

September 16, 2013



Frankel

COMMENTARY

The 4th DCA's decision to overturn a final judgment entered after trial will be important in ongoing and future foreclosure trials and even motions for summary judgment, writes Jed Frankel of Eisinger, Brown, Lewis, Frankel and Chalet. **A5**

Reversal Of Final Judgment Likely To Impact Foreclosures Statewide

By Jed Frankel



The Fourth DCA's decision to overturn a final judgment entered after trial will be important in ongoing and future foreclosure trials, writes Jed Frankel of Eisinger, Brown, Lewis, Frankel and Chalet.

In an opinion that could affect how contested foreclosure cases throughout the State are tried, Florida's Fourth District Court of Appeal in West Palm Beach recently reversed a Final Judgment foreclosing a lien in favor of the Sebastian Lakes Condominium Association entered after a bench trial. In *Yang v. Sebastian Lakes Condominium Association*, the court ruled in a consolidated appeal that the testimony of the plaintiff-association management company's records custodian was insufficient. Without that necessary testimony, the introduction of business records upon which the association relied to establish how much money it was owed was error requiring reversal.

This case arose from a condominium association's attempt to collect past due assessments from unit owners and dealt with critical issues involving the admission of business records into evidence, as well as the testimony of a records custodian at trial. Given the similarities between lien foreclosure and mortgage foreclosure cases, it will likely have ramifications in both types of cases for years to come.

The Sebastian Lakes Condominium Association filed suit to collect monies allegedly owed to it by a husband and wife who each owned one unit in the condominium. The husband and wife unit owners denied the association's claims, asserted that the association failed to credit their accounts with all payments made, and claimed that the collection actions were brought in retaliation because they were part of a group investigating \$100,000 in missing association funds.

The trial court initially began a hearing on the association's motion for summary judgment but considered evidence admitted at the hearing, transforming it into a bench trial. As all plaintiffs in foreclosure cases must do, the association was required to prove its case at trial, including the amount of money owed to it by the husband and wife.

The association presented an employee of its management company as its witness, relying upon business records to establish the amounts owed to the association. This records custodian used the necessary "magic words" in testifying at trial to have the documents admitted into evidence as business records — the ledger entries were made at or near the time the charges were incurred, by a person with knowledge of the information, and were kept in the course of business as part of the association's business practices. The appellate court was not satisfied with these "magic words" and decided from the records custodian's subsequent testimony that she could not confirm that data obtained from a prior association accountant was in fact accurate.

The appellate court reversed the final judgments in favor of the association because the management company employee could not testify as to the starting account balances, never worked with the prior accountant and was unfamiliar with how his recordkeeping, could not confirm the prior accountant used acceptable accounting practices, was not able to state the data from the prior accountant was accurate, and could not testify the liens were valid and that the unit owners' claim of payment was untrue. Without testimony to establish the accuracy of the records as a foundation, the appellate court held that the association ledgers should not have been admitted into evidence and could not be used to establish how much the defendants owed the association. Since the association had no competent substantial evidence to establish the amount of money owed under the liens, it was not entitled to final judgment.

While appellate courts review a trial court's ruling on the admissibility of evidence at trial using a deferential abuse of discretion standard, the Yang court nonetheless found that the lower court improperly admitted the association ledgers into evidence without the proper foundation.

This decision overturning a final judgment entered after trial will be important in ongoing and future foreclosure trials and even motions for summary judgment because it establishes what a records custodian must testify to for the admission of business records — mere "magic words" are no longer

acceptable. Plaintiffs in such contested matters typically rely upon records custodian witnesses rather than persons with the actual knowledge of the underlying lien or mortgage.

After all, flying in an employee of an out-of-state loan servicer who personally handled a particular matter and received all payments made (if such a person or persons in fact exist) for each noticed trial would be cost prohibitive and impractical for a number of reasons. In order to establish the amount owed to it using business records, a plaintiff in a foreclosure action must now be able to present a witness who says not only the "magic words" but who also can testify as to the basis for all amounts claimed to be owed, rebut defendants' claims of uncredited payments, and to the other facts Sebastian Lakes' witness could not.

Jed Frankel is a shareholder in the community association law firm of Eisinger, Brown, Lewis, Frankel and Chaiet, where he heads the litigation department. The firm represents more than 600 condominium and homeowners associations in Florida.