

QUESTION PRESENTED

The core appellate issue is what may constitute the “personal knowledge” required for a witness to authenticate documents and to lay the foundation for a business records exception to hearsay for those documents. Specifically, it presents the question whether the party offering those documents as evidence may convey information to its otherwise unknowledgeable witness to create a veneer of “personal knowledge” with two simple preparatory steps:

- having its witness read the documents before trial; and
- telling its witness what to say in court about the record-keeping policies of an entirely different entity which actually created and kept the records.

The trial court believed that only the first step—simply having the witness read the records before trial—was sufficient to qualify the witness to testify:

THE COURT: ... I think the case law makes it clear that a representative of the ... servicer who has got the kind of responsibility as the witness has is competent to testify on the business practices and the accuracy of records if he has reviewed the file prior to testifying.²

Notably, the witness’s job “responsibility” to which the trial court referred was working with the Bank’s attorneys to move contested foreclosure matters to “resolution.”³

It was manifest error to admit the hearsay documents.

² Transcript of Trial held September 25, 2013 (“T. ___”; Supp. R. 1), p. 200-201.

³ T. 36, 140, 188-190.

STATEMENT OF THE CASE AND FACTS

I. The Pleadings.

In 2006, Joseph B. Gerard signed a Note payable to America's Wholesale Lender, a trade name of Countrywide Home Loans, Inc.⁴ He and his wife, Marie Donna Bastien, signed a Mortgage to Mortgage Electronic Registration Systems, Inc.⁵ making their home collateral for the loan. In 2008, after the Homeowners were no longer able to make timely payments, a stranger to the original transaction, Countrywide Home Loans Servicing, LP, filed a foreclosure action claiming to be the "servicer for the owner and acting on behalf of the owner with authority to do so" as well as something it called a "designated holder of the note and mortgage."⁶ Despite this claim to be a holder, the copy of the Note attached to the Complaint was not endorsed. And, in any event, the original note, having been lost, was not in the Bank's possession.⁷

⁴ Interest Only Fixed Rate Note attached to Complaint to Foreclose Mortgage and to Enforce Lost Loan Documents (R. 19) and endorsed version attached to Amended Complaint to Foreclose Mortgage (R. 126).

⁵ Mortgage attached to Complaint (R. 4). Ms. Bastien was not, however, identified as a mortgagor in the "granting clause" of the mortgage.

⁶ Complaint, filed April 10, 2009, ¶ 5 (R. 1).

⁷ Complaint, Count II (R. 2-3).

Over a year later, the Bank amended the Complaint to drop its lost note count.⁸ Attached was a copy of the Note which was now sporting a new endorsement in blank purporting to have been executed by the original lender.⁹ After preliminary motions, the Homeowners filed an Answer and Affirmative Defenses¹⁰ which they later amended.¹¹

During the litigation, Countrywide (when represented by the Law Offices of David J. Stern) notified the court that its name had changed to BAC Home Loans Servicing, LP.¹² BAC later announced that it had merged into Bank of America, N.A.¹³ This name change and merger were the result of Bank of America's purchase of the separate entity, Countrywide.¹⁴

⁸ Amended Complaint to Foreclose Mortgage, filed May 24, 2010 (R. 106).

⁹ R. 126.

¹⁰ Defendants, Joseph B. Gerard and Marie Donna Bastien's, Answer to Amended Complaint and Affirmative Defenses, served October 5, 2011 (R. 248).

¹¹ Defendants, Joseph B. Gerard and Marie Donna Bastien's, Amended Answer to Amended Complaint and Affirmative Defenses, served May 16, 2013 (R. 332).

¹² Notice of Name Change of Plaintiff, served August 11, 2010 (R. 130).

¹³ BAC's Motion to Substitute Party Plaintiff, served June 18, 2013 (R. 357).

¹⁴ *See*, T. 44, 181.

II. The Trial—The Bank’s “Document Reader.”

At trial, the Bank called a single witness, John Blade, to prove all the elements of its case. Mr. Blade is a lawyer by education.¹⁵ At the time of trial, he had been an employee of Bank of America, N.A. for approximately fifteen months.¹⁶ His employment, therefore, started three years after the previous servicer was purchased by Bank of America and, coincidentally, about three years after this case was filed.¹⁷

His job duties as “Mortgage Resolution Associate”—the only post he has ever held at the Bank¹⁸—are to work with outside counsel to move his “portfolio of contested foreclosure matters” to resolution by verifying and consulting the Bank’s records and testifying.¹⁹ With the exception of a handful of situations that are “potentially litigious,” he deals exclusively with foreclosure cases that are actively

¹⁵ T. 220.

¹⁶ T. 75.

¹⁷ The merger of BAC Home Loans Servicing, LP into Bank of America was in July of 2011 (T. 40), but Countrywide became part of the Bank of America conglomerate at some time before April 21, 2009 (Plaintiff’s Exhibit 1; R. Exh. 4).

¹⁸ T. 179.

