IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

APP. NO: 4D14-3808
CASE NO.: 2010-CA-22151-AW

MCCORMICK 106, LLC
Appellant,

v.

LISA ADJODA
Appellee.

ANSWER BRIEF OF APPELLEE LISA ADJODA

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INTRODUCTION AND SUMMARY OF ARGUMENT

Appellee McCormick 106, LLC,[1] has appealed the judgment in favor of trial-court defendant Lisa Adjoda, a widow who successfully defended her homestead at trial on the foreclosure claims raised by the Investor.

For several reasons, this Court should affirm the judgment of the trial court.

1. Among other grounds, the judgment on appeal is based upon the failure of the Investor to prove compliance with a condition precedent to foreclosure, the notice required by § 559.715, Florida Statutes. This failure, by itself, would be a sufficient ground to deny foreclosure. The Investor has completely failed to raise this issue on appeal, and therefore waived any challenge to that part of the judgment. Even if this Court found error in every issue raised by the Investor, the unchallenged issue would be sufficient to sustain a judgment for Adjoda.
2. The trial court properly followed this Court's decision in *Yang v. Sebastian Lakes Condominium Ass'n, Inc*., 123 So. 3d 617 (Fla. 4th DCA 2013), when it decided to exclude the default letter and the historical pay history. Without those exhibits, there was no evidence that the Investor

[1] This brief shall refer to Appellant McCormick 106, LLC as "Investor" and Appellee Lisa Adjoda, as "Adjoda." Page citations to the record shall take the form R __. Citations to the trial transcript shall take the form Tr. __ and shall refer to the pagination provided by the court reporter. Citations to trial exhibits shall read Tr. Ex. __.

complied with Paragraph 22 of the mortgage, and insufficient evidence to prove default and amount of damages.

3. The trial court properly found that the Investor lacked standing, where the original plaintiff—the failed bank, BankUnited FSB—had already assigned away all its rights to the Note and Mortgage at the time it filed suit, so it lacked standing at that time. The Investor, as a substituted plaintiff, had no greater standing than the original plaintiff. The original plaintiff and its successors have, in their pleadings and other filings, maintained throughout the case that the original plaintiff had assigned its rights to the FDIC before it filed suit, and the Investor, having invited the complained-of error through the admissions in its own pleadings, may not assert any other theory at trial.

Adjoda asserts that the Investor's failure to brief all necessary issues, failure to introduce sufficient evidence at trial, failure to lay the groundwork to admit the evidence it needed, and invitations to the purported errors, are fatal to its appeal. This Court should affirm the judgment on appeal.

STATEMENT OF THE CASE AND FACTS

Lisa Adjoda is the widow of Rajystmanura N. Adjoda. R 102–104. She successfully defended, at trial, this action to foreclose the mortgage on her home. R 434-441. The Investor, who purchased the loan on or about December of 2013,

was an indirect successor to the original plaintiff, BankUnited FSB. R 115–129, R 263–265.

The final judgment in Adjoda's favor cited multiple alternative grounds as the basis for awarding judgment. *Id*. First, the Investor failed, at trial, to prove its performance of conditions precedent. R 437–438. The trial court held that, upon proper allegation by plaintiff, Adjoda specifically denied two conditions: the giving of the notice required by paragraph 22 of the mortgage, and the giving of the notice required by § 559.715, Fla. Stat. R 435. The trial court found that Adjoda's denials were sufficient to put the Investor on notice that these issues were in dispute. *Id*.

The trial court held that the Investor, at trial, "did not attempt to introduce any evidence" that it gave the notice required by § 559.715, Fla. Stat. R 437. By failing to introduce any evidence, Investor failed to meet its burden to prove compliance with a properly-denied condition precedent to suit. R 438. The Investor has not addressed, in its Initial Brief, any part of the judgment regarding § 559.715. (Initial Brief, *passim*.)

