

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket Number CUM-19-48

**THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW
YORK, AS TRUSTEE (CWALT 2005-07CB)**

Appellant

v.

MICHAEL BUCK & DANIELLE SHONE

Appellees

ON APPEAL FROM CUMBERLAND COUNTY SUPERIOR COURT

Superior Court Docket Number PORSC-RE-15116

REPLY BRIEF FOR THE PLAINTIFF-APPELLANT

THE BANK OF NEW YORK MELLON

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ARGUMENT

In proffering the arguments contained within its appellee brief, Defendants make three broad assertions - none of which assist them on appeal.

First, the Defendants falsely argue that the business records at issue in this case, Plaintiff's Exhibit D: "Notice of Default" (hereinafter "notice of default") are those of Bendett & McHugh, P.C.'s, ("BMPC"), the law firm representing Plaintiff in this matter. Rather, the business records at issue are not the business records of BMPC but in fact the business records of Bayview Loan Servicing, LLC ("Bayview"), for whom the presenting witness is employed.

Second, the Defendants falsely argue that a notice of mortgagor's right to cure pursuant to 14 M.R.S.A. § 6111 ("notice of default") in a foreclosure case is somehow subject to greater requirements than those established by M.R. Evid. 803(6) for other business records, requiring personal knowledge of the contents of the business records by a proffering witness. Defendants' claim finds no basis in law or fact and is devoid of any supporting authority.

Third, Defendants falsely argue that Plaintiff's witness is not

qualified to lay the foundation for the entry of the notice of default by summarily disregarding the extensive testimony provided by Plaintiff's witness.

For these reasons - expounded upon below while incorporating all arguments previously raised in its appellant brief - Plaintiff respectfully submits that the Trial Court's decision to disallow the notice of default into evidence was in clear error and that the subsequent judgment for the Defendants should be reversed.

1. The business records at issue are not the business records of Bendett & McHugh, PC, but the business records of Bayview Loan Servicing, LLC, for whom the presenting witness is employed, and are therefore governed by the requirements of M.R. Evid. 803(6).

The issue in this case is the sufficiency of the foundation laid by Plaintiff's witness testimony as it relates to Bayview Loan Servicing, LLC's ("Bayview") business records. Bayview is the loan servicer for the Plaintiff and its employee, Mr. James D'Orlando ("the witness"), provided the testimony necessary for entry of its business record, the said notice of default. The notice of default was not presented as a business record of BMPC and the witness was not

presented as a witness for BMPC. Nor do they need to be. The business record specifically in dispute in this case is a business record which has been memorialized and incorporated into Bayview's business records. See Trial Transcript ("Tr.") at page 57, lines 15-18 (Plaintiff's witness: "[A]fter we provide the information to counsel, they then draft the demand letter for us, and then they provide us with a copy that we upload into our system. It becomes a part of our records moving forward.") On page 12 of the Defendants' brief ("Def. br."), Defendants argue that "Mr. D'Orlando did not testify as to any knowledge of the law firm's on site business practices". Defendants continue on page 13 of their brief, "[t]he witness did not offer information or state his intimate knowledge or familiarity what the business practices of the law firm were. . . at the time the Notice of Default letter was created and mailed."

Completely mischaracterizing the issue in this case, Defendants write that, "Plaintiff argues its witness only needed sufficient knowledge of the law firm's regular general business practices." Def. br. pg. 15. The business practices of the law firm, BMPC, are not the practices at issue in this case. Mr. D'Orlando's testimony shows that Bayview Loan Servicing, LLC – not Bendett & McHugh – develops and

implements the procedures for creation and maintenance, with which Bendett & McHugh is required to comply to generate and send the Notice. *See* Tr. pg. 59 lines 22-25, pg. 60 lines 1-6 (Plaintiff's witness testifies that Bayview conclusively establishes that the law firm complies with Bayview's requirements for the demand letter.)

With respect to the demand letter, the testimony in this case was that of Bayview Loan Servicing, LLC's business records. The record shows that while Plaintiff's law firm, Bendett & McHugh, sent the notice of default to the Defendants on behalf of its client, every step which Bendett & McHugh took to do so is Bayview's business practice. Mr. D'Orlando testified that it is a regular business practice at Bayview for law firms to send Notices on its behalf. *See* Tr. pg. 52-53, lines 25-3. He testified, *inter alia*, that Bayview provides the figures for the Notice (Tr. pg. 55, lines 4-6); that the firm provides a copy of the Notice that gets uploaded into Bayview's system (Tr. pg. 57, lines 16-17); that Bayview has strict requirements for how the Notice is uploaded from Bendett & McHugh to Bayview (Tr. pg. 63, lines 22-24); and that Bendett & McHugh is rigorously audited to ensure accuracy and compliance with **Bayview's business procedures** and requirements. *See* Tr. pages 58-61.

As a result, it is clear that the testimony regarding the notice of default in this case was entirely and only that of Bayview Loan Servicing LLC's business records. None of the aforementioned steps are the product of Bendett & McHugh's business practices. Rather, the testimony in this case unequivocally shows that, as part of the ordinary course of Bayview's business, Bendett & McHugh carries out Bayview's practices when sending out the demand letter.

