IN THE SUPREME COURT OF IOWA
No. 20-0972
Linn County Nos. EQCV091488 and LACV091167

BORST BROTHERS CONSTRUCTION, INC.,
Plaintiff-Appellee,
v.
FINANCE OF AMERICA COMMERCIAL, INC.,
Defendant-Appellant.

FINANCE OF AMERICA COMMERCIAL, INC.,
Plaintiff-Appellant/Cross-Appellee,
v.
THOMAS DOSTAL DEVELOPERS, INC. and RANDY T. DOSTAL,
Appellees/Cross-Appellants,

and

KELLY CONCRETE COMPANY, INC., AFFORDABLE HEATING AND COOLING, INC.,
5 STAR PLUMBING, INC. and BORST BROTHERS, CONSTRUCTION, INC.,
Defendants-Appellees.

BORST BROTHERS CONSTRUCTION, INC.,
Plaintiff-Appellee,
v.
FINANCE OF AMERICA COMMERCIAL, LLC,
Defendant-Appellant.

FINANCE OF AMERICA COMMERCIAL, LLC,
Plaintiff-Appellee,
v.
THOMAS DOSTAL DEVELOPERS, INC. and RANDY T. DOSTAL,
Defendants-Appellants,

and

KELLY CONCRETE COMPANY, INC., DARNELL HOLDINGS, LLC d/b/a DARNELL CONSTRUCTION, AFFORDABLE HEATING AND COOLING,

INC., 5 STAR PLUMBING, INC., BORST BROTHERS CONSTRUCTION, INC., and KEN-WAY EXCAVATING SERVICE, INC.,
Defendants-Appellees.

ON APPEAL FROM THE IOWA DISTRICT COURT FOR LINN COUNTY, HONORABLE MARY E. CHICCHELLY, PRESIDING

COMBINED REPLY BRIEF OF THE APPELLEES/CROSS-APPELLANTS THOMAS DOSTAL DEVELOPERS, INC. and RANDY T. DOSTAL

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II. The District Court Erred In Admitting Into Evidence FAC's Singular Evidence Of Deficiency Amount (Loan Default Amount) And In Ruling FAC Proved The Elements Of Its Mortgage Foreclosure Claim.[1]

C. The District Court Improperly Admitted And Relied On Hearsay Evidence For The Amount Of Deficiency Owing On The Notes.

FAC first criticizes the Dostal Parties for not presenting evidence on the note payoff amounts that Developers had made during the life of the loans and in objecting to FAC's singular evidence on the subject of deficiency amount (on the basis of hearsay). FAC's observations are a none-too-subtle effort to shift the burden to the Dostal Parties to disprove the deficiency amount (an element of FAC's breach of contract claim) as well as the burden to prove the inapplicability of the business records exception to the hearsay rule. But the burden to establish the existence and amount of the deficiency claim (judgment and amount on the notes) as well as to establish that the singular records FAC relied on to do so actually fall within the hearsay exception is squarely on FAC. *Golden Sun Feeds, Inc. v. Clark,* 258 Iowa 678, 682 140 N.W.2d 158, 161 (1966) (plaintiff bears burden to prove contract breach, including damages and the amount); *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998) (same); *State v. Long,* 628 N.W.2d

[1] For ease of comparison and reference, the original division numbering and section lettering that appears in the Dostal Parties' principal brief will be retained in this combined reply brief.

440, 442-43 (Iowa 2001) (proponent of the evidence bears the burden to prove that an exception to the hearsay rule permits that evidence's admission); *State v. Miller,* 204 N.W.2d 834, 840 (Iowa 1973) (same).

Second, FAC does not point to the record where it purportedly made an argument to the district court to show any of the five elements, each of which FAC had to show, that made the deficiency records in question admissible under the business records exception to the hearsay rule—let alone a showing that its single witness (who did not work for the servicing company that actually prepared the records nor did this witness even work for FAC at the time the other company prepared the records) had personal knowledge to make these showings. *Beachel v. Long*, 420 N.W.2d 482, 484 (Iowa Ct. App. 1988) (setting forth the five-element showing of the business records exception to the hearsay exclusionary rule). What the actual trial record reflected is that the documents in question where not ordinary business records (they were in the form of notice deficiency addressed to the borrower but in this case it was established the documents were not used for that purpose or even otherwise sent to the borrower Developers) but rather were created purely for testimonial purposes at the foreclosure/deficiency trial—to provide the singular testimonial evidence of the purported deficiency and amount owing on the notes as of the date of trial. (Trial Trans. at 62:12-66:11; Exhibits F.35.1, F.35.2, F.35.3, F.35.4 and F.35.5; App. 678-679; 680-682; 683-684; 685-686; 687-688.)