Second, the trial court also found that the Investor failed to prove compliance with the notice requirements of Paragraph 22 of the Mortgage. R 436–437. The Investor did attempt to introduce a copy of a notice letter and correspondence log to show the notice was given, but the trial court excluded both on hearsay grounds.

R 436. The Investor did not introduce any other evidence that a letter was sent, or of the contents of any such letter. *Id*. Due to lack of evidence, the Investor failed to prove it complied with the requirements of Paragraph 22 of the mortgage. R 437.

Third, the trial court found that the Investor failed to prove—by the greater weight of the evidence—the amounts due and owing and the existence of a default. R 439. The records admitted at trial showed that the lender "had in fact received payments" from the Adjodas even after the alleged date of default. *Id*. But when the Investor tried to introduce records of prior servicers, the trial court sustained a hearsay objection and excluded those records. *Id*. The admitted records incorporated hearsay data from the excluded records, and the trial court found that the incorporated data was no more credible than the excluded records. *Id*. Because the admitted records only covered the time period beginning December 30, 2013, they were insufficient to prove a default had occurred in May of 2009, given that the Adjodas had made payments after that point. R 438–439.

Fourth, the trial court found that the Investor failed to prove it had standing. R 439. The original plaintiff, BankUnited FSB, did not file suit until August 24, 2009. R 1-35. However, in the amended complaint, plaintiff admitted that BankUnited FSB was shut down and assigned all its assets to the FDIC on May 21, 2009—about three months earlier. R 152–153. All the assets of BankUnited FSB

were later assigned to BankUnited, a "newly chartered federal savings bank". R 152. The Investor or its predecessors as plaintiff also asserted this same set of facts in the initial reply (R 184), in a later reply (R 297–298), and in the Motion to Substitute Party Plaintiff (R 115–129).

Because the original plaintiff, three months before it filed suit, had assigned away its rights to the Note and Mortgage, the trial court found that Investor, as a successor plaintiff, lacked standing. R 439–441.

The record supports each of the trial court's findings. As to the notice requirement in § 559.715, Fla. Stat., the Investor made no attempt to introduce any records showing compliance. Tr. *passim*.

As to the Paragraph 22 letter, the witness had never been employed by BankUnited, was not trained in the policies and procedures of the entity that created the letter, and did not witness the letter being created. Tr. 31–33. As to the collection notes, the witness admitted—in addition to the above—that the exhibit introduced was only one line selected out of the actual collection notes record, and she had no knowledge of how the person creating that record acquired that knowledge. Tr. 33–36.

As to the pay history, the witness clearly identified that a portion of the records were created by BankUnited, not by her employer. Tr. 62. Those records covered the time from 2006 through December 2013. Tr. 63–64. Some of the records were

made by BankUnited FSB, and some made by BankUnited NA. Tr. 64. She had no personal knowledge as to how those records were created. Tr. 65–66. She could not testify if either entity followed applicable banking regulations governing the creation of such records. Tr. 66.

As to the standing issue, the facts surrounding the closure of BankUnited FSB, the assignment of the loan to the FDIC, and the assignment of the loan from the FDIC to BankUnited NA., all three months before BankUnited FSB filed suit, are all assertions made by the plaintiff in its own pleadings and in its motions to substitute party plaintiff. R 115–129; R 152–153; R 184; R 297–298. These were, and always have been, factual assertions by the Investor and its predecessors. The trial court expressly relied on plaintiff's own assertions in the final judgment. R 440–441.

The Investor now appeals the final judgment. R 556–564.

ARGUMENT

I. STANDARD OF APPELLATE REVIEW

This Court may not review any issue that Appellant failed to brief, as that issue has been waived or abandoned. *Polyglycoat Corp. v. Hirsch Distributors, Inc*., 442 So. 2d 958, 960 (Fla. 4th DCA 1983).

