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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO.: SC20-1602

vs.

The Florida Bar File Nos.
2019-70,188 (11H)
2019-70,358 (11H)
2020-70,056 (11H)

BRUCE JACOBS,

Respondent.
_____________________________________/

APENDIX III TO CORRECTED REPLY/ANSWER BRIEF OF RESPONDENT

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Appendix III- Order Granting Final Judgment to Defendant in Palm Beach Circuit Court Case, Wells Fargo Bank v. John Riley, Case No.: 50-2016-CA-010759………….3-14

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

WELLS FARGO BANK, N.A., AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-PR4 TRUST,

Plaintiff,

vs.

JOHN M. RILEY, *et. al.*,

Defendants.

GENERAL JURISDICTION DIVISION

CASE NO.: 50-2016-CA-010759-XXXX-MB

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FILED 2017 DEC 13 PM 3: 54 SHARON R. BOCK, CLERK PALM BEACH COUNTY CIRCUIT CIVIL/PROBATE

ORDER GRANTING FINAL JUDGMENT TO DEFENDANT

THIS CAUSE, having come before the Court for trial on November 14, 2017, and having been duly advised, it is hereby ORDERED AND ADJUDGED as follows:

I. **Plaintiff Engaged in Unclean Hands Trying to Prove Standing to Foreclose**

A. *Unclean Hands, Generally*

1. "One who comes into equity must come with clean hands else all relief will be denied him **regardless of merit of his claim**, and it is not essential that act be a crime; it is enough that it be condemned by honest and reasonable men." *Roberts v. Roberts*, 84 So.2d 717 (Fla. 1956)(emphasis added).

2. Therefore, even if Plaintiff had standing to foreclose (a meritorious claim), Plaintiff would be denied the equitable relief of foreclosure upon a finding that Plaintiff took actions in pursuing this foreclosure that reasonable and honest men would condemn.

3. The Florida Supreme Court noted "the principle or policy of the law in withholding relief from a complainant because of 'unclean hands' is punitive in its nature." *Busch v. Baker*, 83 So. 704 (Fla. 1920). As U. S. Supreme Court Justice Black wrote:

> "[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246, 64 S. Ct. 997, 88 L. Ed. 1250 (1944).

B. *Unclean Hands Re: the Purported Mortgage Loan Schedule for the Trust*

4. Plaintiff attempted to establish standing to foreclose by introducing the Pooling and Servicing Agreement ("PSA") and what purported to be the Mortgage Loan Schedule ("MLS") for the Plaintiff Trust.

5. Plaintiff's Trial Witness, Darlene Marcott, a former Washington Mutual employee who presently works for the servicer, JP Morgan Chase, testified that the MLS admitted in evidence was the same MLS attached to the PSA when the Trust closed in 2005.

6. On cross-examination, Plaintiff's Trial Witness read the definition of the Mortgage Loan Schedule found on page 15 of the PSA into evidence. Ms. Marcott then conceded that "over thirty (30)" of the data fields expressly delineated as required information for the MLS were not included in what was purported to be the MLS presented as evidence in this equitable action.

7. Plaintiff's Trial Witness then attempted to explain the missing data fields by giving what seemed to be compelling testimony that the data fields were missing because they were intentionally redacted to protect the borrower's privacy interests. The Trial Witness even suggested she herself had personally redacted the MLS for other cases to ensure this private information was not impermissibly disclosed.

8. On further cross-examination, Ms. Marcott conceded that a significant number of required data fields missing from the MLS had nothing to do with the borrower's privacy interests, such as the "lien position" and the "Loan to Value Ratio at the time of origination."

9. The Court cannot reconcile the testimony of Ms. Marcott and the evidence introduced at trial. It is apparent the document which Plaintiff admitted as the purported MLS for this Trust is not the actual MLS as defined at page 15 of the PSA.

C. *Unclean Hands re: the Mortgage Assignments Attached to the Complaint*

10. Plaintiff prepared two assignments of mortgage recorded in the public records and attached as exhibits to its complaint which purport to document a sale of the Defendant's Note and Mortgage from JP Morgan Chase to the Plaintiff (the "Mortgage Assignments").

11. Plaintiff identified the "assignment of mortgage" as a trial exhibit on its Renewed Witness and Exhibit List filed on October 11, 2017.

