In the District Court of Appeal
Fourth District of Florida

CASE NO.

(Circuit Court Case No.

and

Appellants,

v.

BANK OF AMERICA, N.A.,

Appellee.

ON APPEAL FROM THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a final summary judgment of foreclosure in favor of the plaintiff, Bank of America, N.A. ("the Bank") against the Defendants, [redacted] and [redacted] ("the Homeowners").

The Bank's Verified Complaint alleged that it was the servicer of the Homeowners' mortgage loan.[1] The Bank alleged that the Homeowners had defaulted in their payment and that the "indebtedness has been accelerated pursuant to the terms of the subject Note and Mortgage."[2] The Homeowners' Answer denied this allegation[3] and raised as their first affirmative defense that "[n]either the Plaintiff nor its agents have complied with the requirements of Paragraph 22 of the subject mortgage. Such compliance is a condition precedent to foreclosure."[4] Paragraph 22 of the mortgage requires the Lender to send a notice to the Borrower not less than thirty days prior to acceleration—a notice that advises the Borrower of certain legal rights.[5]

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[1] Verified Complaint in Mortgage Foreclosure, filed January 30, 2012 ("Complaint"), ¶ 4 (R. 2)

[2] Complaint, ¶ 8 (R. 2).

[3] Answer and Affirmative Defenses, filed August 22, 2013 ¶ 8 (R. 178).

[4] Affirmative Defenses, ¶1 (R. 178).

[5] Mortgage attached to Complaint, ¶ 22 (R. 22).

Even before the Homeowners had filed their Answer, the Bank had filed a summary judgment and accompanying affidavits.[6] Although the Motion stated that the attached affidavit provides testimony regarding, among other things, the notice of breach,[7] neither of the affidavits did so. The Homeowners had filed their own Motion for Summary Judgment on the acceleration issue, along with affidavits asserting under oath that "[n]o notice under the provision of Section 22 was provided … prior to the filing of this foreclosure action."[8] Both summary judgment motions were scheduled for hearing on October 3, 2013.[9]

In its Reply to the Homeowners' affirmative defenses, the Bank attached a letter which it claimed "substantially complies with paragraph 22 of the subject Mortgage."[10] The attached letter, dated over a year before the case was filed, states

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[6] Motion for Summary Final Judgment in Mortgage Foreclosure, filed August 14, 2013 (R. 134); Affidavit Supporting Plaintiff's Motion for Summary Final Judgment, filed August 14, 2013 (R. 141); Affidavit of Costs, filed August 14, 2013 (R. 154).

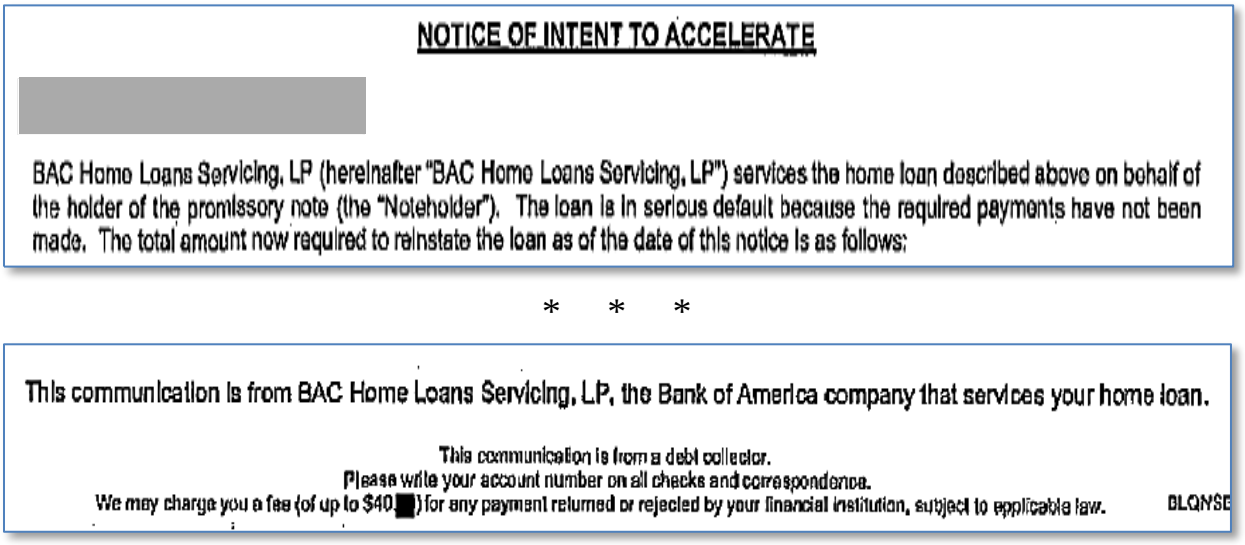
[7] Motion for Summary Final Judgment in Mortgage Foreclosure, ¶¶ 12, 15 (R. 137, 38).