Where a trial court's judgment rests on multiple alternative bases, the appellant must refute all of them or the appellate court has no authority to disturb the judgment. *Research & Design, Inc. v. Heico Corp*., 566 So. 2d 290, 290 (Fla. 4th DCA 1990), *cited by Moore v. Chodorow*, 925 So. 2d 457, 462 (Fla. 4th DCA 2006). If the record reveals any theory or principal of law that support the trial court's judgment, this Court is bound to affirm that judgment. *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 645 (Fla. 1999).

In an appeal from a bench trial, the trial judge's findings of fact are clothed with a presumption of correctness on appeal, and these findings will not be disturbed unless the appellant can demonstrate that they are clearly erroneous. *Lougas v. Sophia Enterprises, Inc*., 117 So. 3d 839, 841 (Fla. 4th DCA 2013).

Appellate courts review evidentiary rulings for abuse of discretion. *Johnson v. State*, 969 So. 2d 938, 949 (Fla. 2007).

Pure questions of law are reviewed *de novo*. *State v. Glatzmayer,* 789 So. 2d 297, 301 n. 7 (Fla. 2001).

II. THE INVESTOR HAS FAILED TO BRIEF, AND THEREFORE HAS WAIVED, THE ISSUE OF COMPLIANCE WITH § 559.715.

A. Any issue not briefed is waived.

The appellate courts may not consider an issue that the Appellant has failed to brief. *Polyglycoat Corp.*, 442 So. 2d at 960.

> It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties… When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy.

Id.

Furthermore, an "appellate court's reversal… on a ground not argued in a brief, amounts to a denial of due process." *Advanced Chiropractic & Rehab. Ctr. Corp. v. United Auto. Ins. Co*., 103 So. 3d 866, 868-69 (Fla. 4th DCA 2012). "An error not raised in the brief is waived." *Id*.

Because the Investor has failed to address, in its initial brief, the trial court's ruling on the failure to prove compliance with § 559.715, it has waived the issue. The judgment, to the extent it relies on that point, cannot be disturbed.

B. This Court should affirm because the waived issue, by itself, can sustain the judgment.

Where the trial court relies on multiple alternative grounds for entry of judgment, the appellant must refute each of the alternative grounds or the judgment must be affirmed. *Research & Design, Inc.,* 566 So. 2d at 290; *Moore*, 925 So. 2d

at 462. Here, by waiving the issue of compliance with § 559.715, Fla. Stat., the appellant has failed to refute that ground. And noncompliance with a condition precedent, by itself, is sufficient to uphold the judgment under appeal. *Holt v. Calchas, LLC*, 155 So. 3d 499, 507 (Fla. 4th DCA 2015) (Dismissal of entire case was justified where plaintiff failed to prove compliance with condition precedent); *See also Sheriff of Orange County v. Boultbee*, 595 So. 2d 985, 987 (Fla. 5th DCA 1992) (Reversing for entry of judgment in favor of defendant because plaintiff's failure to prove compliance with statutory condition precedent was "fatal to her case").

Because the trial court found that Investor failed to comply with the condition precedent in § 559.715, Fla. Stat., and the Investor has failed to appeal that issue, this Court should affirm the judgment in favor of Adjoda.

III. THE TRIAL COURT PROPERLY FOUND THAT THERE WAS NO ADMISSIBLE EVIDENCE OF COMPLIANCE WITH THE CONDITION PRECEDENT IN PARAGRAPH 22.

Because the trial court properly excluded the records regarding the Paragraph 22 letter—*see infra*—it correctly concluded that the Investor has failed to meet its burden to prove that the condition precedent was performed. *Holt*, 155 So. 3d at 507. This Court should therefore affirm the judgment below.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING RECORDS OF A PRIOR BUSINESS.

A. Under controlling law, a witness from one business cannot lay the predicate for admission of another business's records.

Admission of business records over a hearsay objection is governed by § 90.803 (6), Fla. Stat. That statute allows admission of a record where the proponent demonstrates:

> (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record.