12. Ms. Marcott testified she had testified in many trials where similar Mortgage Assignments were introduced at trial as evidence as Plaintiff's standing to foreclose.

13. This Court takes judicial notice of the court file from the first attempt by this Plaintiff to foreclose this mortgage against this Defendant in Palm Beach County Case Number 50

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14. The complaint in the first foreclosure action was filed in August of 2010.

15. Four months later, Plaintiff recorded the first mortgage assignment in the public records of Palm Beach County on December 16, 2010.

16. The first mortgage assignment purported to document a transaction wherein "JP Morgan Chase N.A. as successor in interest to Washington Mutual Bank...." sold Defendant's note and mortgage to the Plaintiff Trust.

17. The Court takes judicial notice that the Honorable Judge John Hoy granted Defendant's Motion for Involuntary Dismissal of the first foreclosure action because "Plaintiff failed to prove standing on the date it filed the complaint" on March 25, 2014.

18. The following year, on May 1, 2015, JP Morgan Chase recorded the second "corrective assignment of mortgage" which purported to document a transaction wherein JP Morgan Chase Bank, N.A., Successor in Interest by Purchase from the Federal Deposit Insurance Corporation as Receiver of Washington Mutual Bank..." sold the Defendant's note and mortgage to the Plaintiff.

19. Thereafter, on September 22, 2016, Plaintiff refiled the instant foreclosure action and attached both the 2010 assignment and the 2015 corrective assignment as exhibits to its complaint.

20. In this case, Defendant's second affirmative defense alleged the assignments were evidence of unclean hands because they represented a transaction that never happened.

21. At trial, Ms. Marcott admitted that any claim JP Morgan Chase ever owned or sold Defendant's note and mortgage was false. She testified that Defendant's note and mortgage were not assets of Washington Mutual after 2005. As such, the 2010 assignment could not truthfully document a transaction that JPMorgan Chase obtained Defendant's note and mortgage from Washington Mutual and sold it to the Plaintiff Trust. This transaction never happened.

22. Moreover, the 2015 assignment contains a materially false statement that JP Morgan purchased Defendant's note and mortgage from the Federal Deposit Insurance Corporation ("FDIC") as Receiver for Washington Mutual.

23. The note and mortgage were not assets of Washington Mutual to be sold by the FDIC Receiver to JP Morgan Chase and or to be sold by JP Morgan Chase to the Plaintiff Trust. Plaintiff's Trial Witness admitted the statement that the FDIC sold this loan as Receiver to Washington Mutual to JP Morgan Chase who sold it to the Plaintiff is materially false.

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D. *Unclean Hands re: the Endorsement on the Note*

24. Plaintiff attached to its complaint a copy of the original note with an undated rubber-stamped endorsement purportedly signed by Cynthia Riley, while she was Vice President of Washington Mutual Bank.

25. Defendant filed its first affirmative defense which raised a challenge to the validity of the endorsement on the note as required by Fla. Stat. §673.3081.

26. Defendant's third affirmative defense alleged the note did not meet the requirements to be a negotiable instrument under Fla. Stat. §673.1041 and Fla. Stat. §673.1061.

27. On April 20, 2017, the Court granted Defendant's Motion to Compel Better Answers to Defendant's Request for Production re: Standing.

28. The Order required Plaintiff to produce the electronic and paper records of any custodian who held the original note and to any documents that show how and when the rubber-stamped endorsement of Ms. Riley was affixed to the original note.

29. Plaintiff's Trial Witness testified the note did not meet the requirements of a negotiable instrument under Fla. Stat. §673.1041 and Fla. Stat. §673.1061. Specifically, the note was not an unconditional promise to pay a fixed amount of money because of its negative amortization provision. She conceded the note contained a banner in all caps across the top that expressly stated the principal balance could fluctuate based on the performance of the loan.

30. Ms. Marcott further stated the note was not an unconditional promise as it was subject to and governed by the mortgage. Specifically, she testified the "uniformed secured note" provision in the note provides there are "additional protections in the mortgage" which provide authority for the Plaintiff to collect all the amounts due under the mortgage for property taxes, insurance, inspections, and other fees.

31. She further testified that Plaintiff's standard operating procedure is to service the note and mortgage as one integrated agreement such that the note is subject to and governed by the mortgage. Accordingly, the note is not a negotiable instrument.