[8] Defendants' Motion for Summary Judgment, filed April 5, 2013 (R. 84); Notice of Filing Affidavit in Support of Motion for Summary Judgment [filed April 5, 2013 (R. 87); Notice of Filing Affidavit in Support of Motion for Summary Judgment [filed April 5, 2013 (R. 89).

[9] Notice of Hearing, dated August 8, 2013; Cross-Notice of Hearing, filed August 14, 2013 (R. 159).

[10] Plaintiff's Reply to Defendants, a/k/a John and Affirmative Defenses, filed September 16, 2013, p. 3 (R. 182).

that it is a communication from BAC Home Loans Servicing, LP (rather than the Plaintiff, Bank of America, N.A.), and that BAC was the servicer of the loan at that time:[11]



NOTICE OF INTENT TO ACCELERATE

[redacted]

BAC Home Loans Servicing, LP (hereinafter "BAC Home Loans Servicing, LP") services the home loan described above on behalf of the holder of the promissory note (the "Noteholder"). The loan is in serious default because the required payments have not been made. The total amount now required to reinstate the loan as of the date of this notice is as follows:

* * *

This communication is from BAC Home Loans Servicing, LP, the Bank of America company that services your home loan.

This communication is from a debt collector.
Please write your account number on all checks and correspondence.
We may charge you a fee (of up to $40[redacted]) for any payment returned or rejected by your financial institution, subject to applicable law. BLQNSE

Although the letter contains the words "Sent Certified Mail" and "Return Receipt Requested," the affiant did not provide a Return Receipt—signed or unsigned.

While this unauthenticated document was filed with the court before the Bank filed its Motion for Summary Judgment,[12] the Bank did not supply any testimony about this letter until it filed an Affidavit as to Notice of Intent to Accelerate, a mere two days before the summary judgment hearing.[13] The

[11] Notice of Intent to Accelerate, dated December 16, 2010 (R. 191).

[12] Plaintiff's Notice of Serving Discovery Responses, served June 17, 2013 (R. 91, 130).

[13] Affidavit as to Notice of Intent to Accelerate, filed October 1, 2013 (R. 195).

affiant—an employee of the Plaintiff Bank, not the purported sender, BAC Home Loans Servicing, LP—averred that certain unidentified business records of the Bank indicate that an acceleration letter was mailed on December 16, 2010.[14] Although the affiant attached a "true" copy of the letter from BAC,[15] he never specifically stated that the letter itself was a business record of the Bank or was found among the Bank's business records with which the affiant claimed to be familiar. Nor did the affiant explain how a record of BAC Home Loans Servicing, LP could be a "business record" of the Bank of America, N.A.

Although the Bank did not supply this affidavit twenty days in advance of the summary judgment hearing, the trial court nevertheless entered Final Summary Judgment.[16] The Homeowners filed a Motion for Rehearing, raising several problems with the judgment, including defects in the language of the acceleration letter, but also expressly objecting to the trial court's reliance on an affidavit "served less than forty-eight (48) hours preceding the motion for summary judgment."[17] The trial court denied the motion[18] and this appeal ensued.

