In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, et al.

Appellees.

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

INITIAL BRIEF OF APPELLANT

Counsel for Appellant
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Statutes

TABLE OF AUTHORITIES
(continued)

Rules

Other Authorities

STATEMENT OF THE CASE AND FACTS

I. The Pleadings

This is an appeal from a foreclosure action originally brought by Countrywide Home Loans Servicing LP ("Countrywide"), claiming to be a "servicer" and a "designated holder" of a note and mortgage with authority from some unidentified person or entity to bring this action.[1] The defendant and appellant, [redacted] ("the Homeowner"), was the maker of the referenced Note which was originally payable to American Brokers Conduit.[2] The version of the Note attached to the Complaint was endorsed in blank.[3]

Nearly a year after filing its Complaint, Countrywide moved to substitute another party as the plaintiff: Federal National Mortgage Association ("Fannie Mae").[4] The motion was granted *ex parte*.[5] Although the order declared that the case style "shall be amended to reflect the same," the order itself bore a case style that identified a completely different plaintiff: BAC Home Loans Servicing.[6]

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[1] Complaint, April 8, 2009 (R. 9), ¶ 3 (R. 10).

[2] InterestFirst Note, dated May 10, 2006 (R. 37).

[3] InterestFirst Note, dated May 10, 2006, p. 3 (R. 39).

[4] Ex Parte Motion for Substitution of Party Plaintiff, filed March 24, 2010 (R. 138).

[5] Order Substituting Party Plaintiff, April 7, 2010 (R. 145).

[6] *Id.*

The Homeowner moved to vacate the *ex parte* order and also moved for a more definite statement of the Complaint.[7] The court neither vacated the order nor ruled on the motion for more definite statement, but did direct the Homeowner to file an answer.[8] The Homeowner complied with the court's order and filed an answer and affirmative defenses along with a motion to dismiss.[9]

The motion to dismiss pointed out that the Complaint now identified Fannie Mae as the Plaintiff, but that the assignment of mortgage attached to the Complaint made Countrywide the mortgagee.[10] It also pointed out that Fla. R. Civ. P. 1.210(a) required joinder of the servicer's principal.[11] The answer denied, among other things, Plaintiff's claim that "[a]ll conditions precedent to the filing of this action ha[ve] been performed or has occurred."[12] The denial specifically identified the Plaintiff's failure to comply with paragraph 22 of the Mortgage and

[7] Defendant, [redacted] [redacted] Motion to Vacate Order On Ex Parte Motion to Substitute Party Plaintiff, and in the Alternative More Definite Statement of the Complaint, July 19, 2011 (R. 208).

[8] Order on Status, December 19, 2013 (R. 389).

[9] Defendant, [redacted] [redacted] Motion to Dismiss, Answer and Affirmative Defenses, December 20, 2013 (R. 390).

[10] *Id*. at 2 (R. 391).

[11] *Id*. at 4 (R. 393).

[12] *Id*. at 10, ¶6 (R. 399).

incorporated further specifics that were alleged in an affirmative defense.[13] The affirmative defense alleged that the Homeowner never received the notice of default required by paragraph 22 and that, as a consequence, the Homeowner was challenging whether it had ever been sent.[14]

Meanwhile, a new attorney appeared in the case as counsel for Bank of America, N.A. Although Bank of America was a stranger to the litigation, the new attorney referred to her client as the "Plaintiff."[15] Notably, Bank of America, N.A. was never mentioned in the chain of ownership alleged in Countrywide's Motion for Substitution of Party Plaintiff.[16] Yet, Bank of America, N.A. filed a witness list and an exhibit list claiming to be the Plaintiff.[17]

No one moved to substitute Bank of America, N.A. for the actual Plaintiff, Fannie Mae. Nor did anyone file a motion to substitute counsel for the Plaintiff and the law firm that had filed the Complaint, Law Offices of Marshall C. Watson,

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[13] *Id*.

[14] *Id*. at 13-14 (R. 402-403).

[15] Notice of Appearance as Counsel, August 28, 2013 (R. 335).

[16] Ex Parte Motion for Substitution of Party Plaintiff, filed March 24, 2010 (R. 138).

[17] Plaintiff, Bank of America, N.A.'s, Exhibit List, August 28, 2013 (R. 326); Plaintiff, Bank of America, N.A.'s Witness List, August 28, 2013 (R. 331).

P.A., remained on the service list, albeit in its later incarnation as Choice Legal Group, P.A.[18]

II. The Trial

A. The absentee plaintiff

On the day of trial, an attorney for Bank of America, N.A. appeared and identified herself as counsel for "plaintiff," even though the court referred to the case as "Countrywide v. [redacted][19]—as did all four trial orders in the case.[20] No attorney made an appearance on behalf of the original Plaintiff, Countrywide, or the actual Plaintiff, Fannie Mae.

The only witness to testify in the case, Mary Davids, testified that she was an employee of Bank of America and that Bank of America was the current servicer of the loan.[21] She testified that Bank of America had come into possession of the note and mortgage in 2006—three years before Countrywide filed this case

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[18] Foreclosure Uniform Order Setting Cause for Non-Jury Trial, and Trial Instructions, March 3, 2014, p. 3 (R. 442)

[19] Transcript of Proceedings before Judge Jacqueline Hogan Scola, April 14, 2013 (Supp. R. 1) (referred to in this brief as "T. __"), pp. 1-4.

[20] Foreclosure Uniform Order Setting Cause for Non-Jury Trial, and Trial Instructions, December 3, 2012 (R. 252); Foreclosure Uniform Order Setting Cause for Non-Jury Trial, and Trial Instructions, July 8, 2013 (R. 280); Foreclosure Uniform Order Setting Cause for Non-Jury Trial, and Trial Instructions, October 30, 2013 (R. 353); Foreclosure Uniform Order Setting Cause for Non-Jury Trial, and Trial Instructions, March 3, 2014 (R. 440).