2. The notice of default pursuant to 14 M.R.S.A. § 6111, as a business record, is subject only to those requirements established in M.R. Evid. 803(6) and do not require personal knowledge of the events stated therein.

Defendants, as does the Court, appear to misunderstand the purpose of the business records exception created by M.R. Evid. 803(6) and argue that a notice of default sent to a mortgagor should be subject to more stringent rules than other business records. Simply put, contrary to the Courts ruling and the Defendants' arguments, a proponent of a business record does not have to provide a witness who has personal knowledge of the facts stated in the business record.

Without requiring firsthand testimony regarding the recorded facts, a party may satisfy the requirements of M. R. Evid. 803(6) by “offering a witness with knowledge of the business practices for production and retention of the record sufficient to ensure the reliability and trustworthiness of the record.” *Beneficial Maine Inc. v. Carter*, 2011 ME 77, ¶ 12, 25 A.3d 96; *see also JPMorgan Chase Co., NA, v. Lowell*, 2017 ME 32, ¶ 11, 156 A.3d 727; *Deutsche Bank Nat'l Trust Co. v. Eddins*, 2018 ME 47, ¶11, 182 A.3d 1241 (“The witness who testifies to the predicate for the admission of a business record need not have personal knowledge about the matter that is memorialized in the document, because the foundational elements of a Rule 803(6) business record, by themselves, provide sufficient indication that the information contained in the record is reliable and trustworthy”).

The purpose of the business records exception to the rule against hearsay is effectively the exact opposite of the “rule” that Defendants suggest. A rule requiring more – such as personal knowledge from a witness who themselves has supervised or participated in the day-to-day operations of the prior business – contradicts both the Rules of Evidence and governing case law.

Maine’s requirements for the admission of integrated business records substantially mirror those of the Federal Rules of Evidence, which likewise impose no additional requirements beyond those stated in Rule 803(6). As the First Circuit notes, in an opinion authored by Justice Souter:

While Federal Rule 803(6) and Maine Rule 803(6) were not entire facsimiles of one another at the time the District Court decided this case, an authoritative treatise on Maine evidence had noted that the State and Federal versions of the rule were “substantively the same,” Richard H. Field & Peter L. Murray, *Maine Evidence* 417 (4th ed. 1997), and **the State has recently revised its Rule 803(6) so that its text is now identical to the Federal Rule, Me. R. Evid. 803(6) advisory committee's note to August 2018 amendment (amending the Maine Rule “to follow a corresponding 2014 amendment” to the Federal Rule).** Maine cases also take the same basic approach as our cases do: **Maine permits the admission of integrated business records if the evidence “demonstrate[s] the reliability and trustworthiness of the information.”** *Beneficial Me. Inc. v. Carter*, 2011 ME 77, 25 A.3d 96, 102 (Me. 2011). [Emphasis added]

U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust v. Jones, --F.3d--, No. 18-1719 (1st Cir. May 30, 2019) (affirming the trial court’s determination to admit the foreclosing plaintiff’s payment history, which included integrated business records). Plaintiff complied with the requirements to admit the demand letter into evidence. There are no additional requirements

beyond those stated in M. R. Evid. 803(6). Defendants argue that “[t]here was no testimony about whether the attorney who ‘signed’ the letter ever saw it; reviewed it; or, even was in the building or in Connecticut at the time it was ‘signed.’” See Defendants’ brief, p. 13. Further, Defendants state on page 14 of the brief that “[t]he Bayview witness never testified 1) about the time frame when the law firm letter was drafted; 2) about the process used by the law firm for the content to compose the letter, review the letter or the mailing process; 3) about the process involving how the name of the attorney is chose to be printed in the signature line; 4) about how the attorney reviews and determines the validity and correctness of the letters; and 5) about any process of obtaining confirmation mailing or the receipt of the letter by the Defendants.”

The error in Defendants’ argument, as in the Court’s decision, is that there *is no* requirement that a proponent of a business record provide a witness with personal knowledge of the facts stated therein to lay the foundation, and the Defendants’ assertion that notices of default in a foreclosure case have to comply with additional requirements beyond those established by M.R. Evid. 803(6) is simply incorrect. Defendants’ argument that notices of default should be

elevated from being considered a “business record” as defined by the Rules of Evidence into some other “greater” category of evidence because they are not just “any old business record” lacks entirely for authority.

Defendants fail to provide any authority for these additional requirements. None exists. Nor should such authority exist. Testimony to lay the foundation for a notice of default in a foreclosure – where the only event giving rise to the complaint is the nonpayment of a loan – would effectively take hours, perhaps even days if, as the Defendants argue, the witness laying the foundation had to testify as to every detail in minutia from the moment a blank document is generated to the moment that it is mailed. It surely outlasts the five requirements set forth in M. R. Evid. 803(6) for admission of a business record.

These additional requirements - imposed as the Defendants would have them - would contravene the very reason for the business records exception: “to allow the consideration of a business record, without requiring firsthand testimony regarding the recorded facts, by supplying a witness whose knowledge of business practices for production and retention of the record is sufficient to ensure the

reliability and trustworthiness of the record.” *Carter, supra*, 2011 ME 77 at ¶ 12.

