In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

ASTORIA FEDERAL SAVINGS AND LOAN ASSN.,

Appellee.

ON APPEAL FROM THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

I. Introduction—Questions Presented

Standing: Where a foreclosure plaintiff alleges in its initial complaint that it is entitled to enforce a lost note payable to another entity and first discloses an endorsement in its favor two years after filing suit, is there a genuine issue of fact whether the plaintiff had standing at inception such that summary judgment was error?

Notice of Default: Where a foreclosure plaintiff's summary judgment affiant—whose personal knowledge of the plaintiff's business records is limited to being "authorized to handle" them—infers that the plaintiff sent a default notice that he does not swear is a true and correct copy that he made from business records, and where the mortgagors state under oath that they did not receive the notice, and where the "notice," in any event, does not state the amount or date of default, is there a genuine issue of fact whether the plaintiff sent a notice that complies with the Mortgage such that summary judgment was error?

II. Appellants' Statement of the Facts

This appeal arises from a foreclosure case filed by ASTORIA FEDERAL SAVINGS AND LOAN ASSN. ("the Bank" or "the Plaintiff Bank"). The Bank filed the case against [redacted] and [redacted] ("the Guzmans") to enforce a promissory note and mortgage they had executed in favor of a different entity, Astoria Federal Mortgage Corp. ("the Lender").[1] The copy of the Note attached to the Complaint was not endorsed.[2] The Bank alleged that it was the "owner and holder of all real and beneficial interests in the subject Promissory Note and Mortgage…",[3] but also alleged that the Note was not in its possession because it had been "lost or destroyed."[4]

Over two years later, the Bank filed an Amended Complaint which attached a different version of the Note.[5] Unlike the version attached to the Complaint, this copy now sported an undated endorsement from the Lender to the Plaintiff Bank:

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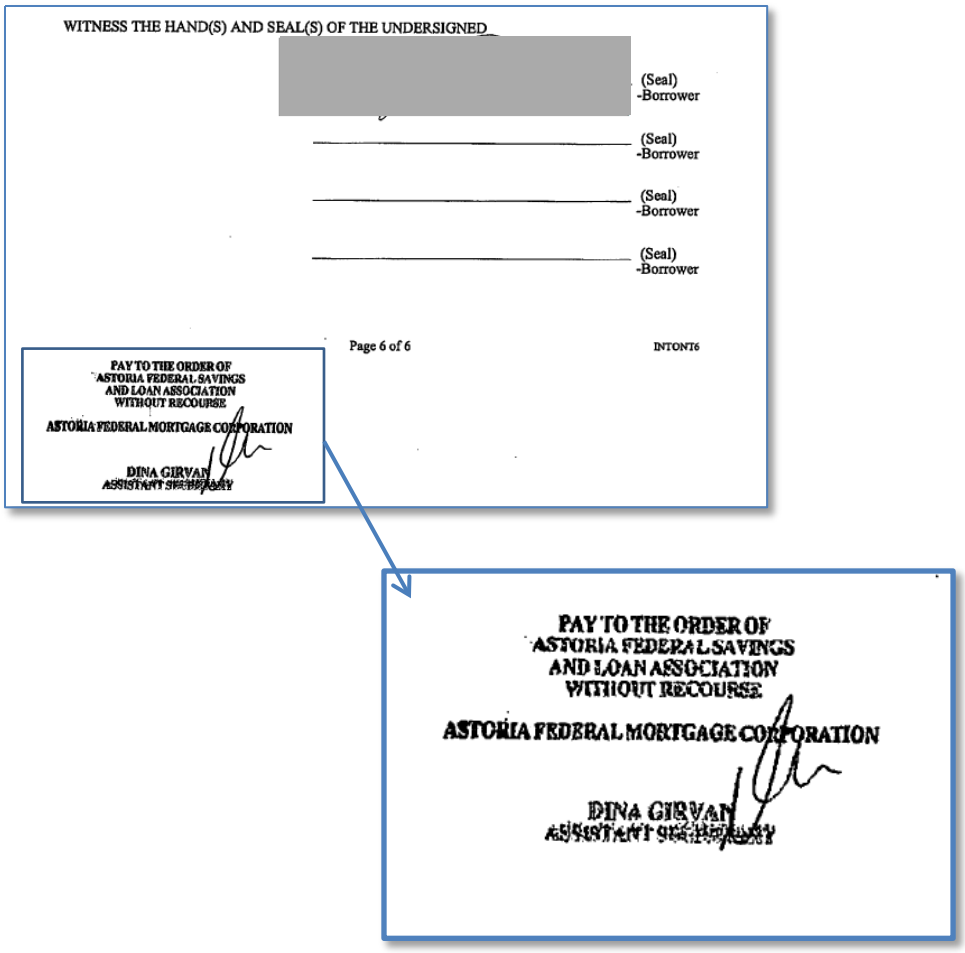
[1] Complaint to Foreclose Mortgage and to Enforce a Lost Instrument and for Reestablishment of a Mortgage ("Complaint"), ¶¶ 2-3, dated December 9, 2009 (R. 8) and Fixed/Adjustable Rate Note, Exhibit A ("Note") to Complaint (R. 13).

