In the District Court of Appeal
Second District of Florida

CASE NO. 2D15-5283

(Circuit Court Case No. 09 CA 030804)

USHA PATEL,

Appellant,

v.

CHASE HOME FINANCE, LLC, et al.,

Appellees.

ON APPEAL FROM THE THIRTEENTH JUDICIAL
CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

I. Introduction

Usha Patel ("the Homeowner") appeals the final judgment of foreclosure rendered in favor of Chase Home Finance, LLC ("the Bank") after a non-jury trial. The Homeowner presents two issues for this Court's review:

- Whether the trial court erred when applying the 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

The Bank initiated this action when it filed its one-count mortgage foreclosure complaint.[1] And while the Bank alleged that a copy of the note and mortgage were attached to its pleading,[2] no such documents were actually attached to the complaint.

Later, the Bank would file what it termed the "original" note.[3] This document identified the "lender" as E-Loans 2000 ("E-Loans").[4] The document also contained a specific endorsement from E-Loans to Crescent Bank and Trust

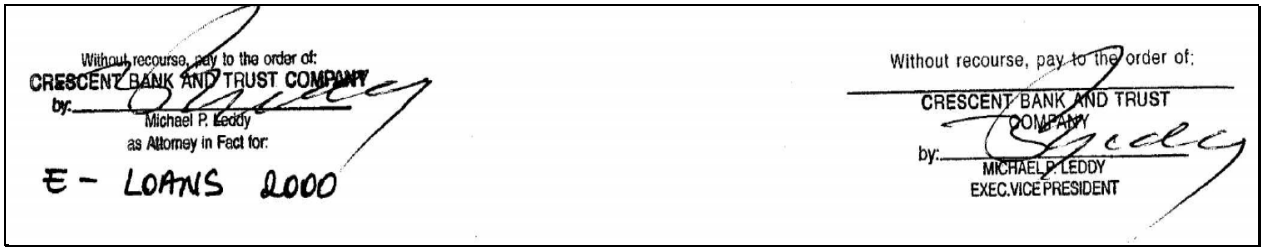
[1] Complaint, December 7, 2009 (R. 17-25).

[2] Complaint, December 7, 2009, ¶ 5 (R. 18).

[3] Note, August 11, 2010 (R. 59-61).

[4] Note, August 11, 2010 (R. 59).

Company ("Crescent") executed by Michael P. Leddy ("Leddy") who identified himself as E-Loans "attorney in fact," and then a blank endorsement executed by Leddy who signed as an executive vice-president for Crescent:[5]



Two months after it filed the purported original note, the Bank filed a motion to "amend plaintiff's name" alleging that after the lawsuit was filed, the Bank merged with JPMorgan Chase Bank, National Association ("JPMorgan") and therefore JPMorgan was "the proper name of the party in interest in the instant action."[6] The trial court granted this motion (one day after it was filed) and "amended" the Bank's name.[7]

In any event, the Homeowner answered the complaint and denied every allegation except that she was the legal owner of the property.[8] And as affirmative

[5] Endorsements on Note, August 11, 2010 (R. 61).

[6] Motion to Amend Plaintiff's Name, October 20, 2011, ¶¶ 1-2 (R. 139).

[7] Order Amending Plaintiff's Name, October 21, 2011 (R. 144).

[8] Answer, September 30, 2011, ¶ 1 (R. 127).

defenses, the Homeowner specifically denied the authenticity of, and authority to make, the endorsements on the note[9] and alleged that the Bank lacked standing.[10]

Prior to trial, the Homeowner moved for summary judgment alleging that E-Loans did not authorize any endorsements on the promissory note.[11] This motion was supported by an affidavit from Gregory Fierce ("Mr. Fierce") who identified himself as the owner and principal officer of E-Loans.[12] Mr. Fierce averred that E-Loans was not a party to any of the servicing documents,[13] had in fact never serviced a loan,[14] and also did not authorize any endorsements to be placed on the note.[15]

The matter was then set for trial.[16]

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[9] Affirmative Defenses, September 30, 2011, ¶ 1 (R. 127).

[10] Affirmative Defenses, September 30, 2011, ¶ 2 (R. 127-128).

[11] Motion for Summary Judgment, February 25, 2014, ¶ 5 (R. 231).

[12] Affidavit, February 25, 2014, ¶ 2 (R. 233).

