5TH DCA CONFIRMS ADMISSIBILITY OF PRIOR SERVICER'S RECORDS, SUBSTANTIAL COMPLIANCE AS TO NOD

The District Court of Appeal of the State of Florida, Fifth District, recently affirmed a final judgment of foreclosure in favor of a mortgagee, holding that:

a. the trial court did not abuse its discretion in determining that the bank's witness was competent to testify about and in admitting the prior servicer's loan history records into evidence;
b. the default letter was not defective because it substantially complied with paragraph 22 of the mortgage; and
c. the borrowers failed to present competent evidence that the loan was subject to Federal Housing Administration (FHA) regulations governing the servicing of federally insured loans.

A copy of the opinion is available at: **Link to Opinion.**

The borrowers obtained a loan for $167,200 in 2008. They defaulted by failing to pay the installment due Oct. 1, 2011 under the note. The mortgagee sent them a default letter pursuant to paragraph 22 of the mortgage. The borrowers failed to reinstate the loan and the mortgagee sued to foreclose the mortgage in January 2013.

At trial, the mortgagee presented one witness, a veteran employee who "testified as to her familiarity with the manner in which [the servicer] creates, stores, and maintains its business records [as well as] her familiarity with [the servicer's] boarding process when it receives loan history data from a prior servicer of the loan and how that data is then converted and entered into [the servicer's] system."

The borrowers objected to the admission of the loan history into evidence on the basis that the mortgagee's witness lacked personal knowledge of any records created before the servicer's merger with the original lender. The trial court overruled the objection and admitted the loan history into evidence and entered a final judgment of foreclosure against the borrowers, from which they appealed.

On appeal, the borrowers argued that 1) the trial court erred by admitting the loan payment history into evidence; and 2) the trial court should have granted their motion for involuntary dismissal because the bank failed to comply with the conditions precedent set for in paragraph 22 of the mortgage; and 3) the bank failed to comply with HUD regulations requiring a certain form notice of default

and a face-to-face meeting or a reasonable effort to hold such meeting before the loan is three months in default.

Relying upon its earlier decision in *Nationstar Mortgage, LLC v. Berdecia*, which "discussed the evidentiary foundation necessary for the admissibility of mortgage documents under the business records hearsay exception, including records of a prior holder or servicer of the note … [and] held that '**the authenticating witness need not be "the person who actually prepared the business records[,]"' … but that 'the witness must be "well enough acquainted with the activity to give the testimony[,]"'"** the Appellate Court concluded that "the trial court did not abuse its discretion in determining that [the bank's] witness was competent to testify and in admitting the loan history records into evidence."

In addition**, because the borrowers did not contest the default date, which occurred approximately two years after the mortgagee acquired the note, the loan history records from the prior note holder "were not critical to [the mortgagee] establishing [borrowers'] default and the monies owed under the note."**

Turning to the borrowers' argument that the default letter was defective, the Appellate Court first noted that they failed to preserve their argument that the letter failed to specify the default because they did not raise it in the trial court.

It then concluded that, even if they had preserved this argument, it, like the borrowers' other argument that the letter did not sufficiently explain how to cure the default, both lacked merit. This is because **the law only requires substantial, not strict, compliance with conditions precedent, and the Court found the letter at issue was not "confusing or misleading."**

The Appellate Court also rejected the borrowers' arguments based on non-compliance with the FHA regulations governing "the mortgage servicing responsibilities of lending institutions with regard to mortgages insured by HUD," because they failed to present competent evidence that the loan was subject to the FHA regulations.

Citing Florida Supreme Court precedent, the Appellate Court reasoned that **"the burden of proving each element of an affirmative defense rests on the party that asserts the defense."** The Appellate Court noted that just because the note and mortgage in the case at bar indicated on their face that they were Fannie Mae/Freddie Mac uniform instruments did not mean that the mortgage at issue was federally insured or that the FHA regulations applied.

Because the borrowers bore the burden of proving that the FHA regulations applied to the mortgage at issue and were conditions precedent to foreclosure, and they failed to present competent evidence at trial to meet their burden, the final judgment of foreclosure was affirmed in its entirety.