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[14] Affidavit as to Notice of Intent to Accelerate, ¶ 6 (R. 196).

[15] R. 198.

[16] Final Judgment in Mortgage Foreclosure, entered October 3, 2013 (R. 200).

[17] Motion for Rehearing filed October 15, 2013 (R. 205), ¶ 7 (R. 206).

[18] Order Denying Motion for Rehearing, dated November 7, 2013 (R. 208).

SUMMARY OF THE ARGUMENT

The trial court erred in granting summary judgment in favor of the Bank because the evidence upon which the Bank relied to refute the Homeowners' affirmative defense regarding conditions precedent was not provided until two days before the hearing. This alone is sufficient reason to reverse the judgment.

Even if it were proper to consider the eleventh-hour affidavit, the affiant professed no knowledge of the recordkeeping or mailing policies of the bank that claims, according to the letter itself, to have sent it. Thus, affiant was not a qualified witness to authenticate the acceleration letter or to testify to the facts needed for a business records exception to hearsay.

Even if the letter qualified as proper summary judgment evidence, the affiant's claim that the letter was sent—when countered by the Homeowners' sworn testimony that such a letter was never received—merely created an issue of fact which still precluded summary judgment. While the Bank need only prove that it sent the letter (not that it was received), evidence of non-receipt creates a triable issue of fact where there is no "convincing evidence" of mailing.

Lastly, even if it were undisputed that the acceleration letter had been sent, the language of the letter did not meet the requirements of the Mortgage.

The Summary Judgment should be reversed.

STANDARD OF REVIEW

"The standard for review of an order granting summary judgment is *de novo*." *Reeves v. North Broward Hosp. Dist.*, 821 So. 2d 319, 321 (Fla. 4th DCA 2002) (citing *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000)). In order to determine the propriety of a summary judgment, the court must resolve whether "there is no genuine issue as to any material fact" and whether "the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). The "burden of proving the absence of a genuine issue of material fact is upon the moving party." *Palm Beach Pain Management, Inc. v. Carroll*, 7 So. 3d 1144, 1145 (Fla. 4th DCA 2009) (quoting *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966)). When considering the evidence contained in the record, including any supporting affidavits, "the court must draw every possible inference in favor of the non-moving party." *Edwards v. Simon*, 961 So. 2d 973, 974 (Fla. 4th DCA 2007). If there is the slightest doubt or conflict in the evidence, then summary judgment must be reversed. *See Carroll*, 7 So. 3d at 1145.

ARGUMENT

I. The Evidence of an Alleged Notice of Acceleration Was Served Less Than Twenty Days Before the Summary Judgment Hearing.

Rule 1.510(c) requires the moving party to "serve the motion at least 20 days before the time fixed for the hearing, and…also serve at that time a copy of any summary judgment evidence on which the movant relies that has not already been filed with the court." Fla. R. Civ. P. 1.510(c). Without this twenty day period, the opposing party would not have adequate time to prepare a challenge to the evidence being presented at the hearing. *Marlar v. Quincy State Bank*, 463 So. 2d 1233, 1233 (Fla. 1st DCA 1985). Florida appellate courts—including this Court—have repeatedly insisted on strict compliance with this rule, reversing summary judgment orders where the movant failed to comply. *See, e.g., Servedio v. U.S. Bank Nat. Ass'n*, 46 So. 3d 1105, 1108 (Fla. 4th DCA 2010); *Verizzo v. Bank of New York*, 28 So. 3d 976, 977-78 (Fla. 2d DCA 2010); *Mack v. Commercial Indus. Park, Inc.*, 541 So. 2d 800, 800 (Fla. 4th DCA 1989).

As this Court stated in *Viola v. U.S. Bank Nat. Ass'n*, 133 So. 3d 1018, 1019 (Fla. 4th DCA 2014), the rule and its application are not complicated:

> The issue is a simple one. Rules 1.510(c) and (e) of the Florida Rules of Civil Procedure provide that a motion for summary judgment, along with any "summary judgment evidence" "on which the movant relies," must be served at least twenty days before the hearing, and the documents supporting the affidavits must be authenticated.