[13] Affidavit, February 25, 2014, ¶ 5 (R. 233).

[14] Affidavit, February 25, 2014, ¶ 7 (R. 233).

[15] Affidavit, February 25, 2014, ¶ 8 (R. 233).

[16] Order Setting Trial, March 26, 2015 (R. 259-260).

B. The Trial

The Bank's case

The Bank's first witness was Kiran Patel, the obligor on the note and one of the mortgagors.[17] Through Mr. Patel, and over the Homeowner's authenticity objection,[18] the Bank admitted the purported original note[19] and mortgage.[20] Mr. Patel did testify, however, that he had never borrowed money from E-Loans or entered into a contract with that company and therefore it was an error to place E-Loans's name on the note.[21] The Bank also called Ms. Patel and, without objection, moved her interrogatory answers into evidence.[22]

The Bank then called its final witness, Ron Mulholland, to the stand.[23] Mulholland was employed by JPMorgan as a "mortgage banking research officer" whose job required him to "research" loans in default so he could prepare for trials, depositions, and mediations.[24] He had previously worked for the Bank as a "short

[17] Transcript of Trial Before the Honorable Sandra Taylor, March 25, 2015 (R. 265; "T. ___") at 7.

[18] T. 10.

[19] Exhibit 1.

[20] Exhibit 2.

[21] T. 12-13.

[22] Exhibit 3.

[23] T. 23.

[24] T. 23-24.

sale negotiator."[25] He had only become familiar with the Homeowner's account by reviewing the "servicing platform" and the documents he intended to introduce at trial.[26] Finally, according to Mulholland, the Bank merged with JPMorgan on May 1, 2011.[27]

Through Mulholland, and over the Homeowner's objection, the Bank introduced the following documents which composed nearly all of its case:[28]

- An "acquisition screenshot" purporting to show when the Bank acquired the loan;[29]
- A DOCLINE report purporting to show the location of the "original collateral file";[30]
- A payment history;[31] and
- A "judgment figures" document.[32]

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[25] T. 24.

[26] T. 26.

[27] T. 25.

[28] The Homeowner did not object to introduction of the acceleration notice (Exhibit 6, T. 46).

[29] Exhibit 4.

[30] Exhibit 5.

[31] Exhibit 7.

[32] Exhibit 8.

And while the Bank asked a series of questions about the acquisition screenshot, the DOCLINE report, and the payment history[33] in an apparent attempt to lay the business records predicate, the Bank never asked, and Mulholland never testified, that it was the regular practice of the Bank to make these documents. And the Bank asked no foundational questions about the judgment figures document, instead attempting to move the document in as a "summary" and arguing that there was no written objection to this request.[34]

Mulholland also testified about a "boarding" process the Bank performed when it allegedly took over the servicing of the loan in 2003.[35] According to Mulholland, this process apparently took place in Monroe, Louisiana where the loan was somehow "checked for accuracy":[36]

> MULHOLLAND: At that point it would have been boarded into our --at the same location I talked about in Monroe, Louisiana. That's when the original files show up in our location there.
>
> At that time they're broken down into a collateral file and a credit file, checked for accuracy, if three's two different QA processes. They would have QC'd the payment history that came from the prior servicer.

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[33] T. 29-30 (as to the acquisition screenshot); T. 35 (as to the DOCLINE report); T. 50-51 (as to the payment history).

[34] T. 59-60.

[35] T. 56.

[36] T. 56.

> Once it was deemed accurate, that's when it would have been uploaded into our system and boarded. So I mean the fact that it's been boarded, we look at that as an accurate payment history.

And according to Mulholland, the DOCLINE report showed transfers of the note into and out of the Bank's "vault" which he once "had a chance to visit to see the boarding process one on one."[37] While Mulholland testified that the Bank had a department responsible for processing payments[38] and a different department responsible for making escrow payments,[39] he never testified that he worked for those departments or otherwise explained how he was familiar with those departments' processes and procedures.

And on cross-examination, Mulholland admitted that during his prior deposition he testified that he could not find a power of attorney allowing Leddy to endorse the note on behalf of E-Loans and that he did another search before trial and could not find one either.[40] He also admitted that he did not know who Leddy was.[41]

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[37] T. 28.

[38] T. 49.

[39] T. 50.

[40] T. 69.