[2] Note, p. 6 (R. 18).

[3] Complaint, ¶ 5 (R. 8).

[4] Complaint, ¶¶ 30-35 (Count III) (R. 10).

[5] Amended Complaint to Foreclosure Mortgage, dated December 21, 2011 (R. 178).



The Guzmans' Answer to the Amended Complaint denied the Bank's allegation that it was the owner and holder of the subject Note and Mortgage as well as its allegation that it had complied with all conditions precedent.[6] The Answer raised seven affirmative defenses, one of which was a specific allegation that the Bank failed to send an acceleration letter, which was a condition precedent

[6] Defendants' Answer to Complaint and Affirmative Defenses, served January 9, 2012, ¶¶ 5, 12 (R. 219).

to filing the action.[7] It also specified that the Guzmans contested whether "any alleged notice proffered by the plaintiff contains the required language."[8]

The Bank moved for Summary Judgment, asserting that it was in possession of the original promissory note[9] and that it sent a notice of acceleration prior to filing suit. The summary judgment motion was accompanied by a supporting affidavit which had been executed by Edward J. Bagdon, as an Assistant Secretary of some unidentified company on some unspecified day in December 2012.[10] Mr. Bagdon claimed to have been "authorized to handle" business records concerning

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[7] Answer, pp. 4-5 (Second Affirmative Defense) (R. 222-23).

[8] *Id*.

[9] Motion for Summary Final Judgment of Foreclosure and for Entry of Supplemental Order and for Award of Attorneys' Fees and Costs, served April 11, 2012 (R. 263); Amended Motion for Summary Final Judgment of Foreclosure and for Entry of Supplemental Order and for Award of Attorneys' Fees and Costs, served March 8, 2013, ¶¶ 5, 6 (R. 520).

[10] Affidavit Supporting Plaintiff's [Amended] Motion for Summary Final Judgment, dated December [?], 2012 ("Affidavit") (R. 525). The Bank had filed an affidavit of Bernadette McDonnell (which was also undated) in support of its original motion for summary judgment. Like Bagdon, McDonnell claimed to be an Assistant Secretary of an unidentified company and that she was authorized "to handle" business records. (Affidavit Supporting Plaintiff's Motion for Summary Judgment, dated February [?], 2012, (R. 265)). McDonnell, however, swore that "Plaintiff's attorney holds the Promissory Note and Mortgage" (*Id*. at ¶4, emphasis added).

the subject Note and Mortgage.[11] Based on these qualifications, Bagdon averred that "Plaintiff holds the Promissory Note and Mortgage…"[12] Bagdon also stated that "[t]he borrower(s) were properly sent notice…prior to the filing of the foreclosure action," as evidenced by an attachment.[13] The appended document—the copy of a letter which was neither sworn nor certified—did not specify what amount must be paid to cure the default, but rather, required that the recipient call to "obtain the amount."[14]

In opposition to the motion, the Guzmans filed affidavits asserting they had never received a notice of default from the Bank or anyone else.[15] The Guzmans also filed a memorandum in opposition to the summary judgment which pointed out that the Bank had not refuted all affirmative defenses, especially those

[11] Affidavit, ¶ 3 (R. 525).

