

SIXTH DISTRICT COURT OF APPEALS
STATE OF FLORIDA

App Case No.: 6D23-1482
LT. Case No.: 2020-CA-007792-O

CHARLES RUFFENACH,
Appellant,

v.

DEUTSCHE BANK NATIONAL
TRUST COMPANY, AS TRUSTEE
FOR AMERIQUEST MORTGAGE
SECURITIES INC., ASSET- BACKED
PASS-THROUGH CERTIFICATES
SERIES 2005-R8, RAYMOND
LOZANO, ALILI RIHKRAND, ET AL.,
Appellees.

REPLY BRIEF

Appeal from the Circuit Court of the
Ninth Judicial Circuit, in and for
Orange County, Florida
Honorable Vincent Falcone, presiding

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A. Personal knowledge: Fla. Stat. 90.604

Defendant has challenged the admission of the previous servicers' business records because the witness did not have personal knowledge to lay the foundation for the business records exception to the hearsay rule. (IB 25-28). In particular, Plaintiff's witness did not know whether the predecessors' records were made at or near the time of the event, by or from a person with knowledge.(R4154-4157; R4160-4162; R3934-39). She also testified that her knowledge of Ocwen's boarding process came from what people told her at training. (R3940) The Plaintiff argues that information obtained through "training" is sufficient to meet the personal knowledge requirement. (AB 12-13). Florida law says otherwise. Plaintiff also suggests that the process of loan boarding negates the need to establish predicate elements for admissibility in Fla. Stat. § 90.803(6). Not true.

Fla. Stat. § 90.604 requires that witness testimony be based upon personal knowledge. In Florida, the requirement of personal knowledge is the same as what a witness "personally observed." *State v. Eubanks*, 609 So. 2d 107, 110 (Fla. 4th DCA 1992) *also L.L.*

v. State, 189 So. 3d 252, 259, (Fla. 3d DCA 2016). Under this system, knowledge based upon hearsay, such as knowledge based upon “information and belief” cannot satisfy Florida law. *Campbell v. Salman*, 384 So. 2d 1331, 1333 (Fla. 3d DCA 1980). For example, the Fourth DCA held that testimony about subjects that the witness “did not actually see” and had no personal first-hand knowledge was inadmissible under Fla. Stat. § 90.604. *Roseman v. Town Square Ass’n* *Roseman v. Town Square Ass’n*, 810 So. 2d 516, 521, (Fla. 4th DCA 2001).

Under this standard, testimony is not competent when the witness has “no personal knowledge of a matter, and the witness's knowledge is derived entirely from information given by another.” *Bryant v. State*, 124 So. 3d 1012, 1015 (Fla. 4th DCA 2013). This concept ties into longstanding concepts of hearsay, because “[w]here 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.” *Id.*; Also *Leonard v. State*, 192 So. 3d 1258, 1260 (Fla. 2d DCA 2016); *Rowan v. State*, 696 So. 2d 842, 844 (Fla. 2d DCA

1997).

In the foreclosure arena, testimony about a prior loan servicer's business practices is inadmissible where the witness was not employed by the previous servicer and lacked personal knowledge of those facts. *Walton v. Deutsche Bank Nat'l Trust Co.*, 201 So. 3d 831, 834 (Fla. 1st DCA 2016). In this case, the witness could have obtained personal knowledge of Ocwen's boarding process by witnessing or participating in the boarding process itself.

Under the federal rules of evidence upon which Florida's rules are based, testimony based upon what a person communicated at "training" is hearsay and violates the personal knowledge rule.

Dresser v. Ohio Hempery, Inc., 2011 U.S. Dist. LEXIS 62757, *37, 2011 WL 2416595 (E.D. La. June 13, 2011) ("Massey's recollection of what she and the other ALJs were told at this training session is inadmissible hearsay"); *Nicolia v. GM, LLC*, 2019 U.S. Dist. LEXIS 172217, *28, 2019 WL 4887845 (WD NY Oct. 3, 2019) (Information obtained through training is hearsay.); *Walden v. Ctrs. for Disease Control & Prevention*, 2009 U.S. Dist. LEXIS 145327, *35 (ND Ga.