[41] T. 70.

After the Bank rested, the Homeowner moved for an involuntary dismissal since a copy of the note was not attached to the complaint.[42] The trial court denied the motion.[43]

The Homeowner's case

The Homeowner's case began with testimony from Mr. Fierce.[44] Mr. Fierce testified that E-Loans had no connection to the Homeowner's property as either the lender or the mortgage holder.[45] And Mr. Fierce testified that even though the note identifies E-Loans as the "lender," this was not correct.[46] Mr. Fierce also testified that E-Loans never took a security interest in the Homeowner's property.[47] And without objection, his previously filed affidavit was admitted into evidence.[48]

The Homeowner also testified that she remembered receiving a copy of the complaint and noting that a copy of the note was not attached to it.[49] She further testified that she went to the clerk's office and a copy of the complaint that was

[42] T. 72-73.

[43] T. 73.

[44] Before the Honorable Sandra Taylor, May 1, 2015 (R. 320; "T2. ___") at 3.

[45] T2. 4.

[46] T2. 4.

[47] T2. 5.

[48] Defendant's Exhibit 1.

[49] T2. 25.

filed there also did not have a copy of the note attached to it.[50] Finally, the Homeowner testified that E-Loans did not take a mortgage out on her house.[51]

After the Homeowner rested its case, the trial court allowed the Bank to reopen its case and recall Mr. Fierce to the stand.[52] Over the Homeowner's completeness objection, the trial court admitted a power of attorney into evidence purportedly signed by Mr. Fierce and purportedly allowing Leddy to endorse notes on E-loans behalf.[53] This document, however, only applied to certain "loans" which were unidentifiable from the document:[54]

> (4) For purposes of this Limited Power of Attorney, the terms "Loan" and "Loans" apply only to [illegible] which Grossant makes funds purchases or services.

At the close of evidence, the Homeowners argued that the Bank was not entitled to foreclose because E-Loans's name was on the note.[55] And the Homeowner also argued that she was entitled to a dismissal because that it was

[50] T2. 27. The trial court also took judicial notice of the fact that the complaint in the court file did not have a copy of the note to it. (T2. 27).

[51] T2. 28.

[52] T2. 31.

[53] Exhibit 9.

[54] R. 445.

[55] T2. 40, 42.

undisputed that the note was not attached to the complaint and there was no testimony about when the endorsement was placed on the note.[56]

After taking the matter under advisement,[57] the court entered judgment in the Bank's favor[58] even though it had previously entered the order "amending" the plaintiff's name.[59] After her timely motion for rehearing[60] was denied,[61] the Homeowner appealed.[62]

[56] T2. 43.

[57] T2. 49.

[58] Final Judgment, May 28, 2015 (R. 447-452).

[59] Order Amending Plaintiff's Name, October 21, 2011 (R. 144).

[60] Motion for Rehearing June 10, 2015 (R. 453-466).

[61] Order on Defendants' Motion for Rehearing, October 20, 2015 (R. 480-481).

[62] Amended Notice of Appeal, November 17, 2015 (R. 492-493).

SUMMARY OF THE ARGUMENT

Initially, the trial court erred in applying the Evidence Code in this case. First, the note should have been excluded on authenticity grounds since the endorsement was neither not presumed authentic or, if such a presumption exists, was burst by the testimony at trial. Furthermore, the Bank did not even lay a business records predicate for the majority of its documents. But even if it had, its witness was singularly unqualified to do so. Finally, the judgment figures document should have been excluded on summary evidence grounds.

And even if the documents were admissible, the evidence is insufficient to support a finding that either the Bank or JPMorgan had standing. First the named mortgagee expressly repudiated the contract and therefore there was no valid mortgage to foreclose. Second, even if there was a valid mortgage, the Bank did not prove that it had standing at inception. Finally, even if the Bank had standing at inception, its own witness's testimony proved that it lacked standing at the time of trial. And if JPMorgan was actually "substituted" as party-plaintiff, the court erred in granting judgment to a non-party and erred in granting judgment where there was no evidence of JPMorgan's standing when judgment was actually entered.

Therefore, the Court should reverse the judgment and remand for dismissal.

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 misapplied the Evidence Code.

A. The Bank did not authenticate the note and the power of attorney should have been excluded under the rule of completeness.

The Bank did not authenticate the promissory note.