32. Even if the note were a negotiable instrument, it would be inequitable to permit Plaintiff to flagrantly violate an order compelling discovery that could show the endorsement for Washington Mutual was added after Washington Mutual went into the FDIC receivership.

33. Pursuant to Fla. R. Civ. P. Rule 1.380, the Court finds Plaintiff cannot introduce the endorsement as evidence of standing after disobeying a court order to compel the evidence in its possession that would establish whether the endorsement violated Fla. Stat. §673.3081.

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E. *Unclean Hands, Conclusion*

34. The Court finds Plaintiff has unclean hands by virtue of their (i) introducing into evidence a document which was purported to be the actual MLS for the Plaintiff's PSA, but in fact was not the real MLS for the Plaintiff Trust; and (ii) for Ms. Marcott giving testimony this court finds is not credible that the missing data fields for the purported MLS for the Trust were redacted for privacy concerns as the redacted information did not disclose private information.

35. The Court finds that Plaintiff has unclean hands by attaching the 2010 and 2015 mortgage assignments to its complaint as evidence of standing which contained materially false statement, that Plaintiff obtained its standing from JP Morgan Chase which is admittedly false.

36. In support of this finding of unclean hands, the Court notes that Fla. Stat. §817.535, effective October 1, 2013, made it a felony to record "any instrument containing a materially false, fictitious, or fraudulent statement or representation…." in the public records.

37. Finally, the Court finds the Plaintiff has unclean hands by its violation of the Court's discovery order related to the electronic and paper records of the custodian and the documents that show when and how the note was endorsed. The failure to comply with this order interfered with the orderly administration of justice.

38. The Court cannot make a finding whether Plaintiff had standing because of the Plaintiff's unclean hands in presenting its evidence of standing.

II. **The Failure of Condition Precedent**

39. Ms. Marcott admitted the default letter was not sent to the Defendant's property address as required under paragraph 15 of the mortgage.

40. Plaintiff admitted there was no other procedure that would permit the notice address to be changed besides the procedure set forth in paragraph 15 of the mortgage which required the borrower to provide written notice substituting a new address for notice.

41. Plaintiff admitted there was no evidence that the Defendant provided any such notice changing the address for service of notice required under paragraph 15.

42. Plaintiff did not send the default letter to the property address. Instead, Plaintiff sent the letter to the law firm of Jacobs Keeley, PLLC, ("JK") in 2015. At the time, JK had represented the Defendant in the 2010 foreclosure that ended in 2014.

43. The condition precedent in paragraph 15 does not permit the Plaintiff to send the default notice to the borrower's attorney in lieu of sending a copy to the property address.

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44. Therefore, Plaintiff failed to prove it sent the notice of default to the property address are required by paragraphs 15 and 22 of the mortgage before filing this action. This failure of an express condition precedent is, by itself, grounds to grant judgment to Defendant.

III. **The Failure to Prove Damages by Competent Evidence**

45. The Court admitted the payment histories into evidence under the business records exception, over timely objection and subject to cross-examination, after the witness testified that each entry was made at or near the time of the transaction or occurrence in accordance with Fla. R. Evid. §90.803(6).

46. On cross-examination, the witness admitted she lacked personal knowledge that each entry was made at or near the time of the transaction. Instead, the witness testified she based her knowledge that each entry was made at or near the time of the transaction on (i) the training manuals she reviewed which were not in evidence; and (ii) the training she received by sitting down with someone from the department that had personal knowledge that each entry was made at or near the time of the transaction.

47. The witness conceded she asked the court to accept as true the out of court statements from the training manuals and from the person from the department with personal knowledge that each entry was made at or near the time of the transaction.

48. The witness conceded that Plaintiff could have produced a witness with actual personal knowledge that each entry was made at or near the time of the transaction.

49. Instead, Plaintiff decided to produce Ms. Marcott and to ask the Court to accept as true the hearsay statement from that person with knowledge. Plaintiff chose not to produce the witness with knowledge at its own peril.

50. The Florida Supreme Court holds, "if evidence is to be admitted under one of the exceptions to the hearsay rule, it must be offered in strict compliance with the requirements of the particular exception. *Yisrael v. State*, 993 So. 2d 952, 957 (Fla. 2008), as revised on denial of reh'g (July 10, 2008).