[21] T. 15; *see also*, T. 79.

claiming to be the "designated holder."[22] Bank of America's counsel freely admitted that her client was not the Plaintiff, but represented that the Plaintiff was Countrywide.[23] While Bank of America's lawyer proffered some documentation intended to establish a link between Countrywide and Bank of America, N.A., she later formally and expressly abandoned the attempt to introduce them as exhibits.[24]

The actual Plaintiff, Fannie Mae, was never mentioned throughout the entire trial—even though it had been the Plaintiff for over three years. And even though Bank of America was merely a servicer,[25] the servicer's principal—the unspecified entity that allegedly authorized Countrywide (and later Fannie Mae) to pursue this action—was never identified. The Plaintiff never produced or proffered any authorization, power of attorney, or ratification of this action by its principal nor was any such document or testimony admitted into evidence.

The court ultimately entered judgment in favor of the non-party, Bank of America, N.A., despite being told by the attorney representing that entity that the Plaintiff was Countrywide.[26]

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[22] T. 14, 15, 61.

[23] T. 79.

[24] T. 69.

[25] T. 15; *see also*, T. 79.

[26] Final Judgment of Foreclosure, April 14, 2014 (R. 513).

B. The servicer's document reader

The servicer called a single witness to prove all the elements of Fannie Mae's case. That witness, Mary Davids, was an employee of Bank of America, N.A. with the job title of Mortgage Resolution Association Assistant Vice President. A regular "part" of her job was appearing in court on behalf of the bank and she could be in court as much as five days a week.[27] To fulfill that role, she was trained "how to access and understand [Bank of America's] systems" and "how to interpret the data that's entered into [Bank of America's] system."[28]

She had worked for Bank of America only a year and a half[29]—which was the entirety of her experience in the banking industry. Prior to that she had worked for law firms such as Elizabeth Wellborn Law Group and the Plaintiff's firm here, Marshall Watson (ironically, during the very time when that firm was asserting that the proper Plaintiff was Fannie Mae).[30]

[27] T. 55.

[28] T. 33, 57-58.

[29] T. 6,

[30] T. 9, 58.

Countrywide's Notice of Acceleration (Exhibit 3)

Davids had never worked for the prior servicer, Countrywide,[31] which had created the Notice of Intent to Accelerate (Exhibit 3).[32] When questioned about Bank of America's policies and procedures manual for mailing such notices, she at first testified that it was "a living breathing document. It changes, adds, subtracts."[33] Yet, despite never having been employed by Bank of America until four years after Countrywide allegedly sent the notice—and despite never having worked for Countrywide at any time—she claimed to know that the policies and procedures had not changed "in the regard of how we send documents and notate our system regarding servicing notes and information relevant to the loan."[34] And even though she was confident that Bank of America had not varied from, or improved on, Countrywide's procedures, Davids admitted that she did not even know the name of the department at Countrywide which would have generated the acceleration notice.[35]

[31] *See*, T. 29, 34 Exhibit 3 (Notice of Intent to Accelerate) on Countrywide letterhead (R. 492).

[32] Notice of Intent to Accelerate (R. 492).

[33] T. 28.

[34] T. 29.

[35] T. 30.

From this the court drew the conclusion that Bank of America had made no changes to Countrywide's policies and procedures for mailing notices after it merged with that failed institution:

> THE COURT: I like that she also said that she reviewed the policies and procedures manual and the procedures haven't changed since 2008. I'll overrule the objection. It will be admitted into evidence as – [Exhibit 3][36]

Countrywide and Bank of America payment history (Exhibit 4)

As with the Notice of Intent to Accelerate, many of the entries in the payment history were made by Countrywide—a company for which Davids had never worked.[37] Indeed, she had never even worked for the departments at Bank of America that had made entries in the document.[38] She did not know any of the Countrywide or Bank of America employees who did enter such data.[39] Although she can enter her own notes into the system when she is reviewing data, she cannot enter payment data.[40] She did nothing to verify the numbers in the payment

[36] T. 32.

[37] T. 34-37.

[38] T. 34.

[39] T. 37.

[40] T. 36.

history.[41] Davids does not personally test the accuracy of the systems and does not supervise anything.[42]

At trial, Bank of America provided no evidence of the date that it took over servicing from Countrywide. The testimony of its own witness[43] (as well as the Complaint and Exhibit 3) did evidence the fact that Countrywide was a prior servicer, even though Bank of America's counsel represented otherwise during closing argument:

> In fact, [the witness has] brought forward documents showing that Bank of America has a payment history for this particular loan, Your Honor. The payment history goes back to 2006 that Bank of America has been servicing the loan. That's the testimony before the Court. There's been nothing to show otherwise in this matter.[44]

But the Plaintiff's Complaint alleges that Countrywide was the servicer in April of 2009 (around the same time that it claimed to have merged with BAC Home Loan Servicing according to its Motion to Substitution of Party Plaintiff). At a minimum, therefore, the entries between August of 2006 and April of 2009—i.e. 49 of the 64 entries (or 77 percent)—were those of Countrywide.

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[41] T. 41.

[42] T. 36.

[43] T. 29, 30, 34, 37.

[44] T. 79-80.

There was no testimony, however, of how the Countrywide information was transferred or "boarded" into Bank of America's systems or whether there was any verification of the accuracy of Countrywide's data during that process.

Damage evidence

When Davids began attesting to the specific amounts of Plaintiff's damages, she testified from a proposed judgment and an "account information statement," neither of which were in evidence.[45] She testified that she did not print the account information statement—it was printed by counsel in preparation for the trial.[46] The information on the document purportedly came from the bank's computer system, which, of course, was not in evidence.[47] The account information statement was never admitted as an exhibit.

As for the proposed judgment, Davids at first testified that she had reviewed the figures and they were "in accordance with the payment history [Exhibit 4] of the bank."[48] She later admitted that the figure for the unpaid interest is not contained in the payment history.[49] Instead, she claimed that the figure was

[45] T. 48-49, 52.

[46] T. 49-50.

[47] T. 50-51.

[48] T. 51.