[12] Affidavit, ¶ 4 (R. 525).

[13] Affidavit, ¶ 6 (R. 525).

[14] Alleged Notice of Default dated September 17, 2009 (R. 563).

[15] Notice of Filing Affidavits, served July 3, 2012 (R. 487); Notice of Filing Affidavits, served July 3, 2012 (R. 437); Notice of Filing Affidavits of [redacted] and [redacted] in Opposition to Plaintiff's Motion for Summary Judgment, served May 24, 2013 (642).

challenging standing (at inception of the case) and conditions precedent.[16] It also pointed out that the affidavit did not comply with Fla. R. Civ. P. 1.510(e) because the attached documents were neither sworn nor certified.[17]

At the hearing on the Bank's Motion for Summary Judgment,[18] the Guzmans reiterated the arguments in their memorandum.[19] The trial court nevertheless granted the motion and entered the final judgment from which this appeal was timely filed.[20]

[16] Defendants, [redacted] and [redacted] Memorandum in Opposition to Plaintiff's Motion for Summary Final Judgment, served May 28, 2013 (R. 766).

[17] *Id*. at 2, 8 (R. 767, 773).

[18] The Guzmans had also moved for summary judgment on the conditions precedent issue. (Defendants, [redacted] and [redacted] Motion for Summary Judgment, served June 15, 2012 (R. 363)). The court had earlier denied that motion without prejudice. (Order, dated July 6, 2012 (R. 494)).

[19] Transcript of Proceedings before Judge Gerald D. Hubbart, May 29, 2013 (Supp. R. 1, attached to Motion to Supplement the Record on Appeal).

[20] Final Judgment of Foreclosure dated May 29, 2013 (R. 790).

SUMMARY OF THE ARGUMENT

Summary judgment must be reversed because there remained genuine issues of fact as to whether the Bank had standing when it filed this case and whether the Bank ever sent a proper default notice (or "acceleration letter").

The Bank initiated this case claiming to be entitled to enforce a promissory note that was neither payable to the Plaintiff Bank, nor even in its possession. Over two years later, it produced a copy of the Note that, for the first time, bore an undated endorsement to the Plaintiff Bank. The Bank identified no evidence that either the endorsement or its possession of the original Note predated the Complaint, leaving only an inference to the contrary.

The Bank's affiant claimed that the Bank sent a default notice to the Guzmans—which they swore they never received. The Bank's claim, however, was solely based on an inference from a document which was neither sworn nor certified to be a true and correct copy of a business record. Nor did the affiant affirmatively show the basis for his personal knowledge or swear that he himself located the document among the Bank's records. Additionally, even if the Bank sent the letter, it did not qualify as notice under the Mortgage because it did not specify the amount or date of the default.

Summary judgment should have been denied.

STANDARD OF REVIEW

This Court reviews a trial court's entry of summary judgment *de novo*, and views the evidence in the light most favorable to the non-moving party. *Mechaia Investments, LLC v. Romano*, 56 So. 3d 107, 108 (Fla. 3d DCA 2011); *see also Sierra v. Shevin*, 767 So. 2d 524, 525 (Fla. 3d DCA 2000) ("If the 'slightest doubt' exists, then summary judgment must be reversed.").

> The moving party has the burden of conclusively showing the absence of genuine issues of material fact. If the existence of such issues or the possibility of their existence is reflected in the record, or the record raises even the slightest doubt in this respect the judgment must be reversed.

Florida E. Coast Ry. Co. v. Metro. Dade Cnty., 438 So. 2d 978, 980 (Fla. 3d DCA 1983) (internal citations omitted).