The Florida Evidence Code provides that commercial papers and signatures in those papers are "self-authenticating," but only to the extent "provided in the Uniform Commercial Code." § 90.902(8), Fla. Stat. However, Article 3 of the Uniform Commercial Code ("UCC") only speaks to "signatures" as being self-authenticating (unless specifically denied in the pleadings)—not entire instruments themselves. § 673.3081, Fla. Stat.[63]

Furthermore, the presumption regarding authenticity was intended to apply only to the signatures of the original makers of a Note, and not to the signatures of third-party endorsers. Nothing in § 3-308 of the UCC refers to endorsements or signatures of endorsers. The Official Commentary to § 3-308 UCC explains that "[t]he presumption rests upon the fact that in ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within

[63] To the extent this Court believes the Second District decision in *AS Lily, LLC v. Morgan*, 164 So. 3d 124 (Fla. 2d DCA 2015) provides otherwise, that opinion should be distinguished as mere *dicta*.

the control of, or more accessible to, the defendant." U.C.C. 3-308 cmt. 1 (2002); § 673.3081, Fla. Stat. Ann. (2012) (emphasis added).[64] Thus, the drafters of the UCC used the word "signatures" to mean those of "defendants" (i.e. "makers")—the ones denying the authenticity of their own signatures.

Moreover, this "access to evidence" rationale for granting a presumption as to the maker's signature cannot be logically extended to signatures by endorsers, because that evidence will not be "within the control of, or more accessible to, the defendant." Here, the evidence of Leddy's authority to act for two different companies is solely within the control of the Bank. It would defy logic—as well as any reasonable sense of equity and fairness—to create a presumption as to the authenticity of endorsements based on access to evidence when the maker of the instrument has no such access.

Nor is the other rationale for the UCC presumption—that "unauthorized signatures are very uncommon"—applicable to documents submitted by banks in foreclosure cases. And this is true especially since it is now common knowledge

[64] The Florida courts regularly rely upon the Official Comments of the UCC to guide their interpretation, in keeping with the goal of ensuring uniform application of the law nationwide. *See, e.g., Nakhal v. Nations Bank*, 796 So. 2d 1281 (Fla. 4th DCA 2001) (relying on official comment to interpret UCC provision); *Union Planters Bank, N.A. v. Peninsula Bank*, 897 So. 2d 499, 500 (Fla. 3d DCA 2005) (same); *Dickason v. Marine Nat. Bank of Naples, N.A.*, 898 So. 2d 1170, 1173 (Fla. 2d DCA 2005) (same); *Cone Constructors, Inc. v. Drummond Cmty. Bank*, 754 So. 2d 779, 780 (Fla. 1st DCA 2000).

that "many, many mortgage foreclosures appear tainted with suspect documents." *Pino v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011).

But even if there was some bursting bubble presumption initially weighing againsnt the Homeowner, she popped it and transferred the burden onto the Bank when Mulholland admitted that he could not find a power of attorney allowing Leddy to execute notes on behalf of E-Loans before he took his deposition; that he was not able to find one during a search he performed after the Homeowner took his deposition; and that he did not know even know who Leddy was.[65] *Bennett v. Deutsche Bank Nat. Trust Co.*, 124 So. 3d 320 (Fla. 4th DCA 2013). And the Bank never satisfied its burden because, as shown below, the power of attorney was an incomplete, and therefore irrelevant, document.

The power of attorney should have been excluded under the rule of completeness.

Indeed when part of a document is introduced during a trial, the "rule of completeness" allows the adverse party to require the movant to produce any other part of the document which, in fairness, should be considered by the trier of fact. § 90.108(1), Fla. Stat.; *Long v. State*, 610 So. 2d 1276 (Fla. 1992). The purpose of

[65] T. 69-70.

the rule is to avoid misleading impressions by taking statements out of context. *Larzelere v. State*, 676 So. 2d 394 (Fla. 1996).

Here, a very specific and very important portion of the power of attorney was not introduced: the portion which described which "loan" or "loans" Leddy had the power to endorse.[66] And without this portion of the power of attorney (which, again, the Bank's own witness admitted he could not find), the trial court could have been given the misleading impression that Leddy had the authority to endorse the note at issue.