November 20, 2009) (Information that “was told during her training are hearsay and cannot be reduced to admissible evidence at trial.”); *United States v. Bravata*, 2013 U.S. Dist. LEXIS 26230, *3, 2013 WL 692841 (E.D. Mich., February 26, 2013) (“Identifying “statements made by John Bravata in some training videos” as “classic hearsay”); *United States v. McConnell*, 2021 U.S. Dist. LEXIS 1005, *5, 2021 WL 37585 (D. Mont., Jan. 4, 2021) (Excluding “statements made by Tiffany Hammer, the individual who conducted the training” as inadmissible hearsay.).

In this case, what the witness heard at “training” cannot supply the personal knowledge required to lay a foundation for business records. The case of *Nationstar Mortgage v. Berdecia*, 169 So. 3d 209 (Fla. 5th DCA 2015) supports this point. There, the trial court excluded business records because the witness “had not personally boarded Borrowers' loan.” *Id.* At 212. This was error. However, the Court reiterated that a business records witness must “demonstrate familiarity with the record-keeping system of [the] business that prepared the document and knowledge of how the data was uploaded into the system.” *Id.* at 213. The Court also

found that a witness must establish the four foundational elements for the business records exception. *Id.* at 212-13. Additionally, when the records are from a previous servicer, the witness must also show that the records are trustworthy by showing a “business relationship or contractual obligation between the parties that ensures a substantial incentive for accuracy” or that the predecessor independently confirmed “the accuracy of the third-party's business records upon receipt.” *Id.* at 215-16. Citation omitted. In other words, the business records foundation needs to be set forth with personal knowledge, and a predecessor’s records need to be trustworthy by a contractual obligation or through independent verification of the records.

Under this reasoning, the witness could lay the foundation for business records generated by Ocwen and PHH. The witness could not lay the foundation for prior servicers. She did not know whether the previous servicers made their records at or near the time of the event, by or from a person with knowledge. (R3934-37). These are foundational requirements for the admission of business records. Fla. Stat. § 90.803(6). She also had no personal knowledge

of the previous servicers' boarding practices, so she could not verify whether those systems ensured the trustworthiness component in *Berdecia*, ie. proving a "business relationship or contractual obligation" that ensures accuracy or that the boarding process independently confirmed "the accuracy of the third-party's business records." Without this, the previous servicers' records were inadmissible hearsay.

B. Boarding Process: Verifying Accuracy

Defendant has challenged the Plaintiff's business records because the servicer did not verify its predecessors' records for accuracy. (IB 28-30). Plaintiff countered—arguing that a servicer's process of verifying the previous servicers' math and accurately importing digital data points are sufficient to satisfy Florida's "verification" requirement to make a previous servicer's records admissible. (AB 13-15).

The requirement that a servicer independently verify the accuracy of the predecessor's records is most aptly described in *Bank of New York v. Calloway*, 157 So. 3d 1064, 1071(Fla. 4th DCA 2015). There, the Court held that "[t]he company's mere reliance

on the document is insufficient to establish trustworthiness.

Rather, trustworthiness can be established through a contractual or business relationship that incentivizes accuracy, or through the testimony showing that the company independently confirmed the accuracy of the creator's documents." *Id.* at 1072.

The issue here involves payment histories from prior servicers. Plaintiff appears to argue that an accurate transmission of data points is all that is required to establish "trustworthiness" under *Calloway*. (See AB 14-15). In making this argument, Plaintiff relies upon *Wells Fargo Bank v. Eisenberg*, 220 So. 3d 517 (Fla. 4th DCA 2017). There, the Court found that:

while Bank could not verify a prior servicer's processing and procedures in their entirety, **Bank's review was based on verifying that the number of payments**, loan balance, interest rate, and due dates as originally provided by the prior servicer **matched those contained in the actual loans** acquired. If the numbers did not match, Bank would have the prior servicer review the information for correctness.

Id. at 522. (AB 13) (emphasis added).

In other words, the servicer in *Eisenberg* independently verified the **factual** accuracy of the data entries. It did not merely ensure that the previous records were accurately copied and pasted into the

new system and the math added up.

It bears emphasis that *Calloway* permits the admission of business records, where the successor works to “independently” confirm the accuracy of the predecessors’ records “upon receipt.” *Calloway*, 157 So. 3d at 1072. The use of the word “independently” signifies that the successor servicer reviews “independent” original documents and cross checks them with the documents in the boarding process. Those documents could be records such as invoices, cashed checks, mortgage statements, and the like. If entries cannot be “independently confirmed,” a servicer can show “evidence of a business relationship or contractual obligation between the parties that ensures a substantial incentive for accuracy.” *Id.* 1072. The Plaintiff did not have this evidence at trial. Indeed, the witness confirmed that the servicer did not conduct an independent verification of the predecessors’ records. (R3940; 3944-45) This means that records based upon the previous servicers could not be relied upon as substantial competent evidence.