Additionally, in order for a plaintiff to obtain a summary judgment where the defendant asserts affirmative defenses, the plaintiff must either disprove those defenses by evidence or establish their legal insufficiency. *O'Neal v. Brady*, 476 So. 2d 294 (Fla. 3d DCA 1985).

Whether the BANK had standing to maintain this foreclosure action is also reviewed *de novo*. *Dixon v. Express Equity Lending Group, LLLP*, 125 So. 3d 965, 967 (Fla. 4th DCA 2013).

ARGUMENT

I. An Issue of Fact Remained As to Whether the Bank Had Standing When the Case Was Filed.

A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose. *Verizzo v. Bank of N.Y.*, 28 So.3d 976, 978 (Fla. 2d DCA 2010). In addition to showing standing as of the time of summary judgment, the foreclosing party must show that it had standing before it filed the case. *See Marianna & B.R. Co. v. Maund*, 62 Fla. 538 (Fla. 1911) ("plaintiff cannot supply the want of a valid claim at the commencement of the action by the acquisition or accrual of one during the pendency of the action."); *Stegemann v. Emery*, 146 So. 650 (Fla. 1933) ("suit may not be maintained upon an after-acquired right.").

Where, as here, the foreclosing plaintiff—a stranger to the original transaction—chooses to demonstrate standing by showing it is a holder under Article 3 of the Uniform Commercial Code (U.C.C.),[21] there must be evidence that

[21] Although not relevant here, proof that one is a holder under Article 3 of the U.C.C. establishes only the right to enforce the negotiable instrument (i.e. obtain a money judgment on the note). To foreclose the lien, the plaintiff must also prove entitlement to enforce the mortgage. This step is often overlooked on the rationale that "the mortgage follows the note." But a mortgage only follows the note to the rightful owner (not just holder) of the note. This is because "the mortgage follows the note" is simply shorthand for an equitable transfer—something that cannot

it became the holder before it filed suit. *McLean v. JP Morgan Chase Bank, N.A.*, 79 So. 3d 170 (Fla. 4th DCA 2011) ("While it is true that standing to foreclose can be demonstrated by the filing of the original note with a special endorsement in favor of the plaintiff, this does not alter the rule that a party's standing is determined at the time the lawsuit was filed.").

The court in *Feltus v. U.S. Bank Nat. Ass'n*, 80 So. 3d 375, 377 (Fla. 2d DCA 2012) reversed a summary judgment under facts similar to this case. There, the unendorsed note attached to the complaint (which also alleged that the note had been lost) showed the lender to be a different entity than the plaintiff. As here, the bank later produced an endorsed version of the note and an affidavit stating that the plaintiff "owns and holds" the note. The appellate court held that the trial court should not have considered the endorsed version of the note because the bank never amended the complaint. But the court also noted that "even if U.S. Bank had

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automatically occur for mere holders who are given the right to enforce a note despite having taken possession of it under inequitable circumstances. (For example, it is often said that "even a thief can enforce a note.") Ownership is proven through evidence of purchase, not by possession alone. The requirement for this additional proof is also evident in the U.C.C., because the concept of mortgages trotting faithfully behind notes is codified in Article 9 (not Article 3), which requires proof of purchase of the loan. The issue is irrelevant here because the Bank failed to prove even the first step of the two-step analysis—that it held the Note at the time it filed suit. But care should be taken about blanket statements concerning proof of standing by way of Article 3.

properly amended its complaint to travel on the original note endorsed in blank, it would have needed to prove the endorsement in blank was effectuated before the lawsuit was filed." *Feltus v. U.S. Bank Nat. Ass'n*, 80 So. 3d 375, 377, n. 2. (Fla. 2d DCA 2012).

