

B. The Trial—the Bank’s document reader.

At trial, the Bank called a single witness, Michelle Words, to prove all the elements of its case. Ms. Words is an attorney by education and was licensed to practice law in 2006.¹⁵ She has been an employee of Bank of America, N.A. for about two years.¹⁶ Her job duties as “Assistant Vice President and Mortgage Resolution Associate” are to “work with in-house and outside counsel to resolve cases that are in current litigation.”¹⁷ A significant portion of these duties is testifying at trials and at depositions.¹⁸ The Bank trained her for this job which consisted of role playing as a witness¹⁹ and instruction on various Bank of America policies and procedures concerning loans in default.²⁰ As she put it:

My job is to manage a case load as well as review documents and loan information that relates to loans that are in default primarily, and to work with our counsel to resolve litigated issues, whether that involves providing documentation of the bank to our counsel or to appear as a witness in a trial or deposition.²¹

Thus, Ms. Words’ duties and training were litigation oriented—not the day-to-day business of the Bank.

¹⁵ Transcript of Trial (“T. __”), p. 69 (attached to Motion to Supplement the Record on Appeal, dated February 20, 2014).

¹⁶ T. 15.

¹⁷ T. 15.

¹⁸ T. 65.

¹⁹ T. 67-68.

²⁰ T. 16-17; 74.

²¹ T. 19.

Despite this training, she could not identify the group within the Bank who would be notified if a loan payment was missed and was uncertain to which department that group belonged. She believed that the group was “possibly” part of the Pre-Foreclosure Department—a department for which she had never worked.²² She was not certain how the group is notified of overdue payments, but stated “there’s probably a reporting once a payment is missed and then the default letters are then sent to the borrower.”²³

Also, she had never worked in Bank of America’s Payment Processing Department which would have input the payment records about which she testified. She conceded that her knowledge of that department’s procedures for recording payments was based entirely on what she was told during “training.”²⁴ She was trained how to review loan information in the Bank’s “AS-400” computer system, but cannot input information.²⁵ She was trained how to review images of documents in the Bank’s “iPortal” computer system, but cannot image documents herself.²⁶

²² T. 75-76.

²³ T. 76-77.

²⁴ T. 89-90.

²⁵ T. 81.

²⁶ T. 82.

Additionally, Ms. Words never worked for the original lender, Diversified Mortgage.²⁷ She was never in charge of creating or maintaining its records and readily conceded she knew nothing about its policies for the maintenance of documents there.²⁸ She was not present whenever Diversified executed the endorsement on the allonge.²⁹ In fact, the Bank’s counsel posited that because “she wasn’t there [when Diversified endorsed the Allonge], she wouldn’t have known anything.”³⁰

Moreover, Ms. Words never worked for, or supervised anyone who worked for, Recon Trust, the company she said maintained the Note and Mortgage before they were sent to the Bank’s foreclosure attorneys.³¹ She conceded she was not familiar with Recon Trust’s policies and procedures, and that anything she knew had been told to her by way of the Bank of America training and a former Recon Trust employee.³²

²⁷ T. 137.

²⁸ T. 137.

²⁹ T. 25, 138.

³⁰ T. 138.

³¹ T. 112, 123, 125.

³² T. 123-124.

Likewise, Ms. Words never worked for the original plaintiff, Countrywide Bank, FSB or the predecessor servicer, Countrywide Home Loans, Inc.³³ Her knowledge of Countrywide's recordkeeping policies and procedures was based solely on what she was told by Bank of America while being trained to be a witness:

Q. Let's talk about the policies and procedures of Countrywide for maintaining documents. You have not been instructed on the policies and procedures at Countrywide before any merger or name change or anything involving Bank of America, were you?

