

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SIXTH DISTRICT**

CASE NUMBER: 6D23-1482

LOWER TRIBUNAL CASE NUMBER: 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,**

Appellee

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF CITATIONS 4

PREFACE..... 5

STATEMENT OF FACTS 6

SUMMARY OF THE ARGUMENT 9

ARGUMENT 10

A. EVIDENTIARY RULINGS 10

 1. Deutsche Bank satisfied the business records exception to the hearsay rule by establishing that the subject loan became a part of the current servicer’s records through the boarding process..... 10

 A. A witness can obtain personal knowledge through training..... 10

 B. The previous servicer’s records were verified for accuracy..... 13

 2. Payment histories do not violate either the best evidence rule or § 90.956..... 15

 3. All relevant documents were admitted into evidence..... 17

B. No additional proof of agency is required to establish standing..... 19

C. The Loan was not modified..... 20

D. The judgment was supported by substantial evidence..... 23

E. § 95.281(1)(c) does not bar Appellee’s foreclosure action..... 23

F. Deutsche Bank confesses partial error regarding the attorney’s fees
award.....25

CONCLUSION26

CERTIFICATE OF COMPLIANCE27

CERTIFICATE OF SERVICE27

TABLE OF CITATIONS

Cases

<i>Bank of New York v. Calloway</i> , 157 So. 3d 1064, 1073 (Fla. 4th DCA 2015).....	10, 11, 14
<i>CitiMortgage, Inc. v. Hoskinson</i> , 200 So.3d 191, 192 (Fla. 5th DCA 2016).....	10
<i>Deutsche Bank Trust Company Americas v. Merced</i> , 238 So.3d 438 (Fla. 5th DCA 2018)	10
<i>Nationstar Mortgage v. Berdecia</i> , 169 So. 3d 209, 215 (Fla. 5th DCA 2015).....	12
<i>Azran Miami 2 LLC v. Deutsche Bank National Trust Company</i> , 282 So. 3d 924 (Fla. 3d DCA 2019).....	12
<i>Deutsche Bank National Trust Company v. Sheward</i> , 245 So.3d 890 (Fla. 2d DCA 2018)	12
<i>Wells Fargo Bank v. Eisenberg</i> , 220 So. 3d 517 (Fla. 4th DCA 2017)	13,14
<i>Cayea v. CitiMortgage, Inc.</i> , 138 So.3d 1214 (Fla. 4th DCA 2014).....	16
<i>Brooks Tropicals, Inc. v. Acosta</i> , 959 So. 2d 288, 295 (Fla. 3d DCA 2007).....	19
<i>Bank of America, N.A. v. Leonard</i> , 212 So.3d 417 (Fla. 1st DCA 2016)..	19
<i>MTGLQ Investors v. Silvia Leones</i> , 320 So.3d 769 (Fla. 4th DCA 2021).....	21
<i>Glob. Discoveries, LTD., LLC v. Keller</i> , 311 So. 3d 178, 180 (Fla. 2d DCA 2020)).....	24
<i>Bartram v. U.S. Bank Nat. Ass’n</i> , 211 So.3d 1009 (Fla. 2016)).....	24,25

PREFACE

Appellee Deutsche Bank National Trust Company, As Trustee For Ameritrust Mortgage Securities Inc., Asset-Backed Pass-Through Certificates Series 2005-R8, Plaintiff/Bank in the lower case, is referred to as “Deutsche Bank.” Appellant Charles Ruffenach, the Appellant/Owner in the lower case, is referred to as “Appellant.” Citations to the Record on Appeal are in the form of (R[page number]:[paragraph/line number]), or (R[page number]). Citations to Appellant’s Initial Brief are in the form (IB [page number]).