Continuing, Defendants asserts that “[a] § 6111 letter, however, *is no mere business record* – a memorandum, report, or record or data[.]” (Def. br. pg. 18)(emphasis added). In doing so, however, Defendants do not suggest what a demand letter *should* be if not a business record. That’s because - to state the obvious - a § 6111 letter is a *record* created in the course of one’s *business*. No more and no less. Defendants cite to no authority indicating that a notice of default is more important than any other document in a mortgage foreclosure. Again, none exists. Indeed, by way of comparison, the foreclosure laws of the State of Maine *do* provide for special treatment of the Note which is the subject of the foreclosure action, the possession of which and review of the original by the Court being typically necessary to secure judgment on behalf of the mortgagee. No special requirements exist as to the notice of default. As such, Defendants should not prevail on these arguments, and the decision of the Trial Court should be reversed.

3. Plaintiff's witness, having provided extensive testimony laying the foundation for entry of the notice of default, is qualified to do so.

Defendants incorrectly argue that Plaintiff's witness is not qualified to lay the foundation for the entry of the notice of default by summarily, disregarding and failing to acknowledge what was in fact extensive testimony with respect to the demand letter.

As previously stated, the Plaintiff's witness, Mr. D'Orlando, testified that it is a regular business practice at Bayview for law firms to send Notices on its behalf. See Tr. pg. 52-53, lines 25-3. He testified, *inter alia*, that Bayview provides the figures for the Notice (Tr. pg. 55, lines 4-6); that the firm provides a copy of the Notice that gets uploaded into Bayview's system (Tr. pg. 57, lines 16-17); that Bayview has strict requirements for how the Notice is uploaded from Bendett & McHugh to Bayview (Tr. pg. 63, lines 22-24); and that Bendett & McHugh is rigorously audited to ensure accuracy and compliance with Bayview's business procedures and requirements. See Tr. pages 58-61. See Trial Transcript ("Tr.") at page 57, lines 15-18 (Plaintiff's witness: "[A]fter we provide the information to counsel, they then draft the demand letter for us, and then they provide us

with a copy that we upload into our system. It becomes a part of our records moving forward.”)

Repeatedly, the Trial Court stated that Mr. D’Orlando, testifying that his responsibilities at Bayview Loan Servicing included that of liaison between Bayview and Bendett & McHugh, satisfied all of the criteria set forth in M.R.Evid. 803(6), *Carter* and *Quint, supra* to be a witness qualified to lay the foundation for Plaintiff’s Exhibit D: “Notice to Quit” – *save for one*: the level of personal knowledge of the business practices employed by Bendett & McHugh, P.C. in its creation and retention of the “Notice to Quit” the Trial Court mistakenly perceived necessary to satisfy the criteria. Quoting the Trial Court:

Let me just say that I think [Plaintiff’s attorney] Mr. Birkenmeier’s done a valiant job of establishing everything but one thing, and that is that this witness has personal knowledge of the record creating and keeping practices of Bendett & McHugh. *See Tr. pg. 73, lines 11-15.*

And I also think this witness has adequately established that the information that goes to Bendett & McHugh is correct information, and that it’s double-checked when it comes back to make sure it’s correct information. *See Tr. pg. 73, lines 22-25.*

[I] think [Plaintiff’s counsel] Mr. Birkenmeier, notwithstanding a valiant effort to -- that establishes most of the elements here, has not established that Mr.

D'Orlando, who is a knowledgeable person and I'm sure knows a lot about making sure that these letters are correct and that they end up correctly in the file, but that he doesn't know exactly the creation, recordkeeping, and mailing processes at Bendett & McHugh, which is I'm afraid what I think you need[.] See Tr., pg. 74, lines 18-25.

[...] I thought you covered -- of what looks like seven bases the law court wants covered, I think you covered six of them. See Tr., pg. 79, lines 2-4.

Despite this testimony and the observations made by the Court, Defendants conclude "the witness offered no understanding or knowledge of the law firm's process for creating a notice of default letter. . . ." Def. br. pg. 16. In truth, the witness testimony satisfied all of the requirements established under M.R. Evid. 803(6) and it was in clear error for the trial court to deny its entry.

CONCLUSION

Defendants utilize the conclusion of their arguments to discuss factors having little to do with this case, such as the Great Recession, the Foreclosure Mediation Program, and the Foreclosure Diversion Program. Defendants do not conclude or allege that the notice of default was never sent nor received, nor do Defendants allege or

conclude that they were prejudiced in any way. Rather, Defendants argue for a rule that has no basis in the rules of evidence, no basis in general foreclosure policy, and no basis in the ideals of justice and economy and expediency which underpin our legal system.

For the foregoing reasons, and for all those stated in its appellant's brief, the Plaintiff respectfully submits that the decision of the Trial Court to deny the admission of Plaintiff's notice of default into evidence was in clear error and that its decision and the subsequent judgment in favor of Defendants should be reversed.

Respectfully submitted,

PLAINTIFF

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