51. "Except as provided by statute, hearsay evidence is inadmissible." See, Fla. Stat. § 90.802 (2014). The Florida Business Records Exception to the hearsay rule, codified at Fla. Stat. § 90.803(6) requires that a custodian or "other qualified witness" lay a proper predicate that, *inter alia*, the records are made in the regular course of business at or near the time of the transaction or occurrence. See, Fla. Stat. § 90.803(6). Any witness who attempts to supply testimony to meet the requirements of Fla. Stat. § 90.803(6) must testify from personal knowledge. See, Fla. Stat.

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§90.604.

52. An "other qualified witness" must have perceived the documents being made in the regular course of business and be able testify from that memory. See, C. Ehrhardt, Florida Evidence § 604.1 (2014 Edition), p. 535; *Roman v. State*, 475 So.2d 1228 (Fla. 1995). Florida law requires that "testimony must be based on matters perceived by the senses of the witness." See, C. Ehrhardt, Florida Evidence § 604.1 (2014 Edition), p. 535; *Roman v. State*, 475 So.2d 1228 (Fla. 1985). "A witness who has actually perceived and observed a fact is the most reliable source of information." See, C. Ehrhardt, Florida Evidence § 604.1, p. 535 (2014 Edition), p. 535; *State v. Eubanks*, 609 So.2d 107, 110 (Fla. 4th DCA 1992).

53. Where a witness has no personal knowledge of a matter, and the witness's knowledge is derived from information given by another, or in training, the witness's testimony is incompetent and inadmissible as hearsay. *See, Bryant v. State*, 124 So.3d 1012 (Fla. 4th DCA 2013); Roman v. State, 475 So.2d 1228 (Fla. 1985); *Kennard v. State*, 28 So. 858 (Fla. 1900).

54. The Second DCA has held business records are admissible only if the custodian or other qualified witness testified to "the manner of preparation and the reliability and trustworthiness of the product." *Specialty Linings Inc. v. BF Goodrich Company*, 532 So. 2d 1121 (Fla. 2nd DCA 1988); *citing Pickrell v. State*, 301 So. 2d 473 (Fla. 2nd DCA 1974)("to prove usual business practices it must first be established that the witness is either in charge of the activity constituting the usual business practices or is well enough acquainted with the activity to give the testimony"); *See also, Alexander v. Allstate Ins. Co.*, 388 So. 2d 592 (Fla. 5th DCA 1980); *Landmark Am. Ins. Co. v. Pin-Pon Corp.*, 155 So. 3d 432, 435-43 (Fla. 4th DCA 2015)(rejecting testimony of architect who was neither in charge of the activity constituting usual business practice or well enough acquainted with the activity to qualify to lay the foundation to admit general contractor's business records incorporated into the architect's file under the business records exception).

55. Here, Ms. Marcott admitted she was trained by someone with personal knowledge that the payment history was made in the regular course of business at or near the time of the transaction or occurrence. Plaintiff could have brought that person, or anyone else who worked alongside that person, to be a witness with personal knowledge in this trial.

56. Plaintiff chose, at its peril, to produce Ms. Marcott to testify about out of court statements she offered to prove that the truth is the payment history was made in the regular course of business at or near the time of the transaction or occurrence. It does not matter that the out of

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court statements came from training manuals or conversations with someone with personal knowledge. The statements are classic hearsay and inadmissible.

57. Plaintiff failed to strictly comply with Fla. R. Evid. §90.803(6) by failing to produce a "qualified witness" with personal knowledge as required by Fla. R. Evid. §90.604 to testify that the payment history was made in the regular course of business at or near the time of the transaction or occurrence.

58. As such, the payment histories are not admissible and Plaintiff failed to prove its damages by substantial competent evidence. This failure to prove damages is, by itself, grounds to grant judgment to Defendant.

WHEREFORE, the Court finds Plaintiff failed to prove every element of its case by substantial competent evidence and has unclean hands, and enters judgment in favor of the Defendant, John Riley, who shall go forth without day, and the Court reserves jurisdiction to award attorney's fees, and any further relief deemed mete and just.

DONE AND ORDERED in Chambers, in West Palm Beach, Florida this 12 day of December, 2017.

CIRCUIT COURT JUDGE

Copies furnished to:
Defendant's counsel:
Bruce Jacobs, Esq., Jacobs Keeley, PLLC., 169 E. Flagler Street, Suite 1620, Miami, FL 33131
Plaintiff's counsel:
Teodora Síderova Esquire, Albertelli Law, P.O. Box 23028, Tampa, FL 33623-2028

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IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

WELLS FARGO BANK, N.A. AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-PR4 TRUST,

Appellant,

v.