¹⁹ T. 36, 140, 188-189.

being litigated—i.e. they have already been filed and contested by an answer or denial.²⁰

The Bank trained him for this job, by telling him what to say about the record-keeping policies of the previous servicer the Bank had purchased, Countrywide:

TESTIMONY	BASIS
Bank of America adopted the same systems used by Countrywide.	“Based on my training and experience with the bank.” ²¹
When a collateral file is received [by Countrywide], the contents are examined and confirmed as to belonging to the correct loan and to make sure it is endorsed and logged into the system.	“Based on my training with the bank.” ²²
Countrywide’s record that allegedly shows that the Note was received by that company on February 11, 2006 is from the same system now used by Bank of America.	“Based on my training and experience with dealing with many of these kinds of records.” ²³
Bank of America uses the same system as Countrywide.	“Based on my training and experience with dealing with these records.” ²⁴

²⁰ T. 189-190.

²¹ T. 43-44.

²² T. 72-73.

²³ T. 82-83.

TESTIMONY	BASIS
Countrywide logged information into the instance summary at or around the time that it received the Note.	“Based on my training with the bank.” ²⁵
Individuals in the cashiering department (where he has never worked) directly enter the information in the loan payment history.	“Based on my training and experience with the bank.” ²⁶
Claimed familiarity with the policies and procedures that were in place for the entry of payment information at Countrywide or BAC.	“...We’ve had quite a bit of training [by Bank of America] on the correct inputting of records, including how those were done within Countrywide and BAC.” ²⁷
Bank of America inputs records in the same way and into the same system as Countrywide did.	“Based on my training, based on my experience with reviewing the files and the accuracy of information.” ²⁸
Records from other servicers that are boarded into the Bank of America system are audited and cross-checked when they come in.	“...I have received training as to these practices.” ²⁹

²⁴ T. 83.

²⁵ T. 97-98.

²⁶ T. 129.

²⁷ T. 140-41.

²⁸ T. 139.

²⁹ T. 141.

TESTIMONY	BASIS
Claimed familiarity with the process and procedures used by Countrywide’s Breach Letter Department.	“From my training and experience with the bank.” ³⁰
Countrywide sent the acceleration notice by first class mail and certified mail.	“From my training and experience with the bank...” ³¹

The court sustained objections to several other questions about the basis for Blade’s purported knowledge:³²

- “Q. ...Though you may be aware of the policies and procedures that govern the various departments of the bank, you don’t actually have any firsthand knowledge of how those policies and procedures are applied or carried out in those various departments, correct?”³³
- “Q. And that great faith [in the integrity of the Bank’s records] is largely, if not entirely, formed by the training that you have received on the policies and procedures of the various departments in the bank, correct?”³⁴
- After witness denies that the only reason he believes everything contained in the computer system is accurate is because he was trained to

³⁰ T. 154.

³¹ T. 155.

³² While not a point that would, standing alone, require reversal, erroneously sustaining the objections to these questions blocked additional testimony that most likely would have further demonstrated the witness’s lack of personal knowledge.

³³ T. 200. Objection sustained as “asked and answered.”

³⁴ T. 200. Objection sustained as “asked and answered” and “mischaracterization of the testimony.”

believe that by Bank of America: “Q. In other words, then, there are independent means that you have to verify the information that’s contained in this instance detail?”³⁵

The Bank’s training of Blade consisted of large group sessions that addressed basic policies and procedures and how to use the systems and how to input data.³⁶ In those sessions, they would “discuss” how Bank of America would create records in departments other than that in which the witness worked.³⁷

Blade never worked for Bank of America’s Cashiering Department—much less that of Countrywide (or BAC Home Loans Servicing, LP.)—which created the records regarding incoming payments.³⁸ And although he “believe[d]—if memory serves” that this particular account used automatic debiting for payments, he did not know the details of how the automatic debiting system works. Nor did he know the “specifics behind this particular debiting account and how it was set up.”³⁹

Blade never worked in, or supervised anyone in, the Boarding Department that would audit data being transferred from other servicers.⁴⁰ He conceded that, in

³⁵ T. 77. Objection sustained on “relevance.”

³⁶ T. 184.

³⁷ T. 186-87.

³⁸ T. 129, 130, 142.

³⁹ T. 205, 210, 212.

⁴⁰ T. 140.

any event, for Countrywide’s data, there was “not a boarding in the normal sense...[but]... more of a continuation of the prior existing records.”⁴¹ Although he still claimed there was a “very large auditing process that took place,” the witness never demonstrated sufficient personal knowledge to describe it:

Q. [Bank’s counsel] So although there was an auditing process you said -- Did that auditing process occur when the merger occurred?

MR. HOLTZ: Objection; calls for hearsay, lack of personal knowledge.

THE COURT: Sustained.

THE WITNESS: It was sustained.

THE COURT: Lay a foundation.⁴²

Rather than laying a foundation, the Bank’s counsel went on to have the witness say that, based on what he had been told, the Countrywide documents were the same as Countrywide had maintained them: “Yes, they are the same records maintained in the same systems, created in the same way, maintained in the same way.”⁴³

⁴¹ T. 146.