STATEMENT OF FACTS

On July 21, 2005, Raymond Lozano executed a promissory note and accompanying mortgage that secured the note to certain residential real property ("Property"). (R3854-3880). On August 1, 2020, Deutsche Bank filed a complaint for foreclosure alleging that Lozano had defaulted on the note by failing to pay the installment due on May 1, 2008. (R21-63). The complaint alleged that the property was owned by a third party, Ruffenach (who had previously obtained title to the Property by virtue of another lien foreclosure). Ruffenach is not a signatory to or obligor under the loan documents.

Lozano did not answer or otherwise make an appearance in the case and was subsequently defaulted. Ruffenach is the only defendant to contest the foreclosure.

The matter went to a non-jury trial on August 12, 2022. Two witnesses testified on behalf of Deutsche Bank: (1) Darian Henderson, the document custodian for McCabe, Weisberg and Conway, and (2) Louise Plasse, a loan analyst for Ocwen Financial Corporation.

Mr. Henderson testified regarding the process by which the original note was obtained from the clerk of court's office (where it had been filed with a previous foreclosure action), as well as the process by

which the certificate of possession was created and filed with the original complaint. (3902:1-8). Mr. Henderson testified that he personally received the original note form the court and that the original note had an endorsement on the back when it was received from the court. (R3903:17-19)

Ms. Plasse then testified regarding the creation and maintenance of records for the subject loan. She testified that PHH, a subsidiary of Ocwen Financial Corporation, was the loan servicer for the subject loan and kept records relating to the subject loan. (R3918:6-10). She testified that she was very familiar with the servicing platform used by PHH, called Black Knight. (R3918:15). She testified that she had received extensive training regarding how information was input into the system. (R3920:14-3921:6). She testified that PHH's business consists of maintaining loan records, and that information in PHH's loan records is contemporaneously input into the system by a person who has knowledge of the information being input. (R3921:8-14).

She further testified that when PHH receives loan records from other servicers that PHH follows a written process called the "boarding process" to verify the information before it is input into the servicing platform. She testified that she receives continuous training on these

procedures and that the loan in question went through this boarding process. (R3922:23-3927:9).

Through Ms. Plasse's testimony, the note, mortgage, payment history, and boarding process were admitted into evidence. At the conclusion of the trial, a final judgment of foreclosure was entered in favor of Appellee. (R3848-3853).

SUMMARY OF ARGUMENT

Deutsche Bank clearly had standing to foreclose. The document custodian for co-counsel gave clear, compelling testimony regarding the note. The witness for the current servicer testified regarding the loan records and the boarding process of the prior servicers' records. These prior records were properly integrated into the current servicer's records and provided competent, substantial evidence that the loan was in default and that Deutsche Bank was entitled to foreclose.

ARGUMENT

A. EVIDENTIARY RULINGS

1. Deutsche Bank satisfied the business records exception to the hearsay rule by establishing that the subject loan became a part of the current servicer's records through the boarding process.

A. A witness can obtain personal knowledge through training.

Deutsche Bank agrees with all of the case law cited by Appellant regarding the business records exception to the hearsay rule. (IB:25). For instance: *Bank of New York v. Calloway*, 157 So. 3d 1064, 1073 (Fla. 4th DCA 2015) ("It is well-settled that a record custodian who has been called to testify under oath need not be the actual person who prepared the document, but he or she must demonstrate knowledge of each requirement for establishing the business record foundation"); *CitiMortgage, Inc. v. Hoskinson*, 200 So.3d 191, 192 (Fla. 5th DCA 2016) ("Any qualified witness who has the necessary knowledge to testify as to how a document was made may lay the foundation to bring the document within the business records exception."); *Deutsche Bank Trust Company Americas v. Merced*, 238 So.3d 438, 441 (Fla.5th DCA

2018) (The witness’s “testimony demonstrated sufficient personal knowledge of PNC’s business relationship with Deutsche Bank and PNC’s record-keeping system to lay the foundation for Deutsche Bank’s business records.”). Each of these cases correctly states the law regarding personal knowledge as applied to the business records exception. Ms. Plasse’s testimony regarding the boarding process of PHH, the current servicer, was sufficient to meet the business records’ exception regarding prior business records.