A. [Ms. Words] It's my understanding that those are the same policies and procedures in place.

Q. That's what someone told you, right?

A. That would be part of my training, yes.³⁴

(She was confident that the people who told her about the Countrywide record-keeping policies were, in fact, knowledgeable about them...because they told her that they were.³⁵) She admitted that she did not know whether Bank of America had done anything to verify that Countrywide's records were accurate.³⁶

³³ See T. 18, 131. "Countrywide" appears to be used throughout the transcript to refer to either entity and will similarly be used here to refer to one or both as context permits.

³⁴ T. 129.

³⁵ T. 130-131.

³⁶ T. 136.

Prior to her assignment as a witness in this case, she had never seen the documents she testified about and knew nothing about the case or the Peugueros.³⁷ Only after being assigned to testify in this case, she prepared for her courtroom presentation by reviewing the documents later presented as evidence: the Note, the Mortgage, the breach (or “default”) letter, and the payment history.³⁸ When asked if she had reviewed the entire loan file for the Peugueros, she responded that she had only reviewed the information that she herself determined was “pertinent.”³⁹ She conceded that there is additional information pertaining to the loan in the computer system that was not included in the printout provided as an exhibit.⁴⁰

After these documents had been admitted into evidence over objection, the Bank’s counsel showed the witness the proposed final judgment. She claimed that she had verified “the information on the final judgment” using “bank records,” with the payment history (Exhibit 2) serving as “one reference.”⁴¹ Over objection,

³⁷ T. 70.

³⁸ T. 20.

³⁹ T. 73.

⁴⁰ T. 91.

⁴¹ T. 58.

Ms. Words was then permitted to read various figures from the proposed final judgment—which was not in evidence.⁴²

After cross-examination and the close of the Bank’s case, the Homeowners moved for an involuntary dismissal upon which the court reserved ruling.⁴³ The Homeowners’ case consisted of the testimony of Natacha Peugnero who affirmed that she did not remember ever seeing the default letter (Exhibit 3).⁴⁴

The Homeowners also read excerpts from a deposition of Michele Sjolander—an “Executive Vice President” of Countrywide Home Loans, Inc. whose name appears on the endorsement stamp from that entity back to Countrywide Bank, FSB.⁴⁵ Her testimony established that there had existed an unknown number of rubber stamps with her name that were routinely used by others to endorse notes.⁴⁶ She had no oversight regarding when they were used or which promissory notes were stamped.⁴⁷ When the stamps were no longer needed, she retrieved them, took them home, and burned them.⁴⁸

⁴² T. 59-63.

⁴³ T. 187-204.

⁴⁴ T. 217-18.

⁴⁵ T. 224-34.

⁴⁶ T. 227-28.

⁴⁷ T. 232-33.

⁴⁸ T. 228-29.

The Homeowners closed their case and renewed their motion for involuntary dismissal, as well as all prior motions and objections.⁴⁹ The court once again reserved ruling, but later entered an order denying the motion for involuntary dismissal⁵⁰ and executed a judgment in favor of the Bank.⁵¹ The Homeowners promptly appealed.⁵²

⁴⁹ T. 237.

⁵⁰ Order on Defendant's Motion for Involuntary Dismissal, dated August 27, 2013 (R. 504).

⁵¹ Final Judgment dated August 27, 2013 (R. 490).

⁵² Notice of Appeal, docketed August 29, 2013 (R. 508).

SUMMARY OF THE ARGUMENT

The Bank's sole witness, Michelle Words, was a professional testifier hired and trained by the Bank to read records about which she had no personal knowledge and then regurgitate them to the fact-finder at trial. Her only connection to the documents and record-keeping policies to which she testified (all of which were from companies and departments for which she had never worked) was that she had read them after being assigned to this trial or told about them during training to be a witness. Her 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 her 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 endorsements were stamped on an Allonge which first appeared years after the suit was filed. For the same reason, the Bank also failed to prove conditions precedent and damages.

Worse, there was no evidence to support the amount of interest awarded, which represented more than a quarter of the total damages. Instead, the court awarded an amount that the witness read (over objection) from a proposed judgment. The trial court should have granted an involuntary dismissal because there was no competent evidence to support the elements of the Bank's claim.