Florida Real Property and Business Litigation Report

Volume XIII, Issue 16
April 18, 2020
Manuel Farach

Roesch v. U.S. Bank National Association, Case No. 2D18-1686 (2d DCA 2020).
A letter log created by a servicer after communications with its third-party mailing company is hearsay unless the predicate can be laid by the third-party mailing company.

Campos Arana Auto Insurance & Multiservices Agency Corp., Case No. 4D19-1419 (Fla. 4th DCA 2020).
A motion to tax costs need not be verified.

contact

Manuel Farach
member > fort lauderdale

T (954) 356-2528
mfarach@mcglinchey.com

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JOHN MARK ROESCH,

Appellant,

v.

U.S. BANK NATIONAL ASSOCIATION, as trustee for Citigroup Mortgage Loan Trust, Inc., Mortgage Pass-Through Certificates, Series 2006-AR9; RICK CROSBY; and FC NOTES SVC, LLC,

Appellees.

Case No. 2D18-1686

Opinion filed April 15, 2020.

Appeal from the Circuit Court for Pinellas County; Patricia Ann Muscarella, Judge.

Lee Segal of Segal & Schuh Law Group, P.L., Clearwater, for Appellant.

Mary J. Walter of Liebler, Gonzalez, & Portuondo, Miami, for Appellee U.S. Bank National Association, as trustee for Citigroup Mortgage Loan Trust, Inc., Mortgage Pass-Through Certificates, Series 2006-AR9.

No appearance for remaining Appellees.

KHOUZAM, Chief Judge.

U.S. Bank National Association filed a foreclosure suit against John Roesch. In his answer, Roesch denied that U.S. Bank had sent him notice of its intent to accelerate the mortgage debt and foreclose, a condition precedent to foreclosure set forth in paragraph 22 of the mortgage. At the non-jury trial, the lower court entered judgment in favor of the bank over Roesch's motion for involuntary dismissal. On appeal, Roesch argues that a crucial business record used by U.S. Bank contained inadmissible hearsay.[1] We agree and reverse, remanding for dismissal of the foreclosure action.

At trial, Roesch asserted that U.S. Bank had not proven compliance with the notice requirement of paragraph 22 because it failed to send him a default letter announcing its intent to foreclose. While the existence of such a letter itself was not disputed, Roesch argued that it had not been mailed. To prove that it was mailed, U.S. Bank introduced a business record, or "letter log," from Wells Fargo, its loan servicer, indicating the date the letter was sent to Roesch. Roesch made a hearsay objection, arguing that the letter log did not fall under the business records exception to the hearsay rule. The letter log had been created by the servicer after communicating with a third-party vendor responsible for mailing its foreclosure letters. This third-party vendor was not named, and the log was introduced through testimony of the servicer's employee, not an employee of the third-party vendor. Roesch argued below that this letter log was hearsay-within-hearsay and the witness could not properly lay the foundation for the business records exception. The trial court disagreed and allowed

[1]Roesch also argues that the bank did not timely disclose this business record to him before trial. We need not address this argument because the hearsay issue is dispositive.

admission of the letter log, a decision Roesch now appeals. We review a trial court's decision on admissibility of evidence for an abuse of discretion, discretion limited by the rules of evidence. Heller v. Bank of Am., NA, 209 So. 3d 641, 643 (Fla. 2d DCA 2017).

"The fact that a document is drafted is insufficient in itself to establish that it was mailed." Soule v. U.S. Bank Nat'l Ass'n for BNC Mort. Loan Tr. 2007-1 Mort. Pass-Through Certificates, Series 2007-1, 253 So. 3d 679, 681 (Fla. 2d DCA 2018) (quoting Spencer v. Ditech Fin., LLC, 242 So. 3d 1189, 1191 (Fla. 2d DCA 2018)). "[M]ailing must be proven by producing additional evidence such as proof of regular business practices, an affidavit swearing that the letter was mailed, or a return receipt." Id. Often, this evidence falls under the definition of hearsay. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. (2017). Absent an exception, hearsay evidence is inadmissible at trial. § 90.802. Furthermore, if a hearsay statement is nested within another hearsay statement, both statements must fall under an exception to be admissible. See § 90.805; Gosciminski v. State, 994 So. 2d 1018, 1026 (Fla. 2008).