But more importantly, since the document was incomplete, it was irrelevant to a determination whether Leddy could endorse the note at issue. And without evidence that Leddy had authority to endorse the note introduced at trial, the Bank did not prove, by a preponderance of evidence, that his endorsement was authorized. *Bennett*, 124 So. 3d at 322.

B. The acquisition screenshot, the DOCLINE report, and the payment history were not admissible as business records.

The Bank laid no proper predicate for the business records hearsay exception for these documents.

To properly authenticate the documents before admitting them into evidence, Mulholland would have had to be sufficiently familiar with them to

[66] R. 445.

testify that they are what the Bank claims them to be. § 90.901, Fla. Stat. Moreover, to overcome the hearsay objections made to each and every exhibit, 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 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 never asked about all the elements of the business records exception for its exhibits. Specifically, Mulholland never testified that it was the regular practice of the Bank to make the acquisition screenshot, the DOCLINE report, and the payment history. Rather, he repeatedly testified that these documents were "maintained" in the regular course of business[67]—which is just a duplicative way of testifying to the third prong. This should simply end the

[67] T. 29-30 (as to the acquisition screenshot); T. 35 (as to the DOCLINE report); T. 50 (as to the payment history).

discussion about this case and require dismissal on remand. *See Sanchez v. Suntrust*, 179 So. 3d 538 (Fla. 4th DCA 2015).

Mulholland had no personal knowledge of any recordkeeping procedures employed by the Bank, and therefore, was not qualified to testify about them.

And in addition to addressing whether Mulholland actually testified about the business records exception elements, the trial court was also required to determine whether he was qualified to talk about them. To be qualified to testify in court, a witness must have "personal knowledge"—i.e. the witness cannot be simply repeating hearsay. § 90.604, Fla. Stat (witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding the witness has personal knowledge about the matter); *Bryant v. State*, 124 So. 3d 1012, 1015 (Fla. 4th DCA 2013) ("Where a witness has no personal knowledge of a matter, and the witness's knowledge is derived entirely from information given by another, the witness's testimony is incompetent and inadmissible as hearsay.").

Thus the question on this appeal is one that has yet to be directly addressed by any Florida court: whether a party offering a document as evidence may present foundational testimony through a blank-slate, professional testifier by simply telling this person what to say in court about that party's record-keeping practices (or even some non-party's record-keeping practices).

This is the crux of the affront to due process and the judicial system known as robo-witnessing—a practice that the Fourth District condemned in *Bank of New York v. Calloway*, 157 So. 3d 1064 (Fla. 4th DCA 2015). It is the as-yet unchecked, expediency-fueled notion that has run rampant in foreclosure cases that a witness may be trained on 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. To permit a witness to parrot what he has been told to say about recordkeeping procedures by the very party interested in portraying those procedures as sufficient to make its purported records admissible is to use hearsay (the purported foundation) to admit other hearsay (the documents).

The touchstone for insuring personal knowledge is encapsulated in the well-known and abundant case law that requires that a witness 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.[68]

[68] *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); *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); *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

But the point of this touchstone is subverted when professional testifiers are substituted for witnesses whose jobs are to actually produce or manage the recordkeeping function which is the subject of the testimony. Not only does this allow hearsay to masquerade as personal knowledge, but in foreclosure cases, the resulting testimony is indistinguishable from the robo-sworn summary judgment affidavits that shocked the nation.

Here, Mulholland was no different than those robo-signing predecessors, completely bereft of any non-hearsay knowledge that would qualify him to testify under oath about the Bank's documents in this case. First, he was a professional testifier. His job duties were "research" defaulted loans so he could prepare for trials, depositions, and mediations.[69]

Second, he failed to give any testimony that he had personal, business-related experience with any of the documents he was sent to talk about. For instance, he testified that the information contained in the DOCLINE report

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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).

[69] T. 24.

reflected transfers into and out of a vault in Monroe, Louisiana…which he once "had a chance to visit."[70] Likewise, while he testified about two departments responsible for processing the payments and making the disbursements found in the payment history,[71] he never testified he worked for those departments or otherwise demonstrated he had a modicum of knowledge about how those departments operated. In fact, other than to testify generally that he was "familiar" with the Bank's and JPMorgan's servicing practices,[72] he offered no testimony whatsoever explaining how he was familiar with apparently every aspect of the Bank's and JPMorgan's business.