However, Appellant then takes this argument to an extreme and argues that not only must a testifying witness have personal knowledge of the *current* servicer’s record keeping procedures, he or she must also have personal knowledge of all of the *previous* servicer’s record keeping procedures. (App. Brief 27). Appellant doesn’t cite any case law to support this proposition because there is none.

On the contrary, there are multiple decisions that hold that it is not necessary to call a record keeping custodian of a previous servicers, including those case cited by Appellant in his initial brief. The *Calloway* case cited by Appellant is the seminal case in establishing the procedure by prior servicer records can be admitted into evidence. In *Calloway*, the only witness who testified on behalf of

the plaintiff was a representative of the current servicer. However, because the witness “confirmed the trustworthiness of the relied-upon third-party business records” by testifying that the records were reviewed for accuracy before integrating the them into the current servicer’s records, the court held that this was sufficient to clear the Borrower’s lack of foundation and hearsay objections. *Id.* at 1074. Other courts have reached the same conclusion. See, e.g., *Nationstar Mortgage v. Berdecia*, 169 So. 3d 209, 215 (Fla. 5th DCA 2015)(“Where a business takes custody of another business's records and integrates them within its own records, the acquired records are treated as having been ‘made’ by the successor business, such that both records constitute the successor business's singular ‘business record.’); *Azran Miami 2 LLC v. Deutsche Bank National Trust Company*, 282 So. 3d 924 (Fla. 3d DCA 2019) (same); *Deutsche Bank National Trust Company v. Sheward*, 245 So.3d 890 (Fla. 2d DCA 2018)(same).

Appellant’s argument regarding Ms. Plasse’s training is also incorrect. Appellant argues that Ms. Plasse’s testimony regarding the boarding process was hearsay because it was “based upon things that she had read or been told by other people.” In other words, because

Ms. Plasse had been trained in the boarding process, this training somehow constitutes hearsay because she learned it from someone else. This argument is meritless and is not how hearsay works. Under Appellant's theory, only the person who created the boarding process would ever be able to testify about it because everyone else would have learned about it through training. This argument is without merit and should be disregarded.

B. The previous servicer's records were verified for accuracy.

Appellant's next argument is that the previous servicer's records were inadmissible because the current servicer did not independently verify them. The Fourth District rejected a similar argument in *Wells Fargo Bank v. Eisenberg*, 220 So. 3d 517 (Fla. 4th DCA 2017). In *Eisenberg*, a witness for a successor servicer testified 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.

In the instant litigation, Ms. Plasse testified that the loans were verified to ensure that the numbers matched and that “nothing’s out of balance.” (R3925:13). If an error is discovered or something doesn’t add up, then the loan is “red flagged for being out of balance.” (R3926:2). The servicer would then get additional information from the prior servicer and would not board the loan until it was satisfied the numbers were correct. (R3926:1-6). The instant loan went through the boarding process. (3926:23-25).

This process is very similar to the one approved by the courts in *Eisenberg* and *Calloway*. Appellants propose an impossible scenario, one in which a successor bank would be required to independently verify the accuracy of every single transaction on a prior servicer’s records—confirm that each and every previous borrower payment, insurance payment, property inspection, tax payment, etc. were all accurate. Appellant’s argument would result in a complete inability of any bank to ever prove the accuracy of any payment record received from any another servicer. No Florida court has imposed such a heavy burden and this court should also decline to do so as well.

Deutsche Bank’s servicer’s written boarding process was admitted into evidence at trial. (R3283-3301). This document is a multi-

page, comprehensive approach that systematically analyzes each loan for deficiencies or errors. There is no question that the witness testimony combined with the written procedures establishes that the current servicer integrated the prior servicer records such that all the prior servicer records became the records of the current servicer and meet the business records exception to the hearsay rule.