See also Williams v. Bank of Am., N.A., 101 So. 3d 1288 (Fla. 4th DCA 2012) (summary judgment reversed where summary judgment evidence was not served twenty days before the hearing); *Holland v. Anheuser Busch, Inc.*, 643 So. 2d 621, 623 (Fla. 2d DCA 1994) (if the trial court's possible reliance on supplemental affidavit was contrary to Rule 1.510(c) in that it was not filed twenty days before the hearing).

The Court should reverse the judgment and remand for further proceedings based on this alone.

II. An Issue of Fact Remained as to Whether the Bank Had Mailed the Required Acceleration Letter.

A. The Affiant did not testify, and was not qualified to testify, that the acceleration letter was sent by the previous servicer.

The Bank was required to disprove the Homeowners' 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; (c) 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. …[19]

The Bank, in its Motion for Final Summary Judgment, claimed that it had accelerated the payments "pursuant to the terms of the loan documents"[20] The Bank's first affiant said nothing about providing the Homeowners with the required acceleration notice.[21] In its second (belatedly filed) affidavit, the Bank's new affiant, Charles James Franciscus, stated that some unspecified records of Bank of America, N.A. indicated that an acceleration notice had been sent over a year before the case was filed:

> The business records of BANK OF AMERICA, N.A. indicate that on December 16, 2010, a Notice of Intent to Accelerate letter was submitted to [redacted] and [redacted] via Certified mail at the subject property address, 125 Cruiser Road S, West Palm Beach, FL 33408-4503.[22]

If Mr. Franciscus was relying upon any records other than the letter itself to say that the letter was actually sent, no such records were identified or attached as sworn and certified copies as required by Fla. R. Civ. P. 1.510(e) . He does not say that he was involved in sending the letter, that he worked for the entity that

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[19] Mortgage, ¶ 22 (R. 22); Answer and Affirmative Defenses, ¶1 (R. 178).

[20] Motion for Summary Final Judgment in Mortgage Foreclosure, filed August 14, 2013, ¶ 12 (R. 137).

[21] Affidavit Supporting Plaintiff's Motion for Summary Final Judgment, filed August 14, 2013 (R. 141).

[22] Affidavit as to Notice of Intent to Accelerate, filed October 1, 2013, ¶ 6 (R. 195).

purports to have sent the letter (BAC Home Loans Servicing, LP), that he has any familiarity with the business records of that entity, or how that entity's records became part of Bank of America's records. Indeed, the affiant never definitively states that the letter itself is a business record of Bank of America.

And while the affiant claims that "[i]t is the regular practice and procedure of BANK OF AMERICA, N.A. to generate and send Notice of Intent to Accelerate letters,"[23] he is silent as to the practice and procedure of the actual sender (according to the letter itself), BAC Home Loans Servicing, LP. Nor did he lay any foundation to show that he would have personal knowledge of some other entity's business practices.

B. The acceleration 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 they are authenticated by an affiant. Fla. R. Civ. P. 1.510(e); *CSX Transp. Inc. v. Pasco*

[23] Affidavit as to Notice of Intent to Accelerate, filed October 1, 2013, ¶ 8 (R. 196).

County, 660 So. 2d 757 (Fla. 2d DCA 1995); *Crosby v. Paxon Elec. Co.*, 534 So. 2d 787 (Fla. 1st DCA 1988).

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); *Morrison v. U.S. Bank, N.A.*, 66 So. 3d 387 (Fla. 5th DCA 2011) (the bank's filing of an unauthenticated notice letter failed to support summary judgment where the defendant asserted she had not received a notice of default).

Here, the affiant claims to have attached "true copies" of the acceleration letter. But the affiant 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) (acceleration 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).