[49] T. 64-65.

calculated by the computer system, but no printout or other document in evidence demonstrated that.[50] She did not verify the number in the proposed judgment by calculating the interest herself.[51] The Homeowner's objection to Davids reading these unsupported numbers from the proposed judgment was overruled.[52]

Additionally, the court prohibited cross-examination about insurance payments being charged to the Homeowner on the grounds that no affirmative defense had been raised that would allow the Homeowner to deny the accuracy of the damages claimed by the Plaintiff. The court sustained the objection even though it agreed with the Homeowner that no affirmative defense is necessary to question the damage total to which the Bank of America witness testified.[53]

* * *

At the close of the Plaintiff's case, the Homeowner moved for involuntary dismissal and renewed his evidentiary objections, pointing out again that Davids was not qualified to introduce the exhibits into evidence or to testify about

[50] T. 64-65.

[51] T. 65.

[52] T. 52-53.

[53] T. 39-40.

Countrywide's recordkeeping practices.[54] The court denied the motion and the defense rested.[55]

During closing argument, the court initially expressed concern about the absence of any proof regarding the relationship between the Plaintiff and the servicer—the only entity that had appeared in court that day:

> THE COURT: Okay. Tell me about this standing argument. What's the relationship between Bank of America and the plaintiff in this case?
>
> MR. ACKLEY [Homeowner's counsel]: The witness has testified, Your Honor, that -- she specifically testified that when it was Countrywide, her understanding, based on her training, is that when it was Countrywide the documents were kept in a certain manner, and that payments were posted in a certain manner, and that now -- she specifically testified that now that the banks have merged that the --
>
> THE COURT: What evidence do I have of a merger? I mean, from sitting on these cases, I have knowledge of all that stuff, but I can't prove it.
>
> MS. ISLES [Bank of America's lawyer]: Your Honor, the plaintiff is Countrywide.
>
> THE COURT: That's right, but the witness is representing Bank of America.
>
> MS. ISLES: The witness can testify that Bank of America is -- she specifically said they're the servicer.

[54] T. 69-72.

[55] T. 75.

> THE COURT: I know. But you don't have anything that shows that she's the servicer, or her company is the servicer, and that she has a power of attorney or they have a power of attorney.
>
> MS. ISLES: I can reopen and have the witness testify.
>
> THE COURT: She testified today. Yeah.
>
> MS. ISLES: She clearly testified that Bank of America services the loan, and there's been nothing otherwise to show that Bank of America does not service the loan. …[56]

The Bank of America attorney went on to represent that the evidence showed that Bank of America had been servicing the loan since its inception, at which point the judge declared that she was finding for the "plaintiff" and executed a judgment in favor of Bank of America, N.A.[57]

This appeal ensued.

[56] T. 79.

[57] T. 79-80; Final Judgment of Foreclosure (R. 513).

SUMMARY OF THE ARGUMENT

The trial court committed fundamental error by granting judgment to a non-party, Bank of America.

Moreover, the trial court erred in failing to grant the Homeowner's motion for involuntary dismissal because Bank of America had no standing even if it had been the Plaintiff. Bank of America, as the servicer, was an agent of an unidentified principal. As such it was required to show that its principal had authorized the foreclosure action. No authorization, ratification, power of attorney or any other document or testimony was offered to prove such authority.

Bank of America had no standing in its own right as the holder of the Note because: 1) the undisclosed principal was the Article 3 holder of the Note; 2) Bank of America was also required to prove that Countrywide was the holder of the Note when it filed suit (and instead proved the opposite); and 3) the evidence of possession of the Note was inadmissible and contradicted its own pleading.

Lastly, there was no admissible evidence proving two key elements of the Plaintiff's *prima facie* case: 1) the mailing of a default letter; and 2) the specific contractual damages actually incurred. The evidence was inadmissible because the only witness at trial was not qualified to authenticate documents from a prior servicer or lay the foundation for a business record hearsay exception.

STANDARD OF REVIEW

"Whether a party is the proper party with standing to bring an action is a question of law to be reviewed de novo." *LaFrance v. U.S. Bank Nat. Ass'n*, 141 So. 3d 754, 755 (Fla. 4th DCA 2014); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 39 Fla. L. Weekly D2156 (Fla. 1st DCA Oct. 14, 2014) ("We review the sufficiency of the evidence to prove standing to bring a foreclosure action *de novo*.").

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); *see also, Blazina v. Crane*, 670 So. 2d 981, 983 (Fla. 2d DCA 1996) (reversing where there was no record support for the trial court's findings of fact).

ARGUMENT

I. The court granted judgment to a non-party which, in any event, had no standing.

A. Bank of America was never a plaintiff.

This case was filed by Countrywide Home Loans Servicing, L.P.[58] Three years before trial, the court substituted Fannie Mae as the plaintiff by way of an *ex parte* order (which oddly declared that the former plaintiff had been BAC Home Loans Servicing, LP). Notably, the motion asking that Fannie Mae be substituted as the Plaintiff does not even mention Bank of America as one of the entities in the chain of those entitled to pursue the action.[59]

Bank of America was never substituted as a party-plaintiff and there was never a substitution of counsel for Plaintiff. Bank of America simply appeared with its own counsel, professed itself to be Plaintiff, and filed an Exhibit List and a Witness List.[60] The attorney representing Bank of America openly acknowledged that her client was not the Plaintiff.[61] She represented, however, that Countrywide

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[58] Complaint (R. 9).

[59] Ex Parte Motion for Substitution of Party Plaintiff, filed March 24, 2010 (R. 138).

[60] Notice of Appearance as Counsel, August 28, 2013 (R. 335); Plaintiff, Bank of America, N.A.'s, Exhibit List, August 28, 2013 (R. 326); Plaintiff, Bank of America, N.A.'s Witness List, August 28, 2013 (R. 331).

[61] T. 79.

was still the Plaintiff. No attorney representing Countrywide—and no attorney representing the real Plaintiff, Fannie Mae—attended the trial.

Yet, judgment was still granted in favor of Bank of America. The court, therefore, 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.").