Appellant's secondary argument that the payment records are untrustworthy similarly lacks merit. (IB39). The payment history admitted into evidence is complete. (R4152-4255). Appellant mischaracterizes Ms. Plasse's testimony regarding "red-flags." At trial, Ms. Plasse said that if payment entries were missing, that would be a red-flag. (R3926:9-18). In follow-up, Appellant's counsel then incorrectly states that there are missing payment histories by referencing documents other than the complete payment history that was subsequently admitted into evidence. (R3929:7-13). However, Appellant's questions are not evidence. Moreover, they are contradicted by the record evidence admitted at trial.

2. Payment histories do not violate either the best evidence rule or § 90.956, Fla. Stat.

Appellant's next argument is that the use of payment histories violates the best evidence rule because the underlying proofs of payment (invoices, receipts, etc.) were not introduced into evidence. (IB32). Also, Appellant argues that the use of payment histories violates Fla. Stat. § 90.956. However, these arguments lack merit and have previously been addressed and rejected by other courts.

In *Cayea v. CitiMortgage, Inc.*, 138 So.3d 1214 (Fla. 4th DCA 2014), the lender, as is typical in foreclosure cases, introduced the loan payment history maintained in their business records. *Id.* at 1215. The borrower objected, arguing that the payment history was a "summary" and did not meet the business records exception. *Id.* at 1216. The Fourth District stated that "although [the borrowers] claim that the printout was a 'summary' within the meaning of section 90.956, we disagree. The totality of [plaintiff's witness's] testimony establishes that he did not review a voluminous amount of documents and create a synopsis of the documents especially for purposes of the trial, rather he merely printed out data kept by the lender in its payment posting system. Printouts 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 so long as a qualified witness

testifies as to the manner of preparation, reliability, and trustworthiness. Indeed, loan payment history printouts, if properly authenticated, are routinely admitted as a business record in foreclosure cases.” *Id.* (internal citations omitted).

In the instant case, Ms. Plasse was a qualified witness who testified as to the preparation, reliability, and trustworthiness of the payment history. Therefore, the payment history was properly admitted into evidence.

3. All relevant documents were admitted into evidence.

Appellant makes three arguments regarding documents that were allegedly referenced at trial yet not admitted into evidence. First, he argues that the agency relationship between the original counsel for Deutsche Bank and Deutsche Bank itself was established through a referral letter, which was not admitted into evidence. Second, the payment histories contain reference to the LIBOR rate, but the various LIBOR rates were not introduced into evidence. Third, the affidavit of debt was allegedly derived from unknown payment histories. Each of Appellant’s arguments lack merit.

First, as set forth in the section below in response to Appellant's next argument, there is no need for any extrinsic evidence to establish an agency relationship between counsel and Deutsche Bank.

Second, Appellant's demand that every change of LIBOR rate be referenced in the payment history is neither required by the evidence rules nor at all practical or necessary. The LIBOR rates are a matter of public record and fall within the hearsay exception located in § 90.803(8), Fla. Stat. They do not need to be referenced on every page of the payment history to be competent, substantial evidence of the amounts due and owing. Based on his arguments, Appellant (again, a third party stranger to the loan) apparently wants to require a bank to produce into evidence at a foreclosure trial every single paper that has ever been associated with a loan. If Appellant had an argument that the interest was not calculated correctly, then that might have merit. However, Appellant is arguing that producing such granular information is part of Deutsche Bank's burden of proof; it is not.

Third, as set forth above, the payment history is complete and is not based on "unknown" payment histories.

B. No additional proof of agency is required to establish standing.

Appellant next argues that McCabe, the law firm that filed the foreclosure action (R21-25), was the entity that possessed the note. Therefore, absent some explicit evidence of an agency relationship, Appellant argues that McCabe had standing to foreclose, not Deutsche Bank. Appellant's argument is creative, but is without merit.