Yisrael v. State, 993 So. 2d 952, 956 (Fla. 2008). The proponent seeking to offer evidence under the exception must show "*strict* compliance with the requirements of the particular exception." *Id*. at 957. (Emphasis original). The statute does not allow the proponent to circumvent the express provisions of the statute by running the records through a "boarding process" or by offering testimony that they have been through some unspecified "review" for "accuracy." § 90.803 (6), Fla. Stat..

B. *WAMCO* does not apply to the proponent's burden and cannot override the strict-compliance requirements expressed in *Yisrael* and implemented in *Yang*.

In its brief, the Investor urges this Court to apply the now-outdated analysis of the Second District in *WAMCO XXVIII, Ltd. v. Integrated Electronic*

Environments, Inc., 903 So.2d 230 (Fla. 2d DCA 2005) and disregard both the plain language of the statute and the Court's own opinion in *Yang*, 123 So. 3d 617.

This Court, in *Yang*, reversed a foreclosure judgment because the trial witness could not lay the foundation for the business records of the prior servicer. *Id*. (Testimony of employee of current management company was not sufficient to lay foundation under § 90.803(6), Fla. Stat., for the records of former business when the employee was not familiar with the manner of keeping the former business' records.). In *Yang*, this Court found that the trial court abused its discretion in admitting records of a prior business where the trial witness admitted the records started with a balance from outside records (like here), that she did not know the practices and procedures of the prior record-keeper (like here), and had never worked for the prior record-keeper (like here). *Id*. at 621. Because the *Yang* case is factually similar to this case, the trial court correctly concluded that the outcome should be the same.

C. Florida's leading expert on evidence approves of *Yang* and criticizes the implications of *WAMCO*.

Florida case law has recognized Professor Charles Ehrhardt's discussion of controlling law regarding the business record exception. *Shorter v. State*, 98 So.3d 685, 690 (Fla. 4th DCA 2012), *rev. denied*, 133 So.3d 528 (Fla. 2014). That discussion includes a synthesis of the *Yang* and *WAMCO* cases.

In his treatise on Florida evidence, Professor Ehrhardt has relied on *Yang* for the proposition that "a record custodian of one business can not lay a foundation for business records of a second business, even in possession of the first business, because the witness would not have personal knowledge of how the second business kept it records and could not testify to the foundation requirements." Charles W. Ehrhardt, Florida Evidence § 803.6 (2014 ed.).

As for *WAMCO*, Professor Ehrhardt was—for his standards—extremely critical:

> The decision *does not discuss the requirement that each of the elements of the exception be present before the lack of trustworthiness issue arises*. Under the facts in the opinion there is *no indication of any testimony* supporting a determination that a WAMCO employee had a *business duty* and *personal knowledge* of the data in the record. A Bank of America employee could have laid the foundation for the records as its business records. Under traditional analysis, *an employee of one business cannot lay the foundation for the records of another business*, because the employee lacks the knowledge to demonstrate the reliability of the record. *Simply having custody of the records of another business does not supply the basis for the hearsay exception*.

Id. at n. 15. (Emphasis added.)

WAMCO cannot, here, save the Investor's case. It does not deal with the four statutory elements enumerated in *Yisrael*, but simply assumes them. Instead, it deals only with the un-enumerated fifth prong of the business records exception: trustworthiness. In particular, the statute reads that the proponent must lay the foundation, and only if that hurdle is overcome, the opponent may challenge the

records if "the sources of information or other circumstances show lack of trustworthiness." § 90.803(6), Fla. Stat.