An exception to the prohibition against hearsay exists for records of a regularly conducted business activity. This evidence is admissible when "(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) []it was a regular practice of that business to make such a record." Yisrael v. State, 993 So. 2d 952, 956 (Fla. 2008) (citing § 90.803(6)(a)). "A party can lay a foundation for the business records exception in three

ways: (1) offering testimony of a records custodian, (2) presenting a certification or declaration that each of the elements has been satisfied, or (3) obtaining a stipulation of admissibility." Jackson v. Household Fin. Corp. III, 236 So. 3d 1170, 1172 (Fla. 2d DCA 2018) (footnote omitted). "If the party offers the testimony of a records custodian to lay the foundation, it is not necessary that the testifying witness be the person who created the business records." Id. Rather, "[t]he witness may be any qualified person with knowledge of each of the elements." Id.; see also Deutsche Bank Nat'l Tr. Co. v. de Brito, 235 So. 3d 972, 975 (Fla. 3d DCA 2017) ("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."). And in a foreclosure action, this means that "a representative of a loan servicer testifying at trial is not required to have personal knowledge of the documents being authenticated, but must be familiar with and have knowledge of how the 'company's data [is] produced.' " Sanchez v. Suntrust Bank, 179 So. 3d 538, 541 (Fla. 4th DCA 2015) (alteration in original) (quoting Glarum v. LaSalle Nat'l Ass'n, 83 So. 3d 780, 783 (Fla. 4th DCA 2011)). Without a qualified witness, "[h]earsay information does not become admissible 'merely because it has been recorded in the regular course of business.' " Rivera v. Bank of New York Mellon, 276 So. 3d 979, 982 (Fla. 2d DCA 2019) (quoting Knight v. GTE Fed. Credit Union, 43 Fla. L. Weekly D348, D349 (Fla. 2d DCA Feb. 14, 2018)).

In Knight, this court considered the admissibility of a letter log under facts strikingly similar to this case. The plaintiff in a foreclosure suit introduced a foreclosure default letter into evidence like the one admitted here. 43 Fla. L. Weekly at D349. To

demonstrate that it was mailed, the lender introduced a letter log from its loan servicer through one of the loan servicer's employees. Id. However, the letter itself was sent by another vendor. Id. This vendor did not create the log entries in the servicer's records. Id. Rather, the vendor reported to the servicer, and the servicer created a log of the mailing based on that report. Id. The servicer's employee who testified had no documents with him that either referenced the vendor or indicated that the vendor had mailed the letter on the date in the servicer's letter log. Id. Furthermore, the servicer's employee had not been to the vendor's offices or spoken to its employees. Id. This court held that the letter log was inadmissible under those facts because the servicer's employee "lacked the requisite knowledge to testify as the records custodian." Id. (quoting Jackson, 236 So. 3d at 1175). Since the servicer's employee himself had no contact or adequate familiarity with the vendor's mailing practices, he could not lay the proper foundation for both instances of hearsay in the letter log. Id.

Similarly, U.S. Bank's witness from its servicer could not adequately testify as to the vendor's mailing practices. Indeed, the vendor was not even named at the trial. As in Knight, the vendor did not create the entry in the servicer's letter log, nor did the servicer's employee have any documents that referenced the vendor or confirmed the contents of the servicer's letter log. The servicer's employee had not spoken to the vendor's employees or visited its offices. He was thus unable to act as a record custodian to admit the vendor's mailing records. U.S. Bank's servicer cannot manufacture a sufficiently knowledgeable witness by merely creating its own record of a record. This creates hearsay within hearsay, requiring two hearsay exceptions to apply. And while the servicer's witness might have been able to testify as custodian for the

servicer's record of the vendor's original record, his testimony indicated that he could not act as custodian for the vendor's original record. See Rivera, 276 So. 3d at 982 ("[I]f that 'business record itself contains a hearsay statement, the admissibility of the record depends on whether the hearsay statement in the record would . . . be admissible under some exception to the hearsay rule.' " (quoting Knight, 43 Fla. L. Weekly at D349)). Because its witness could not establish the necessary foundation for both business records exceptions, U.S. Bank's letter log contained inadmissible hearsay and could not be used to prove that the default letter had been mailed.