B. Bank of America had no standing because it was a servicer with no evidence of authorization to bring the action.

Even if Bank of America had been substituted as the Plaintiff, it was undisputed that it was merely a servicer bringing the action on behalf of its principal. As such, it was required to prove that it was authorized to pursue the action—and that its predecessor, Countrywide, had been authorized to file the action.

In *Elston/Leetsdale, LLC v. CWCapital Asset Mgmt. LLC*, 87 So. 3d 14, 17 (Fla. 4th DCA 2012), the Fourth District held that a servicer may be considered a party in interest to commence legal action as long as the servicer's principal joins or ratifies its action. Here, the servicers, Countrywide and Bank of America neither joined the principal nor submitted any evidence that it ratified the action.

In fact, the principal was never even identified at trial, although the motion to substitute the Plaintiff suggests that the owner—and, as will be explained later, the holder—of the Note was Fannie Mae. Accordingly, Bank of America was not a real party in interest at the time of judgment and Countrywide was not a real party in interest at the time the case was filed.

The analysis in *Elston/Leetsdale*, and this case, begins with Fla. R. Civ. P. 1.210(a) which states that "[e]very action may be prosecuted in the name of the real party in interest…" Under this rule, a real party in interest may sue in its own name. And because the rule is "permissive," a nominal party, such as an agent, may bring suit in its own name for the benefit of the real party in interest. *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1185 (Fla. 3d DCA 1985).

Here, Countrywide brought the case in its own name for the benefit of an unidentified real party in interest—possibly, Fannie Mae. Bank of America sought to continue to prosecute that action on behalf of this undisclosed principal (albeit without a formal substitution). But the ability of an agent to prosecute an action in its own name is not without conditions. One such condition is that the real party in interest must still be joined as a party unless the relationship between that party and the nominal plaintiff fits in to one of six categories:

> Every action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee

> of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought.

Fla. R. Civ. P. 1.210(a) (emphasis added).

The servicers' agency relationship with their principal—the real party in interest—is not one of these six enumerated categories. Neither servicer was: 1) a personal representative; 2) an administrator; 3) a guardian; 4) a trustee of an express trust; 5) a party to a third party beneficiary contract; or 6) someone expressly authorized by statute to sue on the principal's behalf. That the rule expressly lists the types of representatives that may sue in their own name without joining the real party in interest implies the exclusion of other agency relationships. *See Biddle v. State Beverage Dept.*, 187 So. 2d 65, 67 (Fla. 4th DCA 1966) (applying '[e]xpressio unius est exclusio alterius'—the mention of one thing implies the exclusion of another). Accordingly, under the plain language of Rule 1.210(a), the servicers were required to join their phantom principal.

This comports with, and provides the basis for, the court's holding in *Elston/Leetsdale* that required joinder of the principal as one of two options for complying with the real party in interest rule. The other option, ratification by the principal, is a judicial gloss upon Rule 1.210(a)—which does not expressly mention ratification. The gloss arises from decisions such as *Kumar Corp. v.*

Nopal Lines, Ltd., 462 So. 2d at 1185 (affidavits unequivocally show that principal ratified and endorsed agent's action in bringing suit on principal's behalf) and *Juega ex rel. Estate of Davidson v. Davidson*, 8 So. 3d 488, 490 (Fla. 3d DCA 2009) (standing established by affidavit indistinguishable from the affidavit of the principal in *Kumar*). These cases may be harmonized with Rule 1.210(a) by treating the authorization affidavit (or other ratification) as an assignment, which would transform the servicer into a real party in interest in its own right. *See E. Investments, LLC v. Cyberfile, Inc.*, 947 So. 2d 630, 632 (Fla. 3d DCA 2007) (citing to *Kumar* for the conclusion that the plaintiff's lack of standing could be remedied by an assignment from the signatory of the contract).

C. Bank of America had no standing because there was no evidence that it was the holder of the Note.

Bank of America had no standing as the holder of the Note for three reasons: 1) the undisclosed principal was the Article 3 holder of the Note; 2) Bank of America would have to prove that Countrywide was the holder of the Note when it filed suit; and 3) the evidence of possession of the Note was inadmissible.

The undisclosed principal was the Article 3 holder of the Note.

Under Article 3 of the Uniform Commercial Code ("UCC") a servicer which is acting solely as an agent is not a "holder" of the Note. This is because, when an

agent is in the possession of an instrument on behalf of its principal, the UCC considers the principal to be the holder. The Comment to § 3-201 of the UCC explicitly acknowledges that possession may be effected constructively through an agent. § 673.2011, Fla. Stat. Ann. ("Negotiation always requires a change in possession of the instrument because nobody can be a holder without possessing the instrument, either directly or through an agent.) (emphasis added). *See also, Bankers Trust (Delaware) v. 236 Beltway Inv.*, 865 F. Supp. 1186, 1195 (E.D. Va. 1994) (the UCC "sensibly recognizes that a party has constructive possession of a negotiable instrument when it is held by the party's agent…or when the party otherwise can obtain the instrument on demand" [internal citations omitted]); *In re Phillips*, 491 B.R. 255, 263 (Bankr. D. Nev. 2013) ("Thus, a person is a "holder" of a negotiable instrument when it is in the physical possession of his or her agent.")[62]

In fact, the use of an agent to possess the instrument on behalf of the holder is such a common banking practice that it was officially authorized by the 1998 amendments to Article 9 of the UCC[63] (which brought mortgage loans within its

[62] *Quoting*, Lary Lawrence, *Lawrence's Anderson on the Uniform Commercial Code § 1–201:265* (3d ed. 2012).

[63] These changes were enacted in Florida in 2001, effective 2002, §§ 679.1011-.709, Fla. Stat.; s*ee* § 679.3131(3), Fla. Stat. regarding requirements for use of an agent to possess the collateral.

purview for the specific purpose of facilitating securitization[64]). The drafters' Comment 3 to § 9-313 explicitly equated possession by an agent with actual possession by the principal. § 679.3131, Fla. Stat. Ann. ("if the collateral is in possession of an agent of the secured party for the purposes of possessing on behalf of the secured party, and if the agent is not also an agent of the debtor, the secured party has taken actual possession").