The untrustworthiness burden is solely on the opponent of the record. *Love v. Garcia*, 634 So. 2d 158, 160 (Fla. 1994) ("Once this predicate is laid, the burden is on the party opposing the introduction to prove the untrustworthiness of the records."). And the *WAMCO* case dealt only with that burden-shifted fifth prong—it assumed, and never addressed, the burden of the proponent. Instead, it dealt only with the burden of the opponent: "The Guarantors did not demonstrate, and nothing in the record establishes, that the loan information WAMCO received from Bank of America was suspect or untrustworthy…" *WAMCO XXVIII, Ltd*., 903 So. 2d at 233. Because it deals only with the opponent's burden, not the proponent's burden, any reading of *WAMCO* that suggests that testimony about a verification process can substitute for the statutorily-required foundation testimony as to the creation and keeping of records *by the business that created them* is a misreading of the case. Such a reading cannot withstand scrutiny in light of the Florida Supreme Court's more recent pronouncement in *Yisrael* that the proponent must strictly comply with the statute—a statute which provides no exception for any kind of "verification process."

D. The witness did not lay the foundation for admission of the business records of a prior, now-defunct business.

The witness admitted she had no basis to testify how the prior business created or kept the records. She did not—and could not—testify that BankUnited made the record "at or near the time of the event"; or that BankUnited made the records from information transmitted by a person with knowledge; or that BankUnited kept the records in the ordinary course of business; or that it was the regular practice of BankUnited to make such a record. Tr. *passim*. She had no personal knowledge of how BankUnited did anything with its business records. Tr. 31–33, 62–66.

Without laying that foundation, the mere incorporation of BankUnited's records into those of the Investor does not make them admissible. Ehrhardt, § 803.6 at n. 15 ("Simply having custody of the records of another business does not supply the basis for the hearsay exception."); *see also Id*. at n. 4, *citing Belber v. Lipson*, 905 F.2d 549, 552 (1st Cir. 1990) (Custody of medical records from another doctor does not incorporate them into second doctor's business records. The physician in possession had no personal knowledge that any of the foundation requirements for the business record exception). The proponent of such a record must establish—unlike the witness in this case—that "the supplier of the information [acted] in the regular course…" or else "an essential link is broken." *Gray v. Busch Entm't Corp*., 886 F.2d 14, 15-16 (2d Cir. 1989)

And no "verification" process can be found in the statute, so it cannot substitute for the requirements actually contained in the statute. Because the witness did not lay the foundation, the Investor did not strictly comply with the exception, and the records were not admissible.

E. Records of a failed bank are not inherently reliable.

The Investor relies on *Bank of N.Y. v. Calloway*, 40 Fla. L. Weekly D173 (Fla. 4th DCA January 7, 2015) to assert that the records should have been admitted. But that case does not support the Investor's claims under these facts.

The *Calloway* court noted that "records crafted by a separate business lack the hallmarks of reliability inherent in a business's self-generated records," and noted that the proponent of such records must show both that "the custodian entity relied upon the accuracy of the record *and* the other requirements of [section] 803(6) are satisfied." *Id*. And mere reliance on records created by others, "without more is insufficient." *Id*.

And the *Calloway* court went astray where it relied upon a ten-year old opinion from Massachusetts, essentially finding that loan records are somehow inherently accurate. *Id*., *citing Beal Bank, SSB v. Eurich*, 444 Mass. 813, 831 N.E.2d 909, 914 (Mass. 2005). The *Beal Bank* case predates everything we now know about how

lenders and their lawyers[2] participated in falsifying property records and other foreclosure evidence. *See*, *e.g., In re: Carrsow-Franklin*, 524 B.R. 33, 52 (Bankr. S.D.N.Y. 2015) (Finding that Wells Fargo had failed to prove that late-appearing indorsement on note was not a forgery); *Vidal v. Liquidation Props., Inc.,* 104 So. 3d 1274, 1277 (Fla. 4th DCA 2013) (considering that banks have been falsifying assignments of mortgage, "attempting to backdate an event to their benefit."); *Godshalk v. Countrywide Home Loans Servicing, L.P*., 81 So. 3d 626, 629 (Fla. 5th DCA 2012) (describing "robo-signing" of affidavits); *citing Peterson v. Carrington Mortg. Serv., LLC*., 2011 WL 6934551 (Dec. 28, 2011) (describing robo-signing as "a robotic process of the mass production of false and forged execution of mortgage assignments, satisfactions, affidavits and other legal documents related to mortgage foreclosures…") Compared to *Yisrael*, the *Beal Bank* court has nearly nothing helpful to say about how Florida should treat bank records in today's environment.