In *Cutler v. U.S. Bank Nat. Ass'n*, 109 So. 3d 224 (Fla. 2d DCA 2012), the appellate court reversed a summary judgment where a genuine issue of material fact remained as to whether the bank was the proper holder of the note at the time it initiated the action. Like the endorsement here, the allonge was not dated and there was no evidence that the allonge took effect prior to the date of the complaint. *See also Zervas v. Wells Fargo Bank, N.A.*, 93 So. 3d 453, 455 (Fla. 2d DCA 2012) (summary judgment reversed where the bank filed a note that contained a new endorsement after it filed suit, because there was "no evidence in the record establishing that the endorsement in blank was made to [the plaintiff bank] prior to the filing of the foreclosure complaint."); *Green v. JPMorgan Chase Bank, N.A.*, 109 So. 3d 1285, 1288 (Fla. 5th DCA 2013) (summary judgment reversed where "the indorsement in blank did not establish that the Bank had the right to enforce the note when it filed suit, because the indorsement was undated."); *Gonzalez v. Deutsche Bank National Trust Company*, 95 So. 3d 251, 252 (Fla. 2d DCA 2012) (same).

The Bank's affidavit is unavailing because the affiant stated only that the Bank was the current holder of the note and did not state that it had become the holder before it filed suit. *Saver v. JP Morgan Chase Bank*, 114 So. 3d 352, 353-54 (Fla. 4th DCA 2013) (because the bank's affidavits did not state when it became the owner of the note or that it was the owner before it filed suit, the trial court erred in granting summary judgment); *Green v. JPMorgan Chase Bank, N.A.*, 109 So. 3d at 1288 ("[T]he affidavit did not establish that the Bank held the note at the time it filed suit because the affidavit was dated more than two years later.").

Even if the affiant had stated that the bank held the note prior to filing, the affiant did not demonstrate any personal knowledge about when the note was endorsed for any such statement to be admissible summary judgment evidence. *Feltus v. U.S. Bank Nat. Ass'n*, 80 So. 3d at 377 ("The affidavit of indebtedness provided no assistance in this regard because the affiant did not assert any personal knowledge of how [the Bank] would have come to own or hold the note.").

The trial court, therefore, erred in granting summary judgment and the case should be reversed and remanded.

II. An Issue of Fact Remained as to Whether the Bank Had Mailed the Required Default Notice.

The Bank was required to disprove the Guzmans' affirmative defense that it had not sent the default notice required by Paragraph 22 of the Mortgage. *O'Neal v. Brady*, 476 So. 2d 294 (Fla. 3d DCA 1985). Paragraph 22 provides:

> **Acceleration; Remedies**. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this: Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (e) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. …[22]

The Bank, in its Amended motion for Summary Final Judgment, claimed that it "properly sent notice prior to acceleration."[23] The Bank's affiant, Bagdon,

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[22] Mortgage, ¶ 22 (R. 35); Defendants' Answer to Complaint and Affirmative Defenses, pp. 4-5 (R. 222-23).

[23] Amended Motion for Summary Final Judgment of Foreclosure and for Entry of Supplemental Order and for Award of Attorneys' Fees and Costs, served March 8, 2013, ¶ 6 (R. 520).

parroted these words and added that "[e]vidence of the notice provided to the borrower(s) is attached hereto."[24]

The Guzmans filed sworn affidavits saying that they had not received such a notice.[25] Thus, a factual issue remained as to whether the letter filed by the Bank had ever been sent. *Foerster v. Regent Bank*, 110 So. 3d 526 (Fla. 4th DCA 2013) (summary judgment improper where there remains a genuine issue of fact regarding whether bank complied with the condition precedent contained in the mortgage to provide pre-suit notice of acceleration); *Kurian v. Wells Fargo Bank, Nat. Ass'n*, 114 So. 3d 1052 (Fla. 4th DCA 2013) (summary judgment reversed where mortgagee did not sufficiently refute affirmative defense that no Paragraph 22 notice of default had been sent); *Wroblewski v. Am. Home Mortg. Servicing, Inc.*, 68 So. 3d 431 (Fla. 5th DCA 2011) (summary judgment reversed where bank failed to overcome assertion that it had failed to comply with the condition precedent contained in the mortgage, requiring notice and opportunity to cure); *Konsulian v. Busey Bank, N.A.*, 61 So. 3d 1283, 1285 (Fla. 2d DCA 2011) (same).