This explains why mailmen and attorneys can "possess" or "hold" the instrument without becoming Article 3 holders—the true holder remains in constructive possession of the note. Here, if anyone is an Article 3 holder, it is the phantom principal, not the servicers, because it is the principal which has always been in possession of the Note through its agents, Countrywide and Bank of America.

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[64] Dale Whitman, *Transfers of Mortgage Notes under New Article 9*, *available at:* http://dirt.umkc.edu/files/newart9i.htm. (apparent purpose of change was to insulate issuers of mortgage-backed securities from attacks by bankruptcy trustees "without the bother of taking physical possession of the notes in question, a process that they often consider irksome"); Steven Schwarcz, *The Impact of Securitization of Revised UCC Article 9*, 74 Chicago-Kent L. Rev. 947 (1999); H. Bruce Bernstein, *Commercial Finance Association: Summary of the Uniform Commercial Code Revised Article 9*, *available at:* https://www.cfa.com/eweb/DynamicPage.aspx?Site=cfa&WebKey=9d83ef78-8268-4aae-95e1-7f4085764e46 (revised Article 9 facilitated mortgage-backed securitization); David Peterson, *Cracking the Mortgage Assignment Shell Game*, 85 Fla. Bar J. 11, 12 (November 2011) (revisions to Article 9 addressed the needs of banks in the securitization chain by treating mortgages as personal property that could be transferred without regard to the real estate records).

Additionally, one can only become an Article 3 holder by way of a "negotiation"—which involves a transfer of the entire bundle of rights in the instrument. § 673.2011, Fla. Stat. (defining negotiation); § 673.2031(4), Fla. Stat. ("If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur."). Thus, the principal's act of giving possession of the Note to an agent for the purpose of enforcing that Note on the principal's behalf is not a negotiation and was never intended to be. The agent (the servicer), therefore, never becomes a holder.

Bank of America's own evidence undermined the proof it needed that Countrywide was a holder when it filed the case.

Because Bank of America was a stranger to the original transaction, it would not have been enough to demonstrate that it was an Article 3 holder at the time of judgment. It was required to adduce evidence that its predecessor, Countrywide, was the holder when it filed suit. *McLean v. JP Morgan Chase Bank, N.A.*, 79 So. 3d 170 (Fla. 4th DCA 2011) ("While it is true that standing to foreclose can be demonstrated by the filing of the original note with a special endorsement in favor of the plaintiff, this does not alter the rule that a party's standing is determined at the time the lawsuit was filed."); *Pennington v. Ocwen Loan Servicing, LLC*, 1D13-3072, 2014 WL 5740990, at *1 (Fla. 1st DCA 2014) (a bank must have

standing at the time final judgment is entered as well as when it filed the foreclosure action); *Am. Home Mortg. Servicing, Inc. v. Bednarek*, 132 So. 3d 1222, 1223 (Fla. 2d DCA 2014) (requirement that successor entity show that its predecessor was an Article 3 holder when it filed suit satisfied by testimony that "traced the history of the loan from its inception" including "when the loan was being serviced by its predecessor" which filed the case).

Here, the only evidence as to who possessed the blank-endorsed Note at the time Countrywide filed the case was testimony that disproved that it was Countrywide. Instead, Bank of America's witness claimed that the bearer instrument had been in Bank of America's hands all along. Indeed, Davids claimed that Bank of America had come into possession of the note and mortgage in 2006—three years before Countrywide filed this case claiming to be the "designated holder":

> Q. [by Homeowner's counsel] And when did Bank of America come into possession of this mortgage?
>
> A. I believe in 2006.[65]
>
> * * *
>
> Q. [by Homeowner's counsel] When did Bank of America get the note?
>
> A. In 2006.[66]

[65] T. 14.

Upon further examination by the court itself, however, Davids revealed that she was relying on information in documents that never became exhibits:

> Q. [by Bank of America's lawyer] [You] stated upon questioning from the defendant that Bank of America came into possession of the note and mortgage in 2006. Do you recall that?
>
> A. I recall saying that, yes. The servicer came into possession in 2006.
>
> Q. Can you tell the Court what the circumstances were behind Bank of America -- the servicer, I should say -- coming into possession of the note and mortgage in 2006?
>
> [the Homeowner objects to hearsay and authenticity]
>
> THE COURT: How are you familiar with that?
>
> THE WITNESS: By reviewing our business records and working in our servicing platform, which reflects when we became in possession of the originals.
>
> THE COURT: Do you have copies of those here, the documents that you reviewed that substantiate that?
>
> THE WITNESS: The images of the note and the mortgage are in my system. The originals are here today. I didn't print the copies. I saw them in my system.
>
> THE COURT: Is there something in your system that says the date?
>
> THE WITNESS: Yes.[67]

Davids went on to explain that she was relying on documents that were then marked as 1A, 1B, 1C, and 1D for identification.[68] These documents were never

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[66] T. 61.

[67] T. 15-16.

admitted as exhibits and are not part of the appellate record. In fact, Bank of America expressly abandoned them at the end of Davids' testimony:

> THE COURT: Let me ask you about these four exhibits that I don't have numbers for, 1A, 1B, 1C, and 1D. What's the story with those? Did we mark those later?
>
> MS. ISLES [Bank of America's lawyer]: They were not marked later, Judge.
>
> THE COURT: Are you abandoning them?
>
> MS. ISLES: Yes, Judge.[69]

Thus, while this testimony from records not in evidence is not competent to actually prove that Bank of America has always held the Note, it is the only testimony on the issue of standing at inception. If it were to have any evidentiary value it would be to disprove that Countrywide had standing when it filed this suit.

There was no admissible evidence of standing.

Lastly, as discussed in the following point on appeal, Davids was not a qualified witness to introduce Countrywide documents or to testify about Countrywide recordkeeping policies. She had no personal knowledge of when the Note was delivered to Countrywide, Bank of America or Fannie Mae. Davids' claim, therefore, that Bank of America had always possessed the Note is not

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[68] T. 17.