Mr. Franciscus does not claim to be, or to have ever been, an employee of BAC Home Loan Services, LP. He does not say that he is familiar with BAC's

records or record keeping policies.[24] Nor did he claim to be in charge of, or well enough acquainted with, BAC's 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

[24] Arguably, his claim of personal knowledge of Bank of America's records is insufficient to qualify him to authenticate records even from that entity because such an empty self-serving statement does not set forth the facts that "show affirmatively that the affiant is competent to testify" 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 is not satisfied by the statement that he has personal knowledge; there should be stated in detail the facts showing that he has personal knowledge." [emphasis added]).

1980) (adjuster not qualified to testify about the usual business practices of sales agents at other offices).

At best, Mr. Franciscus merely states that the BAC record appears in Bank of America's files—a statement that is insufficient to meet the requirements of the business record hearsay exception. *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, the Bank's belated affidavit lays no foundation to authenticate the purported acceleration letter or to establish a business records exception to hearsay.

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

Even if Mr. Franciscus was qualified to authenticate the BAC letter, the Homeowners had supplied affidavits attesting under oath to the fact that they had never received such a letter.[25] These opposing factual contentions created a triable issue of fact 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

[25] Notice of Filing Affidavit in Support of Motion for Summary Judgment [filed April 5, 2013 (R. 87); Notice of Filing Affidavit in Support of Motion for Summary Judgment [filed April 5, 2013 (R. 89).

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).

The Bank will undoubtedly 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 Homeowners 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

[26] Mortgage, ¶ 15 (R. 19-20).

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

In any event, the Bank's evidence provided, at best, only an inference that the letter was sent—and that it was sent on the date that appears on the letter itself. Although Mr. Franciscus asserts that the letter was sent on that date, it is unclear whether he merely inferred that from the letter itself or some independent record that was never identified or attached. Mr. Franciscus 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 it was the business practice—of either bank—to mail 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.

The denial of receipt is sufficient to raise an issue of fact because, having failed to adduce "convincing evidence of mailing," the Bank is not entitled to any presumption that the letter was sent. In *Best Meridian Ins. Co. v. Tuaty*, 752 So. 2d 733, 737 (Fla. 3d DCA 2000), the Third District held that evidence of routine practice in preparing and mailing notices (including testimony that they were placed in mailing envelopes, delivered to the mail room, stamped with postage, and

deposited in the United States postal mailbox) was not convincing evidence of mailing sufficient to raise a presumption:

> While Best Meridian's evidence is sufficient to make a prima facie case at trial, Best Meridian's showing does not rise to the "convincing" level which would prohibit the insured from questioning the mailing by denying receipt.

Id. at 737. Thus, in *Best Meridian*, even this extensive evidence of routine practice did not meet the "'convincing evidence' threshold." *Id.*

Here, there was absolutely no evidence that the Notice was sent (or when it was sent) apart from whatever inference might be derived from the existence of the unauthenticated letter itself. Indeed, the absence of evidence, such a Return Receipt or even proof of purchase of such service, can also justify an inference that the letter was not sent. The Homeowners, therefore, were entitled to have a fact finder evaluate their credibility and knowledge in juxtaposition to that of Mr. Franciscus. *See also Bank of Am. N.A. v. Evans*, 948 So. 2d 998 (Fla. 3d DCA 2007) ("unequivocal denial of having received [the] contract created an issue of fact on that question, notwithstanding the rebuttable presumption of receipt which arose from corporate testimony as to [its mailing practices]…").

Thus, at the time of summary judgment, the trial court was faced with two competing inferences as to whether the letter had been sent. However, at summary judgment, the court must take all inferences in favor of the Homeowners. *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). Just as the trial court should not have indulged the inferences suggested by the Bank—the summary judgment movant—this Court must also disregard such inferences, particularly when they are based on a single document that is unauthenticated hearsay.

D. The language of the alleged acceleration letter did not comply with the requirements of the Mortgage.

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.