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[24] Affidavit Supporting Plaintiff's [Amended] Motion for Summary Final Judgment, dated December [?], 2012, ¶ 6 (R. 525).

[25] Notice of Filing Affidavits, served July 3, 2012 (R. 437); Notice of Filing Affidavits of [redacted] and [redacted] in Opposition to Plaintiff's Motion for Summary Judgment, served May 24, 2013 (642).

A. The default letter attached to the affidavit was never authenticated as summary judgment evidence.

Rule 1.510(c) Fla. R. Civ. P. requires that all summary judgment evidence be admissible. Rule 1.510(e) Fla. R. Civ. P. describes the procedure that will permit the court to consider documents at summary judgment (or testimony about documents) even though they would normally be unauthenticated hearsay under the evidence code. Specifically, such documents or testimony can become admissible "summary judgment evidence" by way of an affidavit, so long as the affiant provides copies of the documents that are sworn and certified. Fla. R. Civ. P. 1.510(e) ("[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."); *See Zoda v. Hedden*, 596 So. 2d 1225, 1226 (Fla. 2d DCA 1992) (equating the requirement to provide a sworn copy with the admissibility prerequisites of authentication and a hearsay exception).

In short, where an affiant's knowledge is based on a separate document, an admissible version of that document (i.e. sworn or certified) must be attached or otherwise provided to the court. Fla. R. Civ. P. 1.510(e), *CSX Transp. Inc. v. Pasco County*, 660 So. 2d 757 (Fla. 2d DCA 1995); *Crosby v. Paxon Elec. Co.*, 534 So. 2d 787 (Fla. 1st DCA 1988).

The court in *Ferris v. Nichols*, 245 So. 2d 660, 662 (Fla. 4th DCA 1971) addressed summary judgment affidavits in the context of an action to enforce a promissory note. Although the movant had supplied two affidavits, the court reversed the order granting summary judgment specifically because neither affidavit complied with Rule 1.510(e):

> However, neither [of the two affidavits] or both in combination are sufficient to warrant a summary judgment. Neither of the affidavits complied with that portion of the summary judgment rule which provides:
>
> > '* * * Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.' (Emphasis added. See Rule 1.510(e), F.R.C.P.)

Id. (emphasis added). *See also Bifulco v. State Farm Ins. Corp.*, 693 So. 2d 707 (Fla. 4th DCA 1997); *Starkey v. Miami Aviation Corp.*, 214 So. 2d 738 (Fla. 3rd DCA 1968) (affidavits that do not comply with Fla. R. Civ. P. 1.510(e) should be stricken from the record).

Default letters are not immune from the requirement that they be properly authenticated for purposes of summary judgment. *Finnegan v. Deutsche Bank Nat. Trust Co.*, 96 So. 3d 1093 (Fla. 4th DCA 2012) (where borrower filed an affidavit swearing she had never received a default letter, and plaintiff files an uncertified copy of the alleged letter, this becomes an issue of material fact necessitating trial).

The Bank will argue that it did more than merely file a copy of the alleged letter (as in the above-mentioned cases)—it attached the letter to a sworn affidavit. The argument is without merit for two reasons. First, while the affidavit itself is sworn, the affiant does not swear that the attached document is a true and correct copy of any business record. It merely states that the attached document is "[e]vidence of the notice." The plain wording of Rule 1.510(e)—which only applies to documents being attached to sworn affidavits—requires something more: that the documents themselves be sworn or certified. *Cf. Coastal Caribbean Corp. v. Rawlings*, 361 So. 2d 719, 721 (Fla. 4th DCA 1978) (although documents were attached to the complaint rather than the affidavit, Rule 1.510(e) was satisfied precisely because the affiant swore that those documents were true and correct copies).

It is evident that the documents themselves are not sworn because Bagdon would not be subject to a penalty for perjury if it turned out that he attached (or permitted others to attach) false documentation. Indeed, Bagdon does not say that he personally located, selected, reviewed, or attached the document, or even that it was found among the "business records" he claims to be "authorized to handle."