⁴² T. 147.

⁴³ T. 148.

Additionally, Blade never worked in the Collateral Department of Bank of America—much less that of Countrywide—which he asserted created the “Instance Detail” (Plaintiff’s Exhibit 5) six years before he began his employment at the Bank.⁴⁴ Based on his training, he claimed that the Instance Detail disclosed when Countrywide received an endorsed copy of the Promissory Note. The document states, however, that the “current location” of the Note on the date of that record was a law firm, Phelan Hallinan, PLC:

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DOC404R          Bank of America Home Loan          8/05/13
NBKL02U          Instance Detail                    13:02:36
Account          [Redacted]9902 JOSEPH B GERARD .....
Doc Type        N,,      NOTE .....

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Instance No.    001          (Current Instance)
Instance Type   IO__ Indorsed Original Note
Received Date   2/11/06
Inv Qualified   Y__
Recon Qualified N/A
FCL Qualified   Y__

Src. of info    __          No of Pages    __
Status: A Active
Custodian       DH/00101 CF@RECON TRUST COMPANY, N.A.
Current Location AT/01156 CF@PHELAN HALLINAN, PLC
  
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Law firm
that
appeared in
2013

PLAINTIFF’S EXHIBIT 5

⁴⁴ T. 74-75, 97.

Phelan Hallinan, however did not become counsel of record in this case until four years after the case was filed when it first made an appearance for BAC Home Loans Servicing.⁴⁵

Additionally, the Instance Detail listed the “Custodian” as Recon Trust Company, N.A.—another company for which Blade had never worked.⁴⁶ Blade conceded that he did not know when Recon Trust Company had possession of the note—or if it ever did—because knowledge of this “really goes beyond my job duties.”⁴⁷

Additionally, Blade never worked in the Breach Letter Department of Bank of America —much less that of Countrywide—which he asserted sent out a notice of acceleration.⁴⁸ His testimony that Countrywide actually mailed the letter, and when it mailed the letter, was based on the document itself, as well as what his employer told him about Countrywide’s procedures.⁴⁹ He also asserted the letter

⁴⁵ Stipulation for Substitution of Counsel for Plaintiff, served April 25, 2013 (R. 320). The letter attached to the Stipulation is dated December 14, 2012 and is entitled “Transfer of Bank of America files from Morales Law Group, P.A. to Phelan Hallinan, PLC...” implying that, if the Bank gave its attorney possession of the original Note as suggested by Blade (T. 100-01), it was not transferred to Phelan Hallinan until late 2012.

⁴⁶ T. 86, Plaintiff Exhibit 5 (R. Exh. 31).

⁴⁷ T. 93-94, 95.

⁴⁸ T. 154, 179.

⁴⁹ T. 154, 155, 156.

had been received ten days later based on a return receipt containing a signature by Donna Bastien.⁵⁰

The only time Blade looked at the information regarding the loan in this case was after it was assigned to him as a contested foreclosure case.⁵¹ He had never seen what he identified to be the original note before the day of trial.⁵²

Over repeated hearsay objections, the trial court admitted every Bank document proffered as an exhibit.⁵³ After the Bank rested, and again after the defense rested, the Homeowners moved for involuntary dismissal—motions which the court denied.⁵⁴ Based on the Plaintiff's exhibits and Blade's testimony about them, the court entered judgment for the Bank⁵⁵ from which this appeal was taken.⁵⁶

⁵⁰ T. 157; Plaintiff's Exhibit 7 (R. Exh. 40).

⁵¹ T. 191.

⁵² T. 50.

⁵³ Plaintiff's Exhibits 1-2, 4-8 (R. Exh. 1-9, 14-44); T. 41, 64, 69, 102, 153, 158, 174 (Plaintiff's Exhibit 3 for identification was never moved into evidence.)

⁵⁴ T. 236, 251.

⁵⁵ Final Judgment of Foreclosure, filed September 25, 2013 (R. 483).

⁵⁶ Notice of Appeal, filed October 10, 2013 (R. 503).

SUMMARY OF THE ARGUMENT

The Bank's sole witness, John Blade, was a professional testifier hired and trained by the Bank to read records about which he had no personal knowledge and then regurgitate them to the fact-finder at trial. His only connection to the documents and record-keeping policies to which he testified (all of which were from companies and departments for which he had never worked) was that he had read them after being assigned to this trial or told about them during training to be a witness. His knowledge was not "personal" because it was not gained through actual experience with the documents and policies in the course of a business-related duty. Instead it is hearsay knowledge of the worst kind because it was imparted to him for the very purpose of this litigation.

As a result, the Bank failed to prove it had standing at the inception of the suit because there was no admissible testimony as to when the endorsement—which appeared over a year after the suit was filed—was placed on the Note. For the same reason, the Bank also failed to prove conditions precedent and damages.

The trial court should have granted an involuntary dismissal because there was no competent evidence to support the elements of the Bank's claim.