Third District Court of Appeal

State of Florida

Opinion filed September 25, 2019.
Not final until disposition of timely filed motion for rehearing.

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No. 3D18-1394
Lower Tribunal No. 15-19050

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Azran Miami 2 LLC,
Appellant,

vs.

Deutsche Bank National Trust Company, etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Reemberto Diaz, Judge.

Wesoloski Carlson, P.A., and Erik D. Wesoloski, for appellant.

McGlinchey Stafford, PLLC, and William L. Grimsley (Jacksonville), for appellee.

Before SALTER, HENDON and MILLER, JJ.

HENDON, J.

Azran Miami 2 LLC ("Azran") appeals from a final judgment of foreclosure rendered in favor of Deutsche Bank National Trust Company, etc. ("Bank") in June 2018. We affirm.

The original owner of the property at issue defaulted in 2008, and the Bank sued to foreclose that same year. The case was dismissed in 2011 for failure to prosecute. In 2013, the property's condominium association sued for unpaid assessments, and a final judgment was rendered. The property owner declared bankruptcy, and Azran ultimately purchased the property at a foreclosure sale, and a certificate of title was issued to Azran in 2014. The Bank filed a new foreclosure action in 2015, naming Azran as a defendant.[1] The trial date was set for June 1, 2018. On March 21, 2018, the court issued a uniform order setting cause for a non-jury trial. In the uniform order, the court required two things: 1) no later than twenty days before the trial date, the parties shall exchange expert witness lists with one another, and "shall make available to the other party" all the exhibits to be offered as evidence at trial; and 2) no later than fifteen days before the trial date, the parties shall furnish each other with the non-expert witness list, and complete all of their depositions before these time limitations.

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[1] The case was stayed twice pending the Florida Supreme Court's review of Bartram v. US Bank Nat'l Ass'n, 211 So. 3d 1009 (Fla. 2016), and Bollettieri Resort Villas Condo. Ass'n v. Bank of N.Y. Mellon, 198 So. 3d 1140 (Fla. 2d DCA 2016).

Three days after the uniform order was rendered, and over two months prior to the trial date, the Bank provided a letter to Azran's counsel inviting them to schedule a pre-trial meeting in which counsel could look at the exhibits, decide what evidence would be admissible absent stipulations, review depositions, discuss settlement, etc. The record does not indicate whether Azran took advantage of that invitation to inspect the Bank's records and exhibits and to engage in discussion. On May 11, 2018, twenty-one days before trial, the Bank furnished opposing counsel with its amended witness list.

The day before trial, Azran filed a motion in limine seeking sanctions against the Bank for non-compliance with the Order. Azran argued that the Bank had not provided it with copies of the trial exhibits, or given it enough time to depose its witness. The trial court heard the arguments and denied the motion. Azran did not call any witnesses or present any evidence at the foreclosure bench trial. At the conclusion of the bench trial, the court granted final judgment in favor of the Bank. Azran argues on appeal that the trial court erred by denying the motion in limine, and the final judgment of foreclosure must be reversed. We disagree.

Azran first asserts that the Bank did not provide it with trial exhibits until the day before trial. The record, however, shows that the Bank made its trial exhibits available to opposing counsel, pursuant to the uniform order, at least two months prior to trial. The Bank was not required by the uniform order to give copies of all

its exhibits to opposing counsel. Rather, the order clearly states: "[a]ll exhibits . . . shall be made available" to opposing counsel. This was not a complex mortgage situation and the documents presented at the trial were the standard note, mortgage, servicers and payment history, etc. There is no claim by Azran that the files were overwhelming, and indeed there is no suggestion in the record that Azran took advantage of the early availability of the records. We conclude on this basis that the trial court did not abuse its discretion by denying the motion in limine.

Azran next argues that "all" of the Bank's trial exhibits are business records of predecessor companies, and are thus hearsay and inadmissible because the Bank failed to satisfy the business records exception to that rule. We disagree.

The Bank's witness, the records custodian from Select Portfolio Servicing, testified that as his company was the subsequent servicer of the mortgage, that he was familiar with the Bank's boarding process, and that the records were verified and boarded accordingly. It is well-settled that a record custodian who has been called to testify under oath need not be the actual person who prepared the document, but he or she must demonstrate knowledge of each requirement for establishing the business record foundation. Bank of N.Y. v. Calloway, 157 So. 3d 1064, 1073 (Fla. 4th DCA 2015). The circumstances of the loan transfer itself would have been sufficient to establish trustworthiness given the business relationships and common practices inherent among lending institutions acquiring and selling loans. Id. Azran

did not object to the witness's competence to testify, it objected to various admitted documents and that the witness did not personally know who "pushed the button" to create those documents.

The business records exception, section 90.803(6), Florida Statutes (2018), allows a party to introduce evidence that would normally be inadmissible hearsay if:

> (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record.

Yisrael v. State, 993 So. 2d 952, 956 (Fla. 2008). The foundation for admission of a business record may be established by a records custodian or other qualified witness, and the witness authenticating the records need not be the person who actually prepared the business records. See Deutsche Bank Tr. Co. Ams. v. Frias, 178 So. 3d 505 (Fla. 4th DCA 2015); Nationstar Mortg., LLC v. Berdecia, 169 So. 3d 209 (Fla. 5th DCA 2015); Cayea v. CitiMortgage, Inc., 138 So. 3d 1214 (Fla. 4th DCA 2014). The witness just needs to be well enough acquainted with the activity to testify that the successor business relies on those records, and that the circumstances indicate the records are trustworthy. Calloway, 157 So. 3d at 1064; Berdecia, 169 So. 3d at 216 ("Although [the witness] did not personally participate in the 'boarding' process . . . , [the witness] demonstrated a sufficient familiarity with the 'boarding' process to testify about it."); Cayea, 138 So. 3d at 1217. It is not necessary to present a

witness who was employed by the prior servicer or who participated in the boarding process. Ocwen Loan Servicing, LLC v. Gundersen, 204 So. 3d 530 (Fla. 4th DCA 2016). "Where a business takes custody of another business's records and integrates them within its own records, the acquired records are treated as having been 'made' by the successor business, such that both records constitute the successor business's singular 'business record.'" Calloway, 157 So. 3d 1064, 1071; see also Bank of N.Y. Mellon v. Johnson, 185 So. 3d 594 (Fla 5th DCA 2016); Wells Fargo Bank, N.A. v. Eisenberg, 220 So. 3d 517 (Fla. 4th DCA 2017); Deutsche Bank Nat'l Tr. Co. v. de Brito, 235 So. 3d 972, 975 (Fla. 3d DCA 2017). With this in mind, the Bank's records were properly admissible, as was the testimony of its witness.

Affirmed.