Second, even if Bagdon had sworn that the letter was a true and correct copy of a business record, he is not a records custodian or otherwise qualified witness to

authenticate the document. *See Bryson v. Branch Banking & Trust Co.*, 75 So.3d 783, 786 (Fla. 2d DCA 2011) (default letters not accompanied by an affidavit of a record custodian or other proper person attesting to their authenticity or correctness were unauthenticated and insufficient for summary judgment purposes).

Bagdon does not identify his employer, much less, how he would have personal knowledge of documents that he does not even claim to have reviewed. Being "authorized to handle" records is insufficient foundation for such personal knowledge—even a mailman could be said to be authorized to handle records. Bagdon, therefore, failed to set forth the facts that would affirmatively show that he is competent to testify about the documents as required by Fla. R. Civ. P. 1.510(e). *See also*, the Author's Comment to that Rule ("The requirement that it show affirmatively that the affiant is competent to testify to the matters stated therein <u>is not satisfied by the statement that he has personal knowledge</u>; there should be stated in detail the facts showing that he has personal knowledge." [emphasis added]).

Moreover, Bagdon failed to complete the "business record" incantation for a hearsay exception. He never testifies that the records were made by or from information transmitted by a person with knowledge or that the record was part of

a regularly conducted business activity. § 90.803, Fla. Stat. *Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008).

Nor did he claim to be in charge of, or well enough acquainted with, the regular business practice to give such testimony. *See Holt v. Grimes*, 261 So. 2d 528, 528 (Fla. 3d DCA 1972) (records properly excluded where there was "no testimony as to the mode of preparation of these records nor was the witness testifying in regard to the records in the relationship of 'custodian or other qualified witness'"); *Mazine v. M & I Bank*, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011) (judgment of foreclosure after bench trial reversed where bank's only witness "had no knowledge as to the preparation or maintenance of the documents offered by the bank"); *Snelling & Snelling, Inc. v. Kaplan*, 614 So. 2d 665, 666 (Fla. 2d DCA 1993) (witness who relied on ledger sheets prepared by someone else was neither the custodian nor sufficiently familiar with the underlying transactions to testify about them or to qualify the ledger as a business record); *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980) (adjuster not qualified to testify about the usual business practices of sales agents at other offices). *See also Thomasson v. Money Store/Florida, Inc.*, 464 So. 2d 1309, 1310 (Fla. 4th DCA 1985) (statement that demonstrates no more than that the documents

in question appear in the company's files and records is insufficient to meet the requirements of the business record hearsay exception).

Accordingly, Bagdon's affidavit lays no foundation to authenticate the purported default letter or to establish a business records exception to hearsay. The record, therefore, was not "sworn or certified" as required by Rule 1.510(e).

B. Even if the purported default letter had been admissible, it merely presents a disputed issue of fact.

Even if Bagdon had sworn that the attached document was a true and correct copy of a business record, the Guzmans had supplied counter-affidavits attesting to the fact that they had never received such a letter. These opposing factual contentions created a triable issue of fact.

The Bank will argue that it need not prove that the letter was received, but only that it was sent. And, in fact, Paragraph 15 of the Mortgage does state that "Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail…"[26] However, evidence that the Guzmans never received the letter provides an inference that it was never sent. Notably, it is the reliability of the U.S. postal system which makes the contractual presumption of receipt (upon proof of

[26] Mortgage, ¶ 15 (R. 32).

mailing) a reasonable one. And it is that same reliability that strengthens the inference in the Guzmans' favor—that the Bank did not actually send the letter.

In reality, the Bank never proved that the letter was sent. It has only offered an inference that it was sent—and that it was sent on the date that appears on the document. The affiant swore only that it was sent (without specifying the date it was mailed) and expressed no basis for knowing whether it had been mailed having apparently inferred that fact from the existence of the copy itself. Bagdon does not reference a certified mail receipt or any log (from the Bank or the postal service) showing the letter was sent. Nor did he state that there was any business practice of mailing letters on the same date that appears on them. Accordingly, at summary judgment there were competing inferences as to whether the Bank sent the notice, and if so, when.