As such, he conceded that his purported knowledge about all the key points had come from hearsay. Specifically, he testified on direct examination that he was only familiar with the Homeowner's account because he "reviewed" some pieces of paper before trial.[73]

In short, Mulholland was a "robo-witness"—one of the hearsay-toting automatons which, like the robo-signers of yesteryear, have sullied the Florida judicial system. While certainly well trained in the art of giving hearsay testimony,

[70] T. 28.

[71] T. 49-50.

[72] T. 25.

[73] T. 26-27.

Mulholland was not a records custodian or other qualified witness since he was neither in charge of, nor (other than through hearsay) acquainted with, any of the activities constituting usual business practices for creating and maintaining the Bank's purported records. His testimony was pure psittacism.

The witnesses' evidence of verification of the prior servicer's records was wholly insufficient.

In *Calloway*, the Fourth District 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 the witness offer any specific evidence that the Bank verified the prior servicer's records for accuracy after receiving them as required by *WAMCO XXVIII, Ltd. v. Integrated Electronic Environments, Inc.*, 903 So. 2d 230, 233 (Fla. 2d DCA 2005) and its progeny. In fact, Mulholland's testimony about boarding is so vague it is unclear whether the Bank verified the accuracy of the prior servicer's data or just the accuracy of the boarding department's ability to scan this data into its system. A statement in the era of paper documents that would be equivalent to

modern-day "boarding" would have been: "we made sure the photocopier ran smoothly and made extremely accurate copies of each and every document that the previous servicer had…even if the documents themselves were false and erroneous."

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 Mulholland's testimony that the Bank's boarding process here did none of these things.[74]

Therefore, the Bank simply incorporated the prior servicer's payment history without any independent verification of accuracy. But the Fourth District has already expressly held that documents which were only incorporated into a subsequent business's records do not fall within the business records exception.

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

Landmark American Insurance Company v. Pin-Pon Corp., 155 So. 3d 432, 442 (Fla. 4th DCA 2015).[75]

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*

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

§ 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 have one person testify on all aspects of the business.

C. The judgment figures document should not have been admitted as a summary.

Finally, the court erred in admitting the judgment figures as a summary. Initially, this document was admitted because the court agreed with the Bank's

lawyer that there was no "written objection" that the Homeowner was "required" to make.[76]

But no such requirement actually exists in the Evidence Code. In fact, the only requirement for written notice which actually exists in the Code is the requirement that the Bank, as the proponent of the evidence, "give timely written notice of his or her intention to use the summary…" § 90.956, Fla. Stat. Thus, there was no "waiver" of any objection as the Bank wrongly argued at trial.

Further, under the summary evidence rule summaries of business records may only be admitted if it is authenticated by the party who prepared it. *Cayea v. CitiMortgage, Inc.*, 138 So. 3d 1214, 1217 (Fla. 4th DCA 2014). Here, the judgment figures document was not authenticated by the party who prepared it.

And while "[p]rintouts of data prepared for trial may be admitted under the business records exception even if the printouts themselves are not kept in the ordinary course of business" this is so only "so long as a qualified witness testifies as to the manner of preparation, reliability, and trustworthiness" of the document. *Cayea*, at 1217. The witness here, who was not a qualified witness, said nothing about the manner of preparation, reliability and trustworthiness of the document.

* * *

[76] T. 60-61.

In summary, the court erred in admitting the Bank's documents over objection. Without the payment history or the judgment figures, there was no evidence of the Bank's damages and the trial court was obligated to dismiss. *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 153 So. 3d 280, 283 (Fla. 2d DCA 2014). Likewise, without the note, the acquisition screenshot, or the DOCLINE report, there was no evidence of the Bank's standing which also required dismissal. *Hunter v. Aurora Loan Services, LLC*, 137 So. 3d 570, 574 (Fla. 1st DCA 2014).

II. Even if the evidence was admissible, the evidence is insufficient to support a finding that the Bank had standing and therefore the case must be remanded for dismissal.

A plaintiff must acquire standing before filing suit. *Boyd v. Wells Fargo Bank, N.A.*, 143 So. 3d 1128 (Fla. 4th DCA 2014) (reversing summary judgment of foreclosure because foreclosing lender failed to produce documentation establishing that it had standing at the time it filed the foreclosure complaint); *LaFrance v. U.S. Bank Nat. Ass'n*, 141 So. 3d 754, 755 (Fla. 4th DCA 2014) ("A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose…Standing to foreclose is determined at the time the lawsuit is filed.") (Citations omitted).