[69] T. 69.

competent to support the trial court's verdict in favor of Bank of America even if it were a party to this action.

II. The court should have granted an involuntary dismissal because there was no admissible evidence to support the judgment.

Because Bank of America chose to attempt to prove every element of the Plaintiff's case with a single witness, it should not be surprising that the lack of any competence of that witness to testify would taint the entire case. Without the inadmissible exhibits and the testimony based upon them, there was no evidence of the essential elements of the Plaintiff's case, such as:

- **Standing:** As shown above, the only evidence of Countrywide's standing when it filed suit was Davids' testimony contradicting that allegation of the Complaint—testimony based entirely on documents never admitted into evidence.
- **Conditions Precedent:** Because Davids was not qualified to testify about Countrywide records or routine mailing practices, the Notice of Intent to Accelerate (Exhibit 3) was inadmissible, leaving no evidence of compliance with the contractual prerequisite for acceleration in the Mortgage.
- **Damages:** Because Davids was not qualified to testify about Countrywide policies and procedures or even those of Bank of America

departments she never worked in, the payment history (Exhibit 4) was inadmissible. The payment history was the only identified source of information in evidence for the amounts due and owing (except for unpaid interest, for which no documentary source was admitted). Davids' testimony regarding the totals relied on summaries prepared by lawyers, such as the proposed judgment and the account information statement, neither of which was admitted as an exhibit. Such testimony was not competent evidence.

Accordingly, the trial court erred, not only in admitting these documents and testimony into evidence, but ultimately, in denying the motion for involuntary dismissal.

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

The trial court allowed Bank of America to introduce Countrywide's purported business records through Davids, an eighteen-month employee of Bank of America, who had never worked for Countrywide. And no testimony was offered as to how Davids could have any personal knowledge of Countrywide's recordkeeping practices, other than the training she received from Bank of America in order to testify on its behalf. A witness must have personal knowledge

of record-keeping practices to be qualified to lay a foundation for their admission into evidence under the business records exception. *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).

By contrast, to permit a witness such as Davids to lay a foundation for admission of documents created by the prior servicer would be to say that a litigant offering documents as evidence may convey information to its otherwise unknowledgeable witness to create a veneer of "personal knowledge" with two simple preparatory steps:

- having its witness read the documents before trial; and
- telling its witness what to say in court about the record-keeping policies of an entirely different entity which actually created and kept the records.

The personal knowledge required to introduce a company's records is not familiarity with what the records say, but with the facts of how, when, and why the records were created and kept. *Yang*, 123 So. 3d at 621. To hold that the personal

knowledge requirement for authenticity and the business records hearsay exception can be satisfied by reading the records themselves, is to make all records admissible and the hearsay rule superfluous.

Davids was not a records custodian or otherwise "qualified witness"

Davids was a professional testifier whose job duty with the servicer, Bank of America, was to review documents pertaining to the subject loan so that she could communicate the hearsay within those documents to the court. Her only connection with the documents admitted into evidence, over objection, was that she had read them.

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

1) The record was made at or near the time of the event;
2) The record was made by or from information transmitted by a person with knowledge;
3) The record was kept in the ordinary course of a regularly conducted business activity;

4) It was a regular practice of that business to make such a record; 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 to even be permitted to testify to these threshold facts, Davids needed to be a records custodian or an otherwise "qualified" witness—one who is in charge of the activity constituting the usual business practice or sufficiently experienced with the activity to give the testimony. *Hunter v. Aurora Loan Servs., LLC*, 137 So. 3d 570, 573 (Fla. 1st DCA 2014) (finding witness unqualified where the witness "lacked particular knowledge of a prior servicer's record-keeping procedures and "[a]bsent such personal knowledge, he was unable to substantiate when the records were made, whether the information they contain derived from a person with knowledge, whether [the previous servicer] regularly made such records, or, indeed, whether the records belonged to [the previous servicer] in the first place."); *Burdeshaw v. Bank of New York Mellon*, 39 Fla. L. Weekly D2145 (Fla. 1st DCA Oct. 13, 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.*, 39 Fla. L. Weekly D2156 (Fla. 1st DCA Oct. 14, 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*, Case No. 4D13-2101 (Fla. 4th DCA November 5, 2014) (witness was not qualified to introduce bank's payment records over hearsay objection).[70]

See also 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,

[70] Notably, in *sua sponte dicta*, the panel in *Holt* declared that an assignment of mortgage and a notice of acceleration would be admissible over a hearsay objection as "verbal acts." Opinion, pp. 9, 10, 2-3 at n. 2. Here, the Homeowner objected to the Notice of Intent to Accelerate on the additional grounds of authenticity (T. 26-32) which also requires a records custodian or otherwise qualified witness—and the trial court should have excluded the document even if it were not hearsay. Moreover, the *Holt* panel was simply incorrect because the date on the notice of acceleration was offered for the truth of the matter asserted (the implied assertion being that it was mailed on that day), and therefore, was not a verbal act. *See*, Law Revision Council Note—1976 for § 90.801, Fla. Stat., Subsection (1)(c) and cases cited therein.

666 (Fla. 2d DCA 1993) (holding that a witness who relied on ledger sheets prepared by someone else was not sufficiently familiar with the underlying transactions to testify about them or to qualify the ledger as a business record); *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980) (holding that an adjuster was not qualified to testify about the usual business practices of sales agents at other offices). *See also Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121, 1122 (Fla. 2d DCA 1988) (testimony was insufficient under the business records exception to hearsay because the witness was not the custodian, and was not in charge of the activity constituting the usual business practice); *Thomasson v. Money Store/Florida, Inc.*, 464 So. 2d 1309, 1310 (Fla. 4th DCA 1985) (statement that demonstrates no more than that the documents in question appear in the company's files and records is insufficient to meet the requirements of the business record hearsay exception); *Holt v. Grimes*, 261 So. 2d 528, 528 (Fla. 3d DCA 1972) (records properly excluded where there was "no testimony as to the mode of preparation of these records nor was the witness testifying in regard to the records in the relationship of 'custodian or other qualified witness'"); *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825 (Fla. 3d DCA 2014) (holding that without the proper foundation, the documents relied upon by the professional witness were indisputably hearsay).