However, at summary judgment, the court must take all inferences in favor of the Guzmans. *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985) ("the court must draw every possible inference in favor of the party against whom a summary judgment is sought"); *Parrot Jungle & Gardens Ltd., Inc. v. Andrews ex rel. Andrews*, 959 So. 2d 303, 305 (Fla. 3d DCA 2007) (moving party must demonstrate conclusively that no genuine issue exists as to any material fact, even after all reasonable inferences are drawn in favor of the party opposing the

summary judgment). This Court may not indulge inferences suggested by the Bank—the movant here—particularly when they are based on an unsworn and uncertified document.

C. The alleged default letter did not comply with the requirements of the Mortgage because it did not specify the amount or date of the default.

Lastly, even if there were not a genuine issue of fact as to whether the letter was sent, the language of the letter does not comply with the requirements of the Mortgage. The Mortgage states that the acceleration notice "shall specify," among other things, the default and the action required to cure the default.[27] The alleged default letter, however, states only that the loan is in default due to a failure to make some unspecified monthly payments. It does not state which (or how many) payments are overdue or the dollar amount needed to cure the default. Instead, it directs the borrower to "contact [the Bank] to obtain the amount necessary to cover the delinquent installments and any other fees and costs incurred." The missive goes on to say that payment of that unspecified amount will cure the breach.

The letter, therefore, is deficient because it does not sufficiently "specify" the default as required by the Mortgage. *See Judy v. MSMC Venture, LLC*, 100 So. 3d 1287, 1289 (Fla. 2d DCA 2012) (Under a notice of default provision virtually

[27] Mortgage, ¶ 22 (R. 35).

identical to this case, the court ruled that notices which only "generally alleged that the [borrowers] committed a breach" were insufficient because they "failed to specify the breach.").

The letter is also deficient because it does not deliver the information the borrower needs to curing the default—namely, the amount that must be paid. Paragraph 15 of the Mortgage requires that "[a]ll notices given by Borrower or Lender in connection with this Security Instrument must be in writing." Requiring the borrower to call to obtain the default amount and instructions for curing the default telephonically does not comply with this "in writing" requirement. Notably, because it includes unspecified "fees and costs," the borrower cannot avoid acceleration by simply sending in the past due monthly payments.

Even if the Mortgage did not require the cure amount to be delivered in writing, the letter is insufficient to prove that it was ever delivered at all, telephonically or otherwise. Worse, it does not even prove what information would have been delivered had the Guzmans received the letter and called the Bank. With generic letters such as these, whether borrowers are on put on notice of the exigency of their circumstance or induced to remain in default depends entirely upon what is said telephonically. For example, borrowers could be told (even unintentionally) that the default was actually zero and they need do nothing

more. Conversely, they could be told that their only option was to pay the entire balance. Even if it had been received, therefore, it is not evidence that the Guzmans were ever given an actual opportunity to cure.

The lack of specificity of the date of default—i.e. what months have not been paid—also conceals another potential issue of fact. The Complaint states that the first missed payment was the one due July 1, 2009. If the default letter stated a different date, it would have created a genuine issue of fact that would prevent summary judgment. *See Valencia v. Deutsche Bank Nat. Trust Co.*, 67 So. 3d 325, 326 (Fla. 4th DCA 2011) ("The date of default alleged in the complaint and the dates referred to in the 'cure letters' are not identical. This creates, by definition, a genuine issue of a material fact."). At the very least, this demonstrates the critical importance of specificity in the notice. And because the Bank intentionally chose not to disclose the date of default in its notice, the Court would be justified in finding that a genuine issue of fact remains on that issue.

CONCLUSION

The judgment should be reversed and the case remanded for further proceedings.

Dated: January 17, 2014

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this January 17, 2014 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties.

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