Furthermore, a substituted plaintiff only takes whatever standing the original party plaintiff had at the time the complaint was filed. *Assil v. Aurora Loan Services, LLC*, 171 So. 3d 226, 227 (Fla. 4th DCA 2015) ("[A] substituted plaintiff acquires the standing of the original plaintiff.").

And importantly, "[w]here as here, the defendant asserts a lack of standing as a defense to foreclosure, it is incumbent upon the plaintiff to prove its standing at trial." *Dickson v. Roseville Properties, LLC*, __ So. 3d __, 2015 WL 6777155, * 2 (Fla. 2d DCA November 6, 2015). Therefore, because the Homeowner denied the Bank's allegations regarding standing in her answer[77] and asserted standing as an affirmative defense,[78] this became something the Bank had to prove during its case in chief. Such proof was sorely lacking.

A. There was no evidence that there was a valid security interest on the property.

A mortgage, by definition, "is a written instrument providing security for performance of a duty or payment of a debt which, when recorded, gives rise to a lien on the mortgage property." *Gonzalez v. NAFH Nat. Bank*, 93 So. 3d 1054, 1058 n. 2 (Fla. 3d DCA 2012). Thus, where the parties to the mortgage are misidentified, the document is void and no legal obligations are created between

[77] Answer, August 20, 2015, ¶ 1 (R. 570).

[78] Affirmative Defenses, September 30, 2011, ¶ 2 (R. 127-128).

them. *Bank of New York Mellon v. Mestre*, 159 So. 3d 953, 956 (Fla. 5th DCA 2015) ("[T]he court, at the urging of the Mestres, found that the signatures on the mortgage were fraudulently executed. As a result, the forged document became void and unenforceable. Moreover, because the trial court found that the Mestres' signatures were not the signatures on the loan documents, no legal obligations were ever created between the parties.") (citations omitted).

Here, there was no mortgage because the named mortgagee and the payee of the note, E-Loans, expressly repudiated any interest in the documents. Specifically, Mr. Fierce (E-Loans's president and principal officer) testified that E-Loans had no connection to the property as either the lender or the mortgage holder;[79] the maker of the note was not required to repay E-Loans any money;[80] and E-Loans never took a security interest in the property.[81] Likewise, Mr. Fierce's affidavit admitted without objection as Defendant's Exhibit 1 averred that E-Loans was not a party to any of the servicing documents[82] and that it had in fact never serviced a loan.[83]

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[79] T2. 4.

[80] T2. 4-5.

[81] T2. 5.

[82] Affidavit, February 25, 2014, ¶ 5 (R. 233).

[83] Affidavit, February 25, 2014, ¶ 7 (R. 233).

As such, without a valid contractual agreement between E-Loans and the Homeowner, there was simply no mortgage to foreclose.

B. Even if there was a valid security interest in the property, the Bank failed to prove it had standing at inception.

But even if the Court could somehow magically infer over Mr. Fierce's unrebutted testimony that there was a valid mortgage on the property, the Bank still failed to prove its standing at inception. Initially, "[w]hen a plaintiff asserts standing based on an undated endorsement of the note, it must show that the endorsement occurred before the filing of the complaint through additional evidence, such as testimony of a litigation analyst." *Lloyd v. Bank of New York Mellon*, 160 So. 3d 513, 515 (Fla. 4th DCA 2015).

Here, however, no note was attached to the complaint.[84] And the Homeowner testified that when she received a copy of the complaint, she noted that a copy note was not attached to it.[85] Thus, the Bank was not entitled to the inference that it was in possession of the properly endorsed note on the day the lawsuit was filed. *Cf. Ortiz v. PNC Bank, Nat. Ass'n*, __ So. 3d __, 2016 WL 1239760 (Fla. 4th DCA March 30, 2016) (holding that attachment of copy of note

[84] Complaint, December 7, 2009 (R. 17-25).

[85] T2. 25.

endorsed in blank to complaint gives rise to inference that plaintiff had possession of the note absent evidence to the contrary).