Davids was not qualified to lay the foundation for Countrywide's documents because she had never worked for Countrywide.

While Davids was not qualified to lay the foundation even for those records that originated from her employer, Bank of America, she was even less qualified to establish a business records hearsay exception for documents that had purportedly been generated and maintained by Countrywide. That she was never employed by Countrywide even further distanced her from any personal knowledge of how its records were created or maintained. *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780, 783 (Fla. 4th DCA 2011) (holding a servicer's employee was not qualified to testify about records of a previous servicer when, as here, the witness had no personal knowledge as to when or how the entries were made); *Yang*, 123 So. 3d at 621 (holding that an employee from a successor HOA management company did not have personal knowledge of the prior management company's practice and procedure and had no way of knowing whether the data obtained from that company was accurate); *Thompson v. Citizens Nat. Bank of Leesburg, Fla.*, 433 So. 2d 32, 33 (Fla. 5th DCA 1983) (summary judgment reversed where affiant could not state that he had personal knowledge of matters contained in bank's business records, that the records were complete, or that they were kept under his supervision and control).

With respect to Countrywide's procedures for preparing and mailing the Notice of Intent to Accelerate, she claimed to know that Bank of America's procedures were the same as those Countrywide had used four and half years earlier. The procedure manual that she was relying on, however, was a "living breathing document [that] changes, adds, subtracts."[71] She would have no way of knowing whether Countrywide's procedures were the same as the ones she read about, except that she was told that they were during her training.

Of course, being "told" about such processes for purposes of regurgitating such information to the fact-finder is nothing more than a synonym for "hearsay." And it is hearsay of the worst kind because it is deliberately communicated to her for the specific purpose of testifying in court—i.e. improper witness coaching to create the façade of familiarity. To hold that such hearsay knowledge can be substituted for personal knowledge gained through an actual job-responsibility tied to the business activity is to allow the business record exception to swallow the rule because there is no document that a witness cannot be told to say meets the exception.

Moreover, conspicuous by its absence was any specific testimony about Countrywide's policies and procedures for preparing and mailing notices of

[71] T. 28.

acceleration. Paragraph 15 of the Mortgage requires that all notices "shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means."[72] There was no evidence to find that the conditions had been satisfied for the notice to "be deemed to have been given" because there was no evidence—other than the inadmissible letter itself—that that the letter was sent by first class mail, or that it was actually delivered to the Homeowner.

The servicer could have offered such proof by way of testimony that it was Countrywide's normal routine practice to send such letters by first class mail. *See Brown v. Giffen Indus., Inc.*, 281 So. 2d 897, 900 (Fla. 1973) (the requirement of showing proper mailing satisfied by proof of general office practice); *Berwick v. Prudential Prop. & Cas. Ins. Co.*, 436 So. 2d 239, 240 (Fla. 3d DCA 1983) (same). But Davids gave no such testimony and was not qualified to give such testimony. *See Eig v. Ins. Co. of N. Am.*, 447 So. 2d 377, 379 (Fla. 3d DCA 1984) (testimony from witness who was not an employee of the company at the relevant time was incompetent to establish the routine practice of that company).

[72] R. 482.

Davids did not testify to any data verification during a boarding process and would, in any event, have no personal knowledge of the process.

Davids did not testify about the transition process when the Countrywide records were incorporated into Bank of America's records. There was no evidence that Bank of America ever checked the accuracy of Countrywide's records when it took over servicing. This distinguishes this case from one typically relied upon by the banks, *WAMCO XXVIII, Ltd. v. Integrated Elec. Environments, Inc.*, 903 So. 2d 230, 233 (Fla. 2d DCA 2005). In that case, information from a previous servicer was admitted over a hearsay objection because the current note holder had procedures in place to check the accuracy of the information that it received from its predecessor. Without this testimony, the information is inadmissible. *See Holt v. Calchas, LLC*, 4D13-2101, 2014 WL 5614374, at *4 (Fla. 4th DCA 2014) (expressly holding *WAMCO* inapplicable due to the absence of such testimony).

Moreover, the witness in *WAMCO* was personally involved in overseeing the collections of the subject loans and "described the process that [his employers] use to verify the accuracy of information received in connection with loan purchases." *Id*. at 233. Davids did not work for Bank of America when it received the Countrywide information, and therefore, could have no personal knowledge of the process.

Accordingly, because Davids was not a qualified witness, the acceleration notice and the payment history from Countrywide—as well as any testimony based on them—should have been excluded on the grounds that they were unauthenticated hearsay.[73]

The servicer failed to prove a prima facie case

Had the trial court properly applied the hearsay rule to exclude Countrywide's purported acceleration notice, a key element of a *prima facie* foreclosure case would be missing. *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d at 826 ("To establish its entitlement to foreclosure, [the bank] needed to introduce the subject note and mortgage, an acceleration letter, and some evidence regarding the [borrowers'] outstanding debt on the note." [emphasis added]); *Ernest v. Carter*, 368 So. 2d 428 (Fla. 2d DCA 1979) (same); *see DiSalvo v. SunTrust Mortg., Inc.*, 115 So. 3d 438, 439 (Fla. 2d DCA 2013) (unauthenticated notice of acceleration insufficient for summary judgment); *Bryson v. Branch Banking & Trust Co.*, 75

[73] Which is not to say that records of predecessor services can never be admitted without bringing a scattering of live witnesses to a Florida courtroom. Section 90.902(11), Fla. Stat. provides that the testimony of a records custodian or qualified person (who often still works for the successor bank) may be admitted through an affidavit (a "certification or declaration"). *See also* § 90.803(6)(c), Fla. Stat.; *Yisrael v. State*, 993 So. 2d at 957; *Mazine v. M & I Bank*, 67 So. 3d at 1132.