JOHN M. RILEY, *et al.*,

Appellees.

CASE NO. 4D18-812
LT No. 502016CA010759

NOTICE OF VOLUNTARY DISMISSAL OF APPEAL

Appellant, Wells Fargo Bank, N.A. as Trustee for WaMu Mortgage Pass-Through Certificates, Series 2005–PR4 Trust, pursuant to Florida Rule of Appellate Procedure 9.350(b), hereby notices the voluntary dismissal with prejudice of its appeal in this matter.

Respectfully submitted,

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Florida Bar No. 003794
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Counsel for Appellant

By: /s/ Elliot B. Kula
Elliot B. Kula

CERTIFICATE OF SERVICE

I certify that, pursuant to and in compliance with Florida Rule of Judicial Administration 2.516, this Notice of Voluntary Dismissal of Appeal was e-filed with the Court and e-mailed on September 6, 2018, to:

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/s/ Elliot B. Kula
Elliot B. Kula

Prepared by:
Lien Release
JPMorgan Chase Bank, N.A.
700 Kansas Lane
Mail Code LA4-3120
Monroe, LA 71203
Telephone Nbr: 1-866-756-8747

Record and Return To:
JOHN M RILEY, A SINGLE MAN
18367 126TH TER N
JUPITER, FL 33478

SATISFACTION OF MORTGAGE

Pursuant to Fla. Stat. § 701.04.

KNOW ALL MEN BY THESE PRESENTS: that WELLS FARGO BANK, NA AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-PR4 TRUST, 1111 POLARIS PKWY, COLUMBUS, OH 43240, owner of record of a certain mortgage from JOHN M RILEY, A SINGLE MAN to WASHINGTON MUTUAL BANK, FA, securing a certain note in the principal sum of $200,000.00, dated October 20, 2005 and recorded on November 3, 2005 in the Official Records, in Volume/Book 19492 at Page 0041 and/or as Document 20050685511 in the Office of the Clerk of the Circuit Court of PALM BEACH County, State of Florida, does hereby authorize the Recorder to discharge the same of record.

LYING IN SECTION 34, TOWNSHIP 40 SOUTH, RANGE 41 EAST, PALM BEACH COUNTY, FLORIDA, BEING THE NORTH 1/2 OF THE NORTHEAST 1/4 OF THE SOUTHWEST 1/4 OF THE NORTHEAST 1/4 OF THE SOUTHWEST 1/4 OF SAID SECTION 34. SUBJECT TO A ROAD EASEMENT FOR INGRESS AND EGRESS OVER THE EASTERLY 30 FEET THEREOF.

Property Address: 18367 126TH TER N, JUPITER, FL 33478

This Release is solely for the purpose of releasing the real property described above from the lien created by the Mortgage.

IN WITNESS WHEREOF, JPMORGAN CHASE BANK, NATIONAL ASSOCIATION has caused these presents to be executed in its name by its proper officers thereto duly authorized on January 8, 2019.

Power of Attorney for WELLS FARGO BANK, NA AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-PR4 TRUST, State of Florida, County/City of PALM BEACH, Dated 5/14/2010, Recorded 3/18/2011; Book 24414 Page 0086.

WELLS FARGO BANK, NA AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-PR4 TRUST BY JPMORGAN CHASE BANK, N.A., ATTORNEY IN FACT

Ingrid Whitty

Vice President

Signed, sealed and delivered in the presence of:

Arcola Freeman

Donna Acree

STATE OF Louisiana
COUNTY/PARISH OF OUACHITA

On January 8, 2019, before me appeared Ingrid Whitty, to me personally known, who did say that s/he/they is (are) the Vice President of JPMORGAN CHASE BANK, NATIONAL ASSOCIATION and that the instrument was signed on behalf of the corporation (or association), by authority from its board of directors, and that s/he/they acknowledged the instrument to be the free act and deed of the corporation (or association).

MARY BLANCHE, Notary Public

LIFETIME COMMISSION

MARY BLANCHE
Ouachita Parish, Louisiana
LIFETIME COMMISSION
NOTARY ID # 64436

Loan Number: 0701974180
Outbound Date: 01/23/19

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