1. The dollar amount to cure the default was not clearly stated.

The Mortgage states that the acceleration notice "shall specify," among other things, the action required to cure the default.[27] The alleged acceleration letter is

[27] Mortgage, ¶ 22 (R. 22).

ambiguous in that it does not specify the exact amount needed to cure the default.[28] Instead, it states: "To cure this default, on or before January 15, 2011, BAC Home Loans Servicing, LP must receive the amount of $31,648.19 plus any additional regular monthly payment or payments, late charges, fees and charges which become due on or before January 15, 2011."[29] What these additional amounts were, or might have been, is never stated. This ambiguity is compounded by the next sentence with can be read as not requiring any additional payments, late fees and charges:

> The default will not be considered cured unless BAC Home Loans Servicing, LP receives "good funds" in the amount of $31,648.19 on or before January 15, 2011.[30]

This language leaves the reader guessing as to the total amount that, if paid by January 15th, would cure the default. This is especially problematic because the Notice further states that the lender "reserves the right to accept or reject a partial payment of the total amount due without waiving any of its right to proceed with foreclosure."[31] For the borrower, therefore, the interpretation of the indefinite cure amount becomes paramount because the Bank could keep a large, but

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[28] *See*, Motion for Rehearing, ¶ 5 (R. 206) ("The default notice of Plaintiff was defective in that it did not provide an exact payoff figure.").

[29] Notice of Intent to Accelerate (R. 198) (emphasis added).

[30] Notice of Intent to Accelerate (R. 198).

[31] *Id*.

inaccurate payment (*e.g.*, that pays all the arrearage but not some unmentioned late fee) while still continuing to foreclose on the property.

2. The Notice does not advise the borrowers that they have the right to raise defenses in the foreclosure suit.[32]

Additionally, the language in Paragraph 22 of the mortgage explicitly states that the notice must advise the Homeowners of their right to assert defenses in the foreclosure proceeding filed by the lender:

> 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. …[33]

Yet, the Bank's letter simply states, "you may have the right to bring a court action to assert the non-existence of a default or any other defenses you may have to acceleration and foreclosure."[34] The unmistakable implication, of course, is that the Homeowners' defenses must be raised in a cost-prohibitive, separate suit, rather than simply raising them in an answer.

This form language—presumably designed for non-judicial foreclosure states—has the effect of dissuading borrowers in a judicial foreclosure state, such

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[32] *See*, Motion for Rehearing, ¶ 5 (R. 206) ("The default notice to the Defendants was not proper in that it told Defendants they could sue and raises defenses which is improper and does not comply with the contract").

[33] Mortgage, ¶ 22 (R. 22); Answer and Affirmative Defenses, ¶1 (R. 178).

[34] Notice of Intent to Accelerate (R. 198) (emphasis added).

as Florida, from exercising their legal rights. As such, it accomplishes the exact opposite of what was intended by the language in the mortgage. *See Haberl v. 21ST Mortg. Corp.*, 138 So. 3d 1192, 1193 (Fla. 5th DCA 2014) (summary judgment reversed where acceleration letter failed to inform the borrower of two rights, one of which was the right to assert her defenses in the foreclosure proceeding filed by the bank); *Samaroo v. Wells Fargo Bank*, 137 So. 3d 1127, 1129 (Fla. 5th DCA 2014) (summary judgment reversed where the bank's "own mortgage specified the important information that it was bound to give its borrower in default, and it simply failed to do so."); *Judy v. MSMC Venture, LLC*, 100 So. 3d 1287, 1289 (Fla. 2d DCA 2012) (summary judgment reversed where bank failed to refute the affirmative defense of insufficient notice of default).[35]

Accordingly, because the language of the alleged acceleration letter fails to comply with the requirements of the Mortgage, the Bank failed to disprove the Homeowners' conditions precedent defense.

[35] While the Homeowners here were not dissuaded from raising defenses in these proceedings, the Court should reject a "no harm, no foul" argument from the Bank because borrowers who were misled by this form language (and therefore, did not defend) will not likely be in a position to bring this noncompliance to the attention of the courts. The banks, therefore, would have no incentive to discontinue the use of this form if the issue cannot be raised by a borrower who presented defenses.

CONCLUSION

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

Dated: July 16, 2014

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby 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 AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this July 16, 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. I also certify that this brief has been electronically filed this July 16, 2014.

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