And true business records created for a commercial or contractual purpose rarely, if ever, are created singularly for testimonial (litigation) purposes as are the records created by the servicing company in this case (and no one from the servicing company testified). *State v. Musser*, 721 N.W.2d 734, 754 (Iowa 2006); *see also United States v. Norwood*, ___ F.3d ___, No. 19-2178 at *15 (7th Cir. 2020) (business records typically are nontestimonial—that is, such records are not created for litigation purposes); *United States v. Miller*, ___ F.3d ___, No. 18-5578 at 28 (6th Cir. 2020) (bracket in original) ("On the other hand, a report written for a purpose unrelated to creating evidence or proving past events is generally nontestimonial. Business records are the best examples of these reports. Those records are generally admissible without cross-examination of their authors because they are 'created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial[.]'") (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309-11 (2009)).

FAC principally relies on a case out of Connecticut (it cites no in-point Iowa cases), *New England Sav. Bank v. Bedford Realty Corp.*, 717 A.2d 713, 246 Conn. 594 (1998)—but the facts in that case are entirely different. First, the document in question there did not purport to be a different document (that is, as in our case, purported notice to the borrower of amount owing) and second, the document in question was one created by the plaintiff bank itself instead of by a different

company (in our case, a separate and unrelated entity (to FAC) known as a service provider). In this regard, the plaintiff bank's witness actually had personal knowledge to establish each of the five elements for showing the document in question was a business record and admissible into evidence; the *New England Sav. Bank* court emphasized in *id.* at 79, 246 Conn. at 603:

> In this case, the witness introducing the disputed exhibits had been the director of operations of New England for the seven years preceding the closure of the bank, and had set up the procedures to create and format such documents. He testified that the proffered documents appeared to be records generated by New England in the regular course of its business. He also stated that it was the practice at New England to record charges and interest at or near the time they accrued.

Not remotely so with FAC's witness. (Trial Trans. at 62:12-66:11.)

And the other string-cited cases discussed by FAC contain similar distinctions. For example, the only other case discussed in any detail by FAC is a service provider one, and it is the unpublished decision of *Patch of Land Lending, LLC v. Realty Capital Ventures, LLC,* 2018 WL 3899388 (S.D. Fla. 2018), an unappealed summary judgment ruling where the trial court specifically found that an affidavit submitted and concerning loan payoff records was sworn to by someone with personal knowledge and who established the five required elements for showing the document at issue was a business record; but even on this ruling the court agreed that personal knowledge by the witness was essential, distinguishing

the following cases cited at p. *5 of its ruling[2]:

> Rule 56(c)(4) of the Federal Rules of Civil Procedure provides that "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Generally, an affidavit that is not made on the basis of personal knowledge or is based upon inadmissible hearsay cannot be used to support a motion for summary judgment. *See Interstate See De Grande Living Tr. Dated Apr. 1, 1994 v. World Sav. Bank, FSB*, No. CV-07-220-E-BLW, 2009 WL 89644, at *7 (D. Idaho Jan. 8, 2009) ("Ms. Mason's testimony appears to be based, at least in part, upon what someone else told her the retroactive calculation of the pay-off would be. As such, her testimony is inadmissible hearsay. And, without further foundation as to her method of calculation, Ms. Mason is not competent to testify to the pay-off amount. Therefore, her testimony as to the retroactive pay-off amount would not be admissible at trial and may not be considered in deciding the motion for summary judgment."); *Gov't Contractors, Inc. v. Johnson Controls, Inc.*, 186 F.R.D. 694, 697 (M.D. Ga. 1999) ("Christiansen's affidavit does not conform to Rule 56(e), which requires opposing affidavits to be made on the basis of the personal knowledge and set forth facts as would be admissible in evidence. Joseph Christiansen's declaration is based upon information reported to him by the project superintendent of IGGC, Steven Christiansen.").

The same is to be said about FAC's sole witness—he wasn't employed by the

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[2] It is further worth noting that *Realty Capital Ventures* appears not to have been cited as controlling authority by any other court.

service provider at any time; he wasn't employed by FAC when the transaction with Developers was inked; he accordingly was told by others about the process involved for creating and establishing these documents; and he predicably stumbled when trying to describe what information the documents contained and further admitted the documents were in the form of notice transmissions but were not created for that purpose in this case (that is, the documents were not created for their ordinary business purpose—what the documents on their face claimed to be their purpose—but rather for FAC to prove an element of its breach of note/mortgage/guaranty claims—judgment and the amount). (Trial Trans. at 62:12-66:11.)

FAC entirely failed to prove deficiency and the amount on its note-related claims: the claims being for deficiency judgment against the borrower Developers and purported guarantor Dostal. Judgment should be entered for these parties on the deficiency judgment claims and FAC's deficiency judgment claims against borrower and purported individual guarantor should be dismissed with prejudice.

