FLA APP CT REVERSES DISMISSAL OF FORECLOSURE, CONFIRMS 'SUBSTANTIAL COMPLIANCE' AND 'PRIOR SERVICER RECORDS' RULINGS

The District Court of Appeal of the State of Florida, Fifth District, recently reversed an involuntary dismissal of a mortgage foreclosure action, holding that the trial court erroneously ruled that the mortgagee failed to comply with the mortgage's pre-foreclosure notice requirements, and erroneously excluded from evidence the prior loan servicer's business records.

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

A borrower defaulted on her mortgage and the mortgagee sued to foreclose. The foreclosure action proceeded to a non-jury trial, at which an employee of the mortgage servicer testified about the process used to verify the accuracy of loan information obtained from prior servicers. The mortgagee then offered into evidence business records obtained from the prior servicer, including a loan payment history.

The trial court sustained the borrower's hearsay objections, finding that the mortgagee's witness "failed to establish a proper foundation for the records' admissibility under the business records exception to the hearsay rule" set forth in subsection 90.803(6) of the Florida Evidence Code because the business records exception is "based upon a party's own records, not someone else's records" and because the witness "did not work in the boarding department" and so "lacked the requisite knowledge concerning the boarding process."

The trial did, however, admit into evidence a default letter which provided, in relevant part, that "you may have the right to bring a court action to assert the non-existence of a default or any other defense you may have to acceleration and foreclosure."

At the conclusion of the mortgagee's case in chief, the borrower moved to dismiss, arguing that the default letter did not comply with paragraph 22 of the mortgage because the letter stated the borrower would have to file an action to stop the foreclosure, rather than raising any defenses in the mortgagee's foreclosure action, and thus the borrower argued it did not properly inform the borrower of her rights with respect to foreclosure. The trial court agreed and granted an involuntary dismissal. The mortgagee appealed.

On appeal, the Fifth District first addressed the mortgagee's "argument that the trial court erred by determining the default letter failed to comply with paragraph 22's pre-foreclosure notice requirements," explaining that the pre-suit notice requirements in paragraph 22 "are conditions precedent to the filing of a foreclosure action against the borrower" and that "[c]ourts require there to be at least substantial compliance with conditions precedent in order to authorize performance of a contract." In addition, the Court noted that, "[a]bsent some prejudice, the breach of a condition precedent does not constitute a defense to the enforcement of an otherwise valid contract."

The Appellate Court found that the default letter substantially complied with paragraph 22, and in any event that the borrower suffered no prejudice because she was not arguing that the letter completely omitted one of the requirements, but instead that it was confusing. However, the Court noted, the borrower was not confused because she appeared in and vigorously defended the foreclosure action.

Turning to the trial court's exclusion of the business records, the Fifth District explained that although a trial court has broad discretion whether to admit evidence and its ruling on such matters will not be overturned absent an abuse of discretion, the general rule in Florida is that "the authenticating witness need not be the person who actually prepared the business records."

The Appellate Court noted that "[m]ere reliance on these records by a successor business, however, is insufficient to establish admissibility." Instead, the Court explained that, relying on the Fourth District Court of Appeal's decision in Bank of New York v. Calloway, which "clarified the standard for admitting records obtained from a prior loan servicer," it previously held in Nationstar Mortgage, LLC v. Berdecia that "a current servicer can establish a proper foundation for admission of a prior servicer's records 'so long as all the requirements of the business records exception are satisfied, the witness can testify that the successor business relies upon those records, and the circumstances indicate the records are trustworthy.' "

Based on its earlier decision in Berdecia, the Fifth District held that "the trial court abused its discretion by excluding business records obtained from the prior servicer. The trial court's assertion that a business cannot offer business records of a prior servicer does not conform with Calloway and its progeny. In addition, the trial court incorrectly determined that only a

boarding department employee could testify regarding the boarding process."

Because the mortgagee's witness had testified in detail about the loan boarding process and particularly the procedures used to verify that the records from prior servicers were accurate, that the records were kept in the regular course of the servicer's business by persons with knowledge and that it was the servicer's regular practice to make and keep such records, the Fifth District concluded that the witness' "testimony established a sufficient foundation for the records' admissibility under section 90.803(6)(a)," reversed the involuntary dismissal, and remanded the case for a new trial.