Mortgage lenders are a class all to themselves when it comes to questionable records; unlike any other class of litigant, they are required by the Florida Supreme Court to verify the truth of their foreclosure complaints "to give trial courts greater

[2] *See, e.g., The Florida Bar v. Stern*, 133 So. 3d 529 (Fla. 2014) (approving recommendation of disbarment for attorney David J. Stern); *U.S. Bank Nat. Ass'n v. Whyte*, 150 So. 3d 1232, 1233 n. 2 (Fla. 3d DCA 2014) ("David J. Stern has since been disbarred by the Florida Bar.")

authority to sanction plaintiffs who make false allegations." *Pino v. Bank of New York*, 121 So. 3d 23, 41 (Fla. 2013) (Analyzing power of the courts to sanction plaintiffs who make false allegations in mortgage foreclosure filings); *citing In re Amendments To The Florida Rules Of Civil Procedure*, 44 So. 3d 555, 556 (Fla. 2010), *as modified on denial of reh'g* (June 3, 2010).

Any Florida court which, in 2015, asserts that bank records from 2006 are inherently reliable and accurate, is likely to regret taking such a stand. Bank records in mortgage foreclosure cases are notoriously unreliable—moreso, records of failed banks that have passed into FDIC receivership. To presume, as the *Calloway* court did, that banks in the business of flipping loans are somehow able to keep accurate records, is to ignore what we know from real-world experience. The incentives do not promote accuracy, but corner-cutting. And just like they have done in the courts, mortgage bankers have cut corners their record-keeping processes whenever it saves them money. This is one of the root causes of the current crisis.

F. The trial court did not abuse its discretion in excluding the business records.

This Court, in order to reverse on the business records issue, must determine that the trial court abused its discretion in excluding the records. *Yang*, 123 So. 3d at 620. This Court has expressed the standard for what it means for a trial court to abuse its discretion:

> …the appellate court must fully recognize the *superior vantage point* of the trial judge and should apply the 'reasonableness' test to determine whether the trial judge abused his discretion. If *reasonable men could differ* as to the propriety of the action taken by the trial court, then *the action is not unreasonable* and there can be *no finding of an abuse of discretion*. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

Kirkland's Stores, Inc. v. Felicetty, 931 So. 2d 1013, 1015-16 (Fla. 4th DCA 2006). (Emphasis added).

Where the Investor's witness testified that she had never been employed by BankUnited, was not trained in the policies and procedures of the entity that created the letter, and did not witness the letter being created, (Tr. 31–33) and where she testified she had no knowledge of how the person creating the records acquired that knowledge, (Tr. 33–36) and where she testified that she had no personal knowledge of how the records were created, (Tr. 65–66) it can hardly be said that the trial judge was *unreasonable* in excluding the records. Where the Florida Supreme Court, in *Yisrael*, requires strict compliance with the statutory requirements of § 90.803 (6), Fla. Stat., and the witness could not testify as to any of the prongs for how the records were kept and created by BankUnited, (Tr. 64–66), it can hardly be said that the trial court was *unreasonable* in excluding the records. Where the trial court diligently followed this Court's express ruling in *Yang*, it can hardly be said that the trial court was *unreasonable* in excluding the records.

Unless the Investor, or this Court, can somehow articulate that the trial judge was unreasonable in excluding the records of BankUnited, then this Court must affirm the judgment of the court below.

V. THE INVESTOR'S LACK OF STANDING IS WELL-SUPPORTED BY THE RECORD.

A substituted plaintiff acquires the standing of the original plaintiff. *Brandenburg v. Residential Credit Solutions, Inc*., 137 So.3d 604, 605–06 (Fla. 4th DCA 2014); *cited by Kiefert v. Nationstar Mortg., LLC*, 153 So. 3d 351, 353 (Fla. 1st DCA 2014). In this case, the record clearly established that the original plaintiff, BankUnited FSB, had already assigned away its rights to this loan before the foreclosure began.