The cases cited by Appellants all deal with agency relationships between servicers and banks, not between attorneys and their clients. By rule, an attorney "may appear for a party in an action or proceeding" by "signing the first pleading or other document filed on behalf of a party." FL St Gen Prac and J Admin Rule 2.505. No additional proof of agency relationship is required. Once an attorney files the first pleading, that attorney is the agent for the party. See *Brooks Tropicals, Inc. v. Acosta*, 959 So. 2d 288, 295 (Fla. 3d DCA 2007) ("[p]rofessionals, such as lawyers and accountants are always agents of their clients.").

Additionally, an attorney is a proper party to certify possession of the original promissory note in a foreclosure action. See *Bank of America, N.A. v. Leonard*, 212 So.3d 417 (Fla. 1st DCA 2016) ("The

certification that appellant was in possession of the original promissory note was not rendered defective because it was filed by appellant's attorney. While section 702.015(4) requires the plaintiff to file a certification that the plaintiff is in possession of the original promissory note, it does not preclude the plaintiff's attorney from being the 'individual giving the certification' or 'the person who personally verified such possession.'"). Based on these two principals, it is clear that (1) McCabe's possession of the properly-endorsed original note (R65) and (2) McCabe's subsequent filing of the foreclosure complaint as an agent of Appellee (R21-25), constitute competent substantial evidence of Appellee's standing to foreclose.

C. The Loan was not modified.

Appellant next argues that the Loan was modified and, therefore, Deutsche Bank can only foreclose by alleging and proving a breach of the alleged modification agreement. (IB39). Deutsche Bank agrees with Appellant's statement of law. However, Appellant misunderstands his own burden of proof when it comes to loan modification and, therefore, his argument fails. Because Appellant is the party alleging the existence of a loan modification, he is required to prove its existence, not Deutsche Bank. This statement of law is found in

MTGLQ Investors v. Silvia Leones, 320 So.3d 769 (Fla. 4th DCA 2021). In *Leones*, the bank argued that while it appeared that a loan mod had been proposed, no enforceable modification had ever been entered into by the parties. *Id.* at 770-771. The court held that “the loan modification was an affirmative defense to be pled and proven by the Borrowers, not the Bank.” *Id.* at 772. “[B]ecause the Bank did not base its claim or evidence on the loan modification, but rather on the original note and mortgage, the Bank was not required to plead the loan modification. Rather, as the Borrowers raised the loan modification as an affirmative defense, the burden of pleading the loan modification fell to them.” *Id.* at 774.

An examination of the initial complaint (R21-25) shows that Deutsche Bank did not allege that the loan was ever modified. Therefore, Appellant, the party raising the issue of modification, was required to plead and prove the modification’s existence. Appellant failed to do so.

First, no modification was ever entered into evidence. At trial, counsel for Deutsche Bank tried to admit a copy of an unsigned loan modification agreement into evidence to show that it wasn’t executed

by both parties, but Appellant objected. (R3960:1). The document was ultimately excluded from evidence. (R3962:16).

However, in his initial brief, Appellee (perhaps realizing too late that he has the burden of proof on this issue) tries to use Ms. Plasse's identification of this document as evidence of the existence of the loan modification—the very same document to which he objected and which he had excluded from evidence. (IB40). He can't have it both ways. The unsigned document was not admitted into evidence and can't be used as support for his argument regarding the alleged existence of the loan modification.

Second, Ms. Plasse testified extensively that there was no evidence that the loan was modified. There was no change in principal balance (R3962:13-14), no change in interest rate (R3962:15-16), and no large lump sum payment to indicate that a loan modification down payment was made. (R3962:17-19).

In support of his argument, Appellant offers his own interpretation of what the payment records say. (IB40-41). However, Appellant laid no foundation to show he is competent to testify as to what the payment records mean or don't mean. Appellant did not offer up any testimony regarding the existence of the loan modification and did not

call any witnesses (such as the borrower), who could have substantiated whether or not a loan modification existed. Appellant's argument that there is "uncontroverted evidence that the loan was modified" is simply not true. (IB41). On the contrary, the evidence tends to show that prior servicers may have discussed a loan modification with the borrower, but that the loan was never actually modified.