This Court should also note, that the large gap in the

predecessors' records (See § G. below) stands as unrefutable evidence that the servicer did not have a competent system of loan boarding and independent verification.

C. Best Evidence and Summaries

Plaintiff's payment histories, judgment figures, and affidavit of debt (hereinafter "Records") are not the best evidence of taxes, insurance, corporate advances, and other expenses (hereinafter "Expenses"). (IB 30-33) Instead, they are summaries. *Id.* Plaintiff does not present any cognizable argument to contest the fact that the Records violate the best evidence rule for Expenses. (AB 15-17) Plaintiff's witness admitted that the payment history's entries for expenses are based upon a more original document: a bill or invoice. (R3932-33) Because the payment histories-and the judgment figures-are derivative of these more original documents, they violate the best evidence rule. (IB 30-33)

Plaintiff contests whether the Records are summaries of costs, relying upon *Cayea v. CitiMortgage, Inc.*, 138 So.3d 1214 (Fla. 4th DCA 2014). (AB 15-17). The *Cayea* Court appeared to rule that a payment history is not a summary when the witness "merely

printed out data kept by the lender in its payment posting system.” *Id.* at 1217. The Court conflated the concept of summaries with the concept of hearsay, by pointing out that payment histories traditionally are admissible as an exception to hearsay under the business records exception. *Id.* The Court does not explain how business records are an exception to the rule on summaries, or how the payment histories are not summaries under the plain language of Fla. Stat. § 90.956. Further, nothing in the *Cayea* opinion held that payment histories were not improper summaries of costs. The *Cayea* decision also did not address the best evidence rule.

The decision of *Green Tree Servicing, Inc. v. Simms*, 274 So. 3d 1187 (Fla. 5th DCA 2019) contains a better-reasoned approach for summaries. There the Court reasoned that collection notes were not summaries because they were “actual real-time entries.” *Id.* at 1191. In other words, the entries were made in real time, and not derivative of another source. Insofar as the Plaintiff’s Records chronicle payments, it is possible that the payment histories record of payments can fall within this concept. For example, it is possible

that electronic payments are contemporaneously recorded in the payment history.

There is an important distinction here: Defendant is not challenging the records under the summary or best evidence rules for issues of payments, dates of default, or the principal amount owed. Defendant challenges the Records, because the witness testified the entries on Expenses were derivative of best original evidence such as invoices and receipts. Applying the best evidence rule and summary rule, the Records were inadmissible to establish the Expenses because they were derivative. (IB 30-33) As such, the Plaintiff failed to present substantial competent evidence of the Expenses, and those items should be removed from the judgment.

D. LIBOR

Here, the bank's payment histories constitute hearsay evidence of the LIBOR rates for adjustable interest rate calculations. Plaintiff's counter argument appears to be that the LIBOR rates are admissible as a public record under Fla. Stat. § 90.803(8). That statute applies to records of government agencies. *See Yisrael v. State*, 993 So. 2d 952, 959, (Fla. 2008) (describing the

proof required to admit a public record) Nothing in the record below shows that the Plaintiff laid a foundation to admit LIBOR rates as a public record.

However, proof of the LIBOR rates is not overly burdensome: it can be done through judicial notice. *Korte v. US Bank Nat'l Ass'n*, 64 So. 3d 134, 138 (Fla. 4th DCA 2011). Under similar circumstances, the Court in *Gonzalez v. Onewest Bank, FSB*, 204 So. 3d 167, 168 (Fla. 4th DCA 2016) reversed where “[t]here was no testimony about the relevant LIBOR Index on any change date.” See also *Salauddin v. Bank of Am., N.A.*, 150 So. 3d 1189, 1190-91 (Fla. 4th DCA 2014) *Boyette v. BAC Home Loans Servicing, LP*, 164 So. 3d 9, 10 (Fla. 2d DCA 2015). Where a plaintiff fails to introduce original evidence of the LIBOR rates, “the interest rate may be calculated using the lowest rate if that was the only proof adduced at trial.” *U.S. Bank N.A. v. Engle*, 311 So. 3d 197, 202 (Fla. 2d DCA 2020). The note’s lowest interest rate is 6.4% (R3856), which yields \$1,297.34 in monthly interest, and \$221,845.14 total recoverable interest at the time of judgment.

