2015 (R. 147-152) with Copy of Allonge attached to *Ex-Parte* Motion to Substitute Party Plaintiff, March 7, 2015 (R. 247).

[77] T. 68.

insufficient to prove standing where the assignment reflects transfer of only the mortgage, not the note."); *Bristol v. Wells Fargo Bank, Nat'l Ass'n*, 137 So. 3d 1130, 1132 (Fla. 4th DCA 2014) (MERS assignment purporting to transfer only the mortgage without an assignment of the note insufficient to prove standing). *See also Sobel v. Mutual Development, Inc.*, 313 So. 2d 77, 78 (Fla. 1st DCA 1975) ("[A]n assignment of the pledge of the mortgage without an assignment of the pledge of the note or obligation secured thereby creates no right in the assignee or pledge.").[78]

And even if the assignments had some meaning (which they plainly do not), they would not even show an assignment to Chase since Hughes admitted that the initial was executed by MERS on behalf Liberty Home Funding and not Liberty Home Lending,[79] an entity which he was not even sure existed.[80] In other words,

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[78] *See also Jelic v. BAC Home Loans Servicing, L.P.*, __ So. 3d __, 2015 WL 6735353, * 2 (Fla. 4th DCA November 4, 2015) for its apparent conclusion that "one specific line in the mortgage assignment" cannot transfer the note itself. The Homeowners agree that a document entitled an "assignment of mortgage," but which purports to also assign the note is, at least, ambiguous. But notes are clearly assignable and one can sue as an assignee. *See e.g. Taylor v. Deutsche Bank Nat. Trust Co.*, 44 So. 3d 618 (Fla. 5th DCA 2010) (holding that plaintiff had standing to sue where note was not endorsed but assignment assigned both the note and the mortgage to it).

[79] T. 36.

[80] T. 36-37.

the assignment does not even reflect the initial transfer from the original lender to Chase.

Furthermore, the acceleration notice (Exhibit A) did not establish Chase's standing since it did not speak to Chase's specific right to enforce the note. *St. Clair v. U.S. Bank Nat. Ass'n*, 173 So. 3d 1045, 1047 (Fla. 2d DCA 2015). In any event, Hughes admitted that he did not even know whether the notice was even sent.[81]

Finally, all the limited power of attorney (Exhibit G) established was that the Servicer could execute, acknowledge, deliver, and record certain documents on behalf of the Bank.[82] But this document does reference any loans whatsoever – much less the note and mortgage at issue. It is therefore insufficient evidence to support a finding that the Bank had standing at time of judgment. *See Russell v. Aurora Loan Services, LLC*, 163 So. 3d 639, 643 (Fla. 2d DCA 2015).

The proper remedy on remand is involuntary dismissal.

Where a foreclosing plaintiff fails to establish its standing, reversal of the final judgment and entry of an involuntary dismissal on remand is appropriate. *See Dickson v. Roseville Properties, LLC*, __ So. 3d __, 2015 WL 6777155, * 3 (Fla.

[81] T. 26; T. 27.

[82] R. 284.

2d DCA November 6, 2015); *Correa v. U.S. Bank, N.A.*, 118 So. 3d 952, 955 (Fla. 2d DCA 2013). *See also Balch v. LaSalle Bank N.A.*, 171 So. 3d 207 (Fla. 4th DCA 2015); *Joseph v. BAC Home Loans Servicing, LP*, 155 So.3d 444 (Fla. 4th DCA 2015); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So.3d 152 (Fla. 1st DCA 2014); *cf. Guerrero v. Chase Home Fin., LLC*, 83 So. 3d 970, 973 (Fla. 3d DCA 2012) (remanding with specific directions to allow the plaintiff to properly reestablish the note upon a proper pleading—but only because the evidence "confirmed the current owner/holder's entitlement to foreclose the mortgage attached to the complaint").

B. The Bank presented insufficient evidence to support the attorney's fee award.

Finally, the final judgment also awarded the Bank $5,200.00 in attorney's fees.[83] However, the Bank's attorney did not testify or present evidence as to the number of hours spent on the case, nor was there any expert witness testimony as to the reasonableness of the fee.

The trial court therefore erred in awarding attorney's fees without testimony of the attorney as to the number of hours spent on the case or testimony from an expert witness as to the reasonableness of the fee. *Miller v. The Bank of New York Mellon*, 149 So. 3d 1198 (Fla. 4th DCA 2014) (reversing final judgment of

[83] Final Judgment, May 28, 2015 (R. 323).

foreclosure because the attorney's fee award was not supported by expert testimony); *Raza v. Deutsche Bank Nat. Trust Co.*, 100 So. 3d 121 (Fla. 2d DCA 2012) (affirming denial of motion for attorney's fees in foreclosure action because attorney failed to present evidence of number of hours spent); *Saussy v. Saussy*, 560 So. 2d 1385, 186 (Fla. 2d DCA 1990) ("To support a fee award, there must be the following: 1) evidence detailing the services performed and 2) expert testimony as to the reasonableness of the fee.")

Additionally, this issue may be raised for the first time on appeal since it tests the sufficiency of the evidence of the fee award made after a nonjury trial. *Diwakar v. Montecito Palm Beach Condo. Ass'n, Inc.*, 143 So. 3d 958, 961 (Fla. 4th DCA 2014) (holding that the sufficiency of evidence supporting an attorney's fee award after a nonjury bench trial in a foreclosure case can be raised for the first time on appeal); *see also Markham v. Markham*, 485 So. 2d 1299, 1301 (Fla. 5th DCA 1986) (holding that former husband did not waive his right to contest attorney's fee award on appeal where award was established solely through testimony of former wife without testimony from either the attorney rendering services or an expert witness.).

CONCLUSION

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

Dated: November 16, 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 November 16, 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 November 16, 2015.

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