D. The judgment was supported by substantial evidence.

Appellee's next argument is that because the payment records were not admissible as argued in Section A, the judgment is not supported by competent, substantial evidence. However, as set forth above in Appellant's response to Section A, the payment records were admissible and, therefore, the judgment is supported by competent, substantial evidence.

E. § 95.281(1)(c) does not bar Appellee's foreclosure action.

Appellant's next argument has no reported case law and appears to be an issue of first impression. Appellant argues that § 95.281(1)(c), Fla. Stat. bars the collection of any obligation paid by the mortgagee more than five years prior. It is settled that § 95.11(2)(c), Fla. Stat., is a statute of limitations, while § 95.281, Fla. Stat., is a statute of repose

for mortgage foreclosures. See, e.g. *Glob. Discoveries, LTD., LLC v. Keller*, 311 So. 3d 178, 180 (Fla. 2d DCA 2020)(“the timeliness of an action to foreclose a mortgage is controlled by section 95.11(2)(c), a statute of limitations, and the duration of the lien created by such mortgage is governed by section 95.281, a statute of repose.”)

§ 95.11(2)(c) serves as a statute of limitations and provides that an action to foreclose a mortgage must be commenced within five years from when the right accrues. Recent case law, including *Bartram v. U.S. Bank Nat. Ass’n*, 211 So.3d 1009 (Fla. 2016) and its progeny, have confirmed that each missed payment is a separate and distinct default. Therefore, if a bank files a foreclosure action and alleges at least one default within the five year statute of limitations, the bank can seek acceleration of all sums due under the note, even those falling outside of the statute of limitations. *Id.* at 1021.

Statutes of repose are different from statutes of limitations in that they establish “an ultimate date when the lien of the mortgage terminates and is no longer enforceable.” *Keller* at 181. § 95.281(1)(c), Fla. Stat. states that:

(1) The lien of a mortgage or other instrument encumbering real property...shall terminate after the expiration of the following periods of time:

(c) For all obligations, including taxes, paid by the mortgagee, 5 years from the date of payment.

Id. Appellant argues that, based on this language, any amount paid by Appellee more than five years before the date of filing the foreclosure complaint is barred. However, this argument ignores the above-cited evolution of Florida foreclosure jurisprudence.

It makes little sense to, on the one hand, allow a foreclosing mortgagee to reach back several more years to obtain all missed payments (even those that fall outside the statute of limitations), while on the other, preventing the mortgagee from obtaining reimbursement of actual hard costs it expended in the protection of the collateral. § 95.281(1)(c) should be read in conjunction with *Bartram* and provide that as long as the underlying breach that necessitated the need to protect the collateral falls within the applicable statute of limitation and statute of repose, the entire amount due can be collected.

F. Deutsche Bank confesses partial error regarding the attorney's fees award.

Appellant agrees that the award of attorney's fees must be accompanied by time records as well as expert testimony regarding reasonableness; these were absent from the instant litigation. However, Appellee's assertion that the \$94,225.35 line item consists entirely of attorney's fees is incorrect. Ms. Plasse testified that the recoverable balance includes "all the fees associated with the foreclosure and attorney's fees." (R3965:13-14). So while the balance does include attorney's fees, it also includes other unspecified non-attorney's fees, which would be recoverable without expert testimony. The court should remand the matter for an evidentiary hearing to determine the amount of attorney's fees and other fees.

CONCLUSION

Deutsche Bank provided substantial competent evidence to uphold the trial court's final judgment of foreclosure, other than the inclusion of attorney's fees. The court should affirm the judgment in all other respects and remand the matter back to the trial court for an evidentiary hearing on attorney's fees.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the requirements of Rules 9.210 and 9.045 of the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was served by electronic mail on this 14th day of August 2023 to the following parties:

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