E. Agency and Standing

Plaintiff failed to prove standing at the inception. The evidence showed that a law firm had possession of the note at inception, but the Plaintiff had no admissible competent evidence to prove that the law firm was an agent of Plaintiff, or even the agent of a servicer for the Plaintiff. (IB 34-39) Plaintiff counters, arguing that the law firm's possession of the note and the law firm's filing of the complaint was competent substantial evidence of Plaintiff's standing.

Plaintiff's is wrong. "The party alleging the agency relationship bears the burden to prove it." *Robbins v. Hess*, 659 So. 2d 424, 427, (Fla. 1995). This proof requires evidence that the principal has given authority to the agent. As such, when there is no proof of a "representation of authority by the principal, no apparent or implied agency arises." *Stalley v. Transitional Hosps. Corp. of Tampa, Inc.*, 44 So. 3d 627, 630 (Fla. 2d DCA 2010). The Plaintiff's argument that the acts of agent can be prove an agency relationship is not supported by Florida law: "[t]he acts of the agent, standing alone, are insufficient to establish that the agent is

authorized to act for the principal.” *Id.* “Moreover, the scope of the agent's authority is limited to what the principal has authorized the agent to do.” *Id.* Within this concept, for example, “[e]mployment of an attorney to represent a client does not confer on the attorney implied or apparent authority to compromise or settle the client's claims.” *Sharick v. Southeastern Univ. of the Health Servs., Inc.*, 891 So. 2d 562, 565, (Fla. 3d DCA 2004).

While it may be reasonable to assume that someone hired the law firm to hold the note and file the case, there was no admissible competent evidence that it was Plaintiff or one of Plaintiff's agents. Standing cannot be proven through speculation. (IB 39) The law firm did not receive the note from Plaintiff, it received it from the clerk of courts. (R3898-3901). The law firm's witness did not review any representation agreements to link the law firm with the servicer or with the Plaintiff. (R3909) The only document that the witness reviewed that could link the Plaintiff with the law firm was a referral letter, which was never in evidence. (R3909-10) Since this document is hearsay, Plaintiff had no competent evidence to support any agency relationship between the holder—the law

firm—and the Plaintiff.

Even the business records custodian admitted that the servicer, PHH, had no documents in its possession “that would show any sort of agency relationship between McCabe and PHH or McCabe and the plaintiff.” (R3993-94) Under this deficient proof, Plaintiff had no competent substantial evidence to prove an agency relationship with the note holder, and therefore failed to prove standing through the theory of constructive possession.

F. Modification

There was substantial evidence that the loan was modified. (IB 40-41). This included the witnesses’ admission that if the loan was modified “you would see documentation to that effect.” (R3962) There was documentation to that effect. The payment history says “W MODIFICATION” on an entry dated February 15,2010 (R4194), and the payment history showed a new principal amount of \$306,814.75 on March 11, 2010 (R4196). The borrower made a payment on March 22, 2010(R4202) consistent with performance under a loan modification. Under these facts, the case must be dismissed because Plaintiff did not allege and prove a breach of the

loan modification agreement. *McIntosh v. US Bank N.A.*, 352 So. 3d 1288 (Fla. 3d DCA 2023).

G. Gap in Records

The Plaintiff claims that the payment records are complete. (AB 15) The records and testimony show otherwise. (R3990 ln7-10); (R3929 ln7-16) *See also record citations and summary in* (IB 5-18).

H. The Statute of Repose

The trial court erred by awarding amounts that are barred by the statute of repose in Fla. Stat. § 95.281. (IB 43-47) That statute extinguishes mortgage lien rights “[f]or all obligations, including taxes, paid by the mortgagee, 5 years from the date of payment.” Fla. Stat. § 95.281(1)(c). Plaintiff asks this Court to make exceptions to the plain language of this statute based upon public policy. (IB 25). It argues that “[i]t makes little sense to allow a foreclosing mortgagee to reach back several more years to obtain all missed payments” as permitted by the Court’s interpretation of the foreclosure statute of limitations, Fla. Stat. § 95.11(2)(c), in *Bartram v. U.S. Bank Nat. Ass’n*, 211 So.3d 1009 (Fla. 2016), “while on the other, preventing the mortgagee from obtaining

reimbursement of actual hard costs it expended in the protection of the collateral.” (AB 25)