D. The District Court Erred In Granting FAC A Judgment On The Foreclosure Claim.

FAC claims no notice was due—either to borrower or purported personal guarantor—of defaults because the transactional documents did not provide for the same (correspondingly, FAC admits that if the documents required notice for cure purposes then it can be in breach of the transactional documents for failing to provide

the same). And the transactional documents expressly provided for such notice. Specifically, paragraph 14 of the notes (exhibits F.29.1, F.29.6, F.29.11, F.29.16 and F.29.14; App. 500-506; 535-541; 570-576; 605-611; 599-601) contains the notice provision that governs defaults; it provides that: "All notices required or permitted to be given hereunder shall be given in the manner and to the place as provided in the Mortgage/Deed of Trust for notices to the party to whom each notice is given." As it respects the mortgages (exhibits F.29.2, F. 29.7, F.29.12, F.29.17 and F.29.22; App. 507-523; 542-558; 577-593; 612-628; 647-663), paragraph 19 defines "events of default" (capitalization omitted) which includes at subparagraph A borrower's (Developers) failure to pay a note installment within the grace period (five days after due date, and as set forth in the notes) and then that same paragraph at subpart D further defines how long after notice from FAC to Developers as borrower does Developers have to cure such a default: "If default shall continue for 15 days *after notice thereof by Mortgagee to Mortgagor* in the due and punctual performance or observance of any other agreement or condition herein or in the Note contained; [remainder of the provision extends the cure period to 30-days after notice is delivered in the event the default is not otherwise susceptible of cure within the 15-days after notice period]." (emphasis added).

The Dostal Parties in their first brief showed that FAC breached the notice provisions for cure, and thus improperly accelerated the notes and mortgages. FAC

ultimately failed to prove the loan and mortgage foreclosure claims as a result of its own material breaches. *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998) (plaintiff party in material breach of contract on which it sues is not entitled to judgment on its claim).

FAC should not have been granted judgment on its underlying contract claims (mortgage foreclosures and breach of notes) as its own evidence showed it breached the notice provisions of the notes and mortgages. Judgment on those claims should be entered for the Dostal Parties and the claims dismissed against FAC with prejudice.

REPLY ARGUMENT ON THE APPEAL OF THE DOSTAL PARTIES TO FAC'S ATTORNEY FEE AND EXPENSE AWARD

III. The District Court Erred In Ruling That FAC Was Entitled To An Attorney Fee And Expense Award And In Awarding The Full Amount FAC Requested.

C. The District Court Erred In Granting FAC A Judgment On Its Attorney Fee And Expense Request And In The Full Amount Of That Request.

The parties do not materially dispute the legal principles; FAC is not entitled to a fee and expense award in any amount if it fails to prevail on its mortgage-foreclosure related claims, and even if it prevails on the foreclosure claims its award must be reduced in some proportionate amount where it failed to prevail on its other and associated claims. *Ferguson v. Exide Techs., Inc.*, 936 N.W.2d 429 (Iowa 2019); *Smith v. Iowa State Univ. of Sci. & Tech.*, 885 N.W.2d 620 (Iowa 2016). And for

the reasons stated and authorities cited in the Dostal Parties' briefs, FAC is not entitled to judgment on its mortgage foreclosure claims (hence it is not entitled to a fee and expense award in any amount) and even if it is entitled to foreclosure it is not entitled to deficiency judgments against either Developers or Dostal (and accordingly its present award of full fees and expenses incurred must be significantly reduced—by up to 75% as suggested by the Dostal Parties before the district court).

CONCLUSION

For the reasons stated and authorities cited in the submissions of the Dostal Parties, the appeals court should accord the Dostal Parties the following relief: (1) affirm the ruling in favor of Dostal on the guaranty claim (either by affirming the district court's original ruling on this claim or otherwise on appeal ruling in favor of the Dostal Parties on this claim through the issues they have raised on cross-appeal—that is, affirming alternatively that a deficiency judgment, and in some amount, was not proven against Developers and Dostal respectively); (2) reverse the district court's ruling on FAC's mortgage foreclosure claims and entering judgment on these claims in favor of the Dostal Parties; and (3) reverse the ruling awarding FAC attorney fees and expenses (and by awarding FAC no such fees and expenses) or otherwise ordering the amount of fees and expenses that were awarded be substantially reduced and by remand to the district court for a determination in the first instance of the percentage of that reduction.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION AND TYPE AND TYPE-STYLE REQUIREMENTS

1. This combined reply brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 2,360 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This combined reply brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word format 2010 in Times New Roman 14-point style.

/s/ S.P. DeVolder
S.P. DeVolder

February 24, 2021
Date

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on February 24, 2021, a copy of this Combined Reply Brief of the Appellees/Cross-Appellants was filed electronically with the Clerk of the Iowa Supreme Court through the EDMS system, and which system further will provide access to and service of the Brief on that same date to:

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