A. Parties are bound by their own pleadings.

The Investor, in its pleadings, asserted that its standing derived from the closure of BankUnited FSB, in May of 2009, three months before this lawsuit commenced: its first reply, second reply, its amended complaint, and its motion to substitute party plaintiff all recited this same set of facts. R 115–129, 152–153, 184, 297–298.

Parties are bound by the assertions they make in their pleadings. *Hart Properties, Inc. v. Slack*, 159 So. 2d 236, 238 (Fla. 1963); *Fernandez v. Fernandez*, 648 So. 2d 712, 713 (Fla. 1995) ("…a party is bound by the party's own

pleadings."). Here, the Investor is bound by the facts it asserts in its amended complaint, both replies, and in its motion for substitution of party plaintiff.[3]

B. The Investor cannot complain when the trial court accepts its invitation to adopt the same facts asserted in Investor's pleadings.

In addition to the binding effect of its own pleadings, Investor is barred from complaining of a supposed error that the Investor itself invited. *Millsaps v. Kaltenbach*, 152 So. 3d 803, 805 (Fla. 4th DCA 2014) ("A party cannot successfully complain about an error for which he or she is responsible or of rulings that he or she has invited the trial court to make.") Here, the Investor vigorously asserted throughout the litigation that the original plaintiff, BankUnited FSB, was shut down by the FDIC and all of its loans were assigned to the FDIC as receiver three months before this suit commenced. R 115–129, 152–153, 184, 297–298. It cannot now object when the trial court, in entering final judgment, took the Investor's word at face value on that point. Accordingly, to the extent the trial court made a factual finding that BankUnited, FSB, assigned the loan away before it filed suit, the Investor is barred from appealing that point.

[3] The last document is not a "pleading" as defined in Fla. R. Civ. P. 1.100, but restates the same operative facts. The motion for substitution, although not a pleading, was clearly intended to induce the trial court to believe the very same facts the Investor now seeks to contravene.

C. The trial court correctly determined that the Investor lacked standing.

Upon a finding that the original plaintiff assigned away its rights to this loan before filing suit, the trial court correctly determined that both the original plaintiff and the successor plaintiff lacked standing. In *Venture Holdings & Acquisitions Group, LLC v. A.I.M. Funding Group, LLC*, 75 So. 3d 773, 776 (Fla. 4th DCA 2011), this Court held that a party who assigned the promissory note and mortgage to a third party before filing suit did not have standing to foreclose. The facts in the instant case—as urged upon the trial court by the Investor in its pleadings—show the same set of facts. Therefore, BankUnited FSB lacked standing when it filed suit, and its successor plaintiffs had no greater claim to standing. *Brandenburg* 137 So.3d at 605–06. The final judgment on this point was correct.

CONCLUSION AND REQUESTED RELIEF

This Court should affirm the judgment on appeal for multiple reasons.

First, the Investor failed to appeal the trial court's holding that it failed to comply with the statutory condition precedent in § 559.715, Fla. Stat. This alone is fatal to the appeal.

Second, the trial court properly found that the Investor failed to prove performance of the Paragraph 22 condition precedent where the evidence admitted at trial did not include a copy of the letter or any record the letter had been sent.

Third, the trial court properly excluded hearsay records where the trial evidence did not show that the proponent had strictly complied with the business records exception to the hearsay rule.

Fourth, the trial court properly took the Investor at its word, where it relied on the exact facts asserted in the pleadings established that Plaintiff lacked standing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by email unless otherwise indicated, on March 17, 2015, to:

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210

I HEREBY CERTIFY that the lettering in this brief is Times New Roman 14-point Font and complies with the font requirements of Florida Rule of Appellate Procedure 9.100(1).

Respectfully submitted,
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