The Plaintiff’s argument fails. This Court cannot deviate from the statute’s plain language to import public policy considerations. *Thrivent Fin. for Lutherans v. Dep’t of Fin. Servs.*, 145 So. 3d 178, 182 (Fla. 1st DCA 2014). It also fails because it conflates the statute of repose with a statute of limitation. The statute of limitations in Fla. Stat. § 95.11(2)(c) “is a procedural statute that prevents the enforcement of a cause of action that has accrued.” *Houck Corp. v. New River, Ltd., Pasco*, 900 So. 2d 601, 603 (Fla. 2d DCA 2005). It “does not affect the life of the lien or extinguish the debt; it merely precludes an action to collect the debt after five years.” *Id.* In contrast, the statute of repose in Fla. Stat. § 95.281 “prescribes the enforceable life of a mortgage lien, but does not operate to preclude an action to foreclose the mortgage.” *Id.* “It provides a substantive right to be free from liability after the established time period.” *Id.*

Because the trial court permitted the Plaintiff to include amounts barred by the plain language of the statute of repose in

the foreclosure judgment, those amounts must be removed. The bank had \$40,267.92 in recoverable payments towards taxes and insurance (IB 43-47) Yet the trial court awarded \$104,806.26. (R3848) Because there is no public policy exception to Fla. Stat. § 95.281(1)(c), the foreclosure judgment must be reduced by \$64,538.34.

I. Attorney's Fees

Plaintiff admits that the evidence at trial was insufficient to award attorney's fees, but contests that the \$93,225.35 in the final judgment may not be all attorney's fees. (AB 26) The problem here is that Plaintiff can cite no record evidence as to what number in this amount represents attorney's fees, and what amount may be recoverable "other fees." Due to this deficient proof, Plaintiff asks the court to "remand the matter for an evidentiary hearing to determine the amount of attorney's fees and other fees." (AB 26)

Plaintiff is precluded from getting a second bite of the apple on remand. It is well-established that "[d]amages cannot be based upon speculation or guesswork, but must have some reasonable basis in fact." *Smith v. Austin Dev. Co.*, 538 So. 2d 128, 129 (Fla.

1989). “If the proof of any plaintiff’s damages is legally insufficient, damages cannot be awarded.” *Silver Unicorn v. Matheson*, 638 So. 2d 985, 986 (Fla. 5th DCA 1994). Where a plaintiff fails to prove its damages, it is not entitled to a new trial or a second bite of the apple to prove these amounts after an appellate reversal. *Van Der Noord v. Katz*, 481 So. 2d 1228, 1230, (Fla. 5th DCA 1985); *Levy v. Ben-Shmuel*, 255 So. 3d 493, 496 (Fla. 3d DCA 2018); *Morton’s of Chi., Inc. v. Lira*, 48 So. 3d 76, 80 (Fla. 1st DCA 2010); *Evans v. Delro Indus., Inc.*, 509 So. 2d 1262, 1264 (Fla. 1st DCA 1987); *Emerald Pointe Prop. Owners’ Ass’n v. Commercial Constr. Indus.*, 978 So. 2d 873, 879-880 (Fla. 4th DCA 2008).

CONCLUSION

The Plaintiff’s proof at trial was woefully deficient. This Court should reverse on issues of agency, standing, loan modification, and insufficient proof. This requires a remand for an involuntary dismissal without prejudice. Any reversal based upon insufficient evidence of damages or the statute of repose should result in a reversal that reduces the amounts in Plaintiff’s foreclosure judgment. The Plaintiff is not entitled to a second bite of the apple

to prove its damages. Because Defendant has redemption rights in this foreclosure, any reversal that removes items from the foreclosure judgment necessarily requires another foreclosure sale. As such, any reversal that reduces the foreclosure judgment amount requires that this Court vacate the foreclosure sale and certificate of title, so that Defendant has the right to redeem at the number actually proven by the Plaintiff.

CERTIFICATE OF COMPLIANCE WITH RULE 9.210

I HEREBY CERTIFY that the foregoing complies with the requirements of Florida Rule of Appellate Procedure 9.210 and 9.045. Specifically: this reply brief does not exceed 4,000 words, not including those items that would otherwise be excluded by Fla. R. App. P. 9.045(e); the font is 14-point Arial or Bookman Old Style; and the text is double-spaced.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was furnished via eservice to Michael W. Smith at mwsmith@burr.com and nwmosley@burr.com, on this 27th day of September, 2023.

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