Further, the endorsements on the note are undated[86] and Mulholland never testified when the endorsements were placed on the note. Nor do either the acquisition screenshot (Exhibit 4) or the DOCLINE report (Exhibit 5) indicate when the endorsements were placed on the note. These documents are therefore insufficient evidence to support a finding that the note was endorsed before the lawsuit was filed and that the Bank had standing. *J-H Home Mortg. Rescue, LLC v. Fed. Nat. Mortg. Ass'n*, 184 So. 3d 1168 (Fla. 2d DCA 2015) ("[T]he screen shot was not competent, substantial evidence of [the bank's] acquisition."); *Calvo v. U.S. Bank Nat. Ass'n*, 181 So. 3d 562 (Fla. 4th DCA 2015) (reversing foreclosure judgment and remanding for an involuntary dismissal because screenshots admitted at trial "did not set forth whether the note that was changing hands included the blank endorsement.").

C. The Bank also failed to prove that either it or JPMorgan had standing on the day of trial.

Finally, even if the Bank had proven it had standing at inception (which it did not), it admittedly did not have standing at the time of judgment because

[86] Note, Exhibit 1 (R. 61).

Mulholland testified that the Bank "merged" with JPMorgan on May 1, 2011.[87] The Bank's failure to prove standing at the time of judgment is likewise fatal to its claim. *Pennington v. Ocwen Loan Servicing, LLC*, 151 So. 3d 52, 53 (Fla. 1st DCA 2014) ("Additionally, a bank must also have standing at the time final judgment is entered..").

The Bank may argue that since the trial court entered the order "amending" the plaintiff's name,[88] its failure to prove standing at the time of judgment is a moot point. There are two flaws with this argument. First, to the extent JPMorgan was substituted as party-plaintiff in place of the Bank, the court erred by granting a judgment in favor of a non-party. *Beaumont v. Bank of New York Mellon*, 81 So. 3d 553, 554 (Fla. 5th DCA 2012) ("It is fundamental error to enter judgment in favor of a nonparty."); *Rustom v. Sparling*, 685 So. 2d 90 (Fla. 4th DCA 1997) ("The trial court may not adjudicate the rights of a non-party.").

Second, if JPMorgan was substituted as party-plaintiff, the Bank was also required to prove that JPMorgan had standing at the time of trial. *Creadon v. U.S. Bank, N.A.*, 166 So. 3d 952 (Fla. 2d DCA 2015). But the order granting the Bank's motion to "amend" the plaintiff's name did not create standing, and the Bank could

[87] T. 25.

[88] Order Amending Plaintiff's Name, October 21, 2011 (R. 144).

not claim JPMorgan was a holder or a nonholder of the note because the note was filed before the plaintiff's name was "amended." *Geweye v. Ventures Trust 2013-I-H-R*, __ So. 3d __, 2016 WL 1038616 (Fla. 2d DCA March 16, 2016).

Nor does Mulholland's testimony about the alleged "merger" carry the day. Initially, this testimony was rank hearsay and cannot be used to sustain the judgment. *Doyle v. CitiMortgage, Inc.*, 162 So. 3d 340, 342 (Fla. 2d DCA 2015) (testimonial evidence was inadmissible hearsay such that judgment was not supported by competent, substantial evidence); *Mount Sinai Med. Ctr. of Greater Miami, Inc. v. Gonzalez*, 98 So. 3d 1198, 1203 (Fla. 3d DCA 2012) (no finding may be based on hearsay alone). And even if it could, a merger can show standing only if the acquiring bank proves that it "acquired all of the original lender's assets, including [the] note and mortgage, by virtue of the merger." *Johnson v. Space Coast Credit Union*, 184 So. 3d 1247, 1250 n. 2 (Fla. 4th DCA 2016) (emphasis added and citations omitted).

Here, since there was no evidence that JPMorgan purchased any assets from the Bank (much less the subject note and mortgage), there is insufficient evidence to prove that JPMorgan had standing at the time of judgment.

* * *

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 Sorrell v. U.S. Bank Nat. Ass'n*, __ So. 3d __, 2016 WL 1360758, * 3 (Fla. 2d DCA April 6, 2016) ("Therefore, because U.S. Bank's evidence was legally insufficient to prove it had standing when it filed the complaint, we must reverse and the final judgment in favor of U.S. Bank and remand for dismissal."); *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").

CONCLUSION

The Court should reverse the final judgment and remand for an involuntary dismissal

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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 May 9, 2016 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 May 9, 2016.

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