As an alternative argument against this result, U.S. Bank argues that its copy of the notice letter itself, admitted without objection, contained indicia of mailing in the form of a barcode at the top. The servicer's employee testified that this barcode indicated first class mailing and that he knew this because of his training. Aside from this brief and vague testimony, there is no indication of what this "training" was, who placed the barcode on the letter, or what it means. Even assuming the barcode was placed there by the mailing vendor, the servicer witness could not lay the proper foundation for the same reason he could not lay the foundation for the letter log: his lack of familiarity with the vendor's mailing practices. And because the letter log and the barcode were the only evidence that a default letter was mailed to Roesch, U.S. Bank failed to prove that it was mailed as required by paragraph 22 of the mortgage. We therefore reverse the judgment and remand for dismissal of the foreclosure action.

Reversed and remanded.

ROTHSTEIN-YOUAKIM and SMITH, JJ., Concur.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JOSHUA CAMPOS, an Individual, and **INSTA INSURE, LLC,** a Florida Limited Liability Company,
Appellants,

v.

ARANA AUTO INSURANCE & MULTISERVICES AGENCY CORP., a Florida for profit Corporation,
Appellee.

No. 4D19-1419

[April 15, 2020]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Cymonie S. Rowe, Judge; L.T. Case No. 50-2015-CA-009523-XXXX-MB.

Orrin R. Beilly of the Law Office of Orrin R. Beilly, LLC, Palm Beach Gardens, for appellants.

No brief filed on behalf of appellee.

PER CURIAM.

The trial court denied a motion to tax costs based on a lack of verification. Because there is no requirement that a motion to tax costs be verified or accompanied by affidavit, we reverse and remand for further proceedings.

After a bench trial, the trial court entered a final judgment in favor of the appellants, the defendants below. The appellants filed a motion to tax costs, wherein the type of costs sought to be reimbursed was categorized and amounts provided. The order denying the motion provided that counsel failed to appear and that the motion was insufficient due to a lack of verification. The appellants then filed a verified motion for rehearing, wherein they explained the extenuating circumstances surrounding counsel's absence and pointed out that counsel was prepared to offer evidence in support of the motion. The following exhibits were attached to the motion for rehearing: invoices for court reporting services, including the production of transcripts; a mediation conference report and

photocopies of a check or checks made out to the mediator; and an invoice for an expert's services.

The trial court's order setting a hearing on the motion for rehearing provides that "the attorneys/parties must submit to the Court . . . 1. copies of all relevant pleadings; 2. a copy of any memorandum of law . . . ; 3. copies of all case law authority."

After the hearing was held, the trial court denied the motion for rehearing, reasoning that the parties failed to submit "*all* relevant pleadings prior to the hearing" and that the appellants' counsel "never verified the costs in the [original motion to tax costs], which was the original basis of the Court's denial." The court further reasoned that "[w]hen seeking to tax costs, the movant must file the appropriate motion, attaching a verified statement setting forth the items claimed to be taxable."

Section 57.041(1), Florida Statutes (2018), provides in pertinent part that "[t]he party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment[.]" The claim for costs does not need to be asserted in the pleadings. *See First Protective Ins. Co. v. Featherston*, 978 So. 2d 881, 883 (Fla. 2d DCA 2008).

Florida Rule of Civil Procedure 1.525 provides in pertinent part that "[a]ny party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment[.]" Florida Rule of Civil Procedure 1.100(b) provides that motions "must be made in writing unless made during a hearing or trial, must state with particularity the grounds for it, and must set forth the relief or order sought." This court has held that these rules do not require a supporting affidavit. *See Silver Springs Props., L.L.C. v. ERA Murray Realties, Inc.*, 874 So. 2d 712, 714 (Fla. 4th DCA 2004). Other courts have agreed. *See McDaniel v. Edmonds*, 990 So. 2d 9, 12 (Fla. 2d DCA 2008) ("Rule 1.100(b) does not impose a requirement that motions for attorney's fees and costs be accompanied by affidavits setting forth the amount of fees and costs claimed."); *Seminole Cty. v. Koziara*, 881 So. 2d 83, 84 n.2 (Fla. 5th DCA 2004) ("[N]othing in section 57.041, Florida Statutes or Florida Rule of Civil Procedure 1.525 requires supporting affidavits. If (as there almost never is) there is a genuine dispute over an identified item of taxable costs, the court should conduct a hearing to resolve the dispute." (citation omitted)).

Based on the foregoing, we find that the trial court erred in denying the motion based on a lack of verification and on counsel's failure to submit "*all* relevant pleadings." We reverse and remand for further proceedings.

Reversed.

LEVINE, C.J., CIKLIN and GERBER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.