So. 3d 783 (Fla. 2d DCA 2011) (copies of default letters that purportedly were sent to mortgagor were not self-authenticating and thus could not be considered).

Likewise, the amounts due and owing as contractual damages was an essential element of the Plaintiff's case. *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d at 826; *see Wolkoff v. Am. Home Mortg. Servicing, Inc.*, ___So. 3d. ___, 39 Fla. L. Weekly D1159, at *3 (Fla. 2d DCA May 30, 2014) ("When a party seeking monetary damages fails to establish an evidentiary basis for the damages ultimately awarded at trial, reversal for entry of an order of dismissal is warranted.").

All Davids' testimony regarding damages—except for the amount of interest due—came from the payment history, on which the vast majority of the entries had apparently been made by Countrywide employees. That exhibit and the testimony from it was hearsay and should have been excluded.

The amount of interest due was not contained in the payment history[74] and Davids never verified the interest figure by calculating it herself.[75] The interest computation was taken from an "account information statement" marked for identification as "1G" but never admitted into evidence or even proffered as an

[74] T. 64-65.

[75] T. 65.

exhibit.[76] The document was not a business record because it was printed by counsel for the purpose of litigation:

> Q. How is this document printed? Did you print it, or did somebody else print it?
>
> A. I did not print it. It's printed from someone's computer.
>
> Q. Do you know who, by any chance?
>
> A. My counsel would have printed it. It was received by Bank of America.
>
> Q. So it was for the purpose of litigation here today, the purposes of this trial; right?
>
> A. The information was, yes, sent to counsel as a summary so they can prepare the final judgment.[77]

Accordingly, there was no evidence supporting the interest figure in the judgment. Nor did the court, as the factfinder, attempt to calculate the interest from the Note (or the inadmissible payment history).[78] The trial court, therefore, abdicated its fact-finding role by simply signing a proposed judgment without determining whether the documents in evidence supported the amounts awarded. *Perlow v. Berg-Perlow*, 875 So. 2d 383 (Fla. 2004) (trial court's verbatim adoption of proposed final judgment suggested that trial court did not independently make factual findings and legal conclusions, created appearance of impropriety, and was

[76] T. 48, 49.

[77] T. 49-50.

[78] T. 80.

reversible error); *Walker v. Walker*, 873 So. 2d 565, 566 (Fla. 2d DCA 2004) (a proposed judgment cannot substitute for a thoughtful and independent analysis of the facts, issues, and law by the trial judge).

The trial court also erred in prohibiting cross-examination into the accuracy and legitimacy of the information in the payment history such as the insurance payments.[79] A defendant need not file an affirmative defense to be entitled to challenge a plaintiff's allegations that have been denied in the answer—a proposition with which even the trial court agreed (despite prohibiting the cross-examination).[80] *See generally Embrey v. Southern Gas & Electric Corp.*, 63 So.2d 258, 262 (Fla.1953) (cross-examination extends to the "entire subject matter" of the direct examination including "all matter[s] that may modify, supplement, contradict, rebut or make clearer the facts testified to" on direct.)

[79] T. 39-40.

[80] Although not raised as a separate ground for reversal, this error limited cross-examination which exacerbated the error of permitting an unqualified witness to testify. This improper restriction not only skewed the information available to the factfinder, but hampered the Homeowner's ability to fully demonstrate the unreliability of Davids' testimony on appeal. If this Court remands the case for retrial based on one of the main points on appeal, the Homeowner requests that it be accompanied by an instruction that the trial court permit cross-examination on the evidence that the Plaintiff proffers in support of its allegations.

The Plaintiff had its day in court.

The real Plaintiff, Fannie Mae, did not appear at trial, even though its attorneys were on notice of the proceedings. To the extent that Bank of America intended to prove that Fannie Mae was entitled to a judgment, it adduced no such evidence. In fact, the words "Fannie Mae" or "Federal National Mortgage Association" were never mentioned at trial.

To the extent that Bank of America, as an interloper, sought to prove its own entitlement to foreclose, it brought no admissible evidence of its standing or the amount of damages to which it would have been entitled. A party (or a non-party in this instance) may not neglect to bring evidence to prove elements of its damages and be given another bite at the evidentiary apple. *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 39 Fla. L. Weekly D1159 (Fla. 2d DCA May 30, 2014) ("[A]ppellate courts do not generally provide parties with an opportunity to retry their case upon a failure of proof." [internal quotation omitted]).

A personal injury plaintiff, for example, cannot ask the appellate court for another chance at proving medical bills he did not bring to the trial. *See Pain Care First of Orlando, LLC v. Edwards*, 84 So. 3d 351, 355 (Fla. 5th DCA 2012) ("Having proceeded to judgment on legally insufficient proof, Appellee does not get a do-over."); *Van Der Noord v. Katz*, 481 So. 2d 1228, 1230 (Fla. 5th DCA

1985) ("Having failed to introduce competent, substantial evidence in regard to this issue, the buyer is not entitled to a second bite at the apple."); *Loiaconi v. Gulf Stream Seafood, Inc.*, 830 So. 2d 908, 910 (Fla. 2d DCA 2002) (same); *J.J. v. Dep't of Children & Families*, 886 So. 2d 1046, 1050 (Fla. 4th DCA 2004) (where Department did not seek a continuance to secure additional evidence, "[n]o statute or rule permitted the trial court to give the Department a 'do-over'…").

CONCLUSION

The Court should reverse the judgment and remand for entry of dismissal of the case with prejudice.

Dated: November 17, 2014

ICE APPELLATE
Counsel for Appellant
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

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.

ICE APPELLATE
Counsel for Appellant
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this November 17, 2014 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this November 17, 2014.

ICE APPELLATE
Counsel for Appellant
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

SERVICE LIST

Debbie C. Isles, Esq.
ALDRIDGE I CONNORS, LLP
1615 South Congress A venue
Suite 200
Delray Beach, FL 33445
ServiceMail@aclawllp.com;
srubino@aclawllp.com
Appellee's Counsel