In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted] DATED MARCH 17, 1999

Appellants,

v.

HSBC Bank USA National Association, as [redacted] for Wells Fargo Home Equity Asset-Backed Securities 2006-3 [redacted] Home Equity Asset-Backed Certificates, Series 2006-3, et al.,

Appellees.

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

INITIAL BRIEF OF APPELLANTS

IceAppellate

Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

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STATEMENT OF THE CASE AND FACTS

I. Introduction

, Individually and as of the Dated April 24, 2007 and Individually and as of the Dated March 17, 1999 (collectively, "the Homeowners") appeal the final summary judgment of foreclosure rendered in favor of HSBC Bank USA National Association, as for Wells Fargo Home Equity Asset-Backed Securities 2006-3 Home Equity Asset-Backed Certificates, Series 2006-3 ("the Bank"). The Homeowners present two issues for the Court's review:

- Whether the Bank's motion for summary judgment should have been summarily denied on procedural grounds;
- Whether the trial court erred in granting summary judgment where there was no admissible summary judgment evidence of a notice of acceleration that met the requirements of the mortgage.

II. Appellants' Statement of the Facts

A. The Pleadings

The Bank initiated this action when it filed its two-count mortgage foreclosure and mortgage reformation complaint.[1] According to Paragraph 22 of the mortgage attached to the complaint, the lender was required to send the Homeowners written notice of default and an opportunity to cure prior to acceleration and foreclosure.[2]

The Homeowners filed an answer to the Bank's complaint which raised the affirmative defenses of the Bank's failure to comply with Paragraph 22 of the mortgage.[3] The Homeowners alleged that the Bank failed either to mail the notice timely (or at all), or to include the required language.

Approximately two months later, the Bank filed a "supplemental" affidavit regarding service of what the Bank termed were "notices of default and acceleration" and attached to the affidavit a copy of the purported notice allegedly sent by the Bank's law firm to each of the Homeowners. The affidavit did not identify these attachments as "true and correct" copies of the notices allegedly

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[1] Complaint, July 25, 2012 (R. 1-39).

[2] Mortgage attached to the Complaint, July 25, 2012, ¶ 22 (R. 27).

[3] Second Affirmative Defense, Failure to Comply with Conditions Precedent, May 8, 2013 (R. 225).

mailed.[4] The affidavit also generally averred that, pursuant to the law firm's "custom and practice" the affiant reviewed and signed the notices.[5] Additionally, in accordance with "custom and practice, the notices "would have" been sent immediately by "regular and certified US Mail" to the addresses listed on the notices on the date reflected on the letter.[6]

Nine months after the "Supplemental Affidavit" was filed, the Bank filed a two paragraph motion for summary judgment which did not identify the "Supplemental Affidavit" as summary judgment evidence upon which the Bank intended to rely.[7] In fact, the motion failed to identify any evidence the Bank was relying on in support of the motion.[8] But the Bank did file, simultaneously with the motion, an affidavit entitled "Affidavit in Support of Motion for Summary Judgment."[9] And while this affidavit averred that a notice of default was allegedly sent to the Homeowners and that the Bank was due a certain amount of money pursuant to a loan history attached to the affidavit, the affiant—like the earlier

[4] Supplemental Affidavit Regarding Service of Notice of Default and Acceleration, July 1, 2013 (R. 237-244).

[5] *Id.*, ¶ 3 (R. 237).

[6] *Id.*, ¶ 4 (R. 238).

[7] Motion for Summary Judgment, April 11, 2014 (R. 273-274).

[8] *Id.*

[9] Affidavit in Support of Motion for Summary Judgment, April 11, 2014 (R. 277-309).

affiant—failed to aver that any of the documents attached to the affidavit were "true and correct" copies.[10]

The Homeowners filed two counter-affidavits in which both Ms. Impellitteri[11] and Mr. Sutton[12] averred that they never received a notice of acceleration and therefore disputed that any notice was sent.

On this record, the Bank's motion was set for hearing.

B. The Hearing on the Bank's Motion for Summary Judgment

At the outset of the hearing, the Homeowners' attorney objected to the Bank's use of the "Supplemental Affidavit" regarding notice because this affidavit was not identified in the Bank's motion as evidence it would be relying on in support of its motion:

> MR. ACKLEY: Your Honor, I would object to two of the documents included in the packet. One is the reformation affidavit, which was not included in the summary judgment evidence as far as I recall. It has not been filed as supported evidence towards summary judgment, nor has the supplemental affidavit with regard to acceleration been supplied to the Court or noticed for today's hearing. It has not been identified as summary judgment affidavit.
>
> THE COURT: It's not in the court file?

[10] Affidavit in Support of Motion for Summary Judgment, April 11, 2014, ¶ 4 (R. 277-278).

[11] Affidavit of Cheryl Impellitteri, July 16, 2014, ¶ 3 (R. 421).

[12] Affidavit of James P. Sutton, July 16, 2014, ¶ 3 (R. 423).

> MR. ACKLEY: It's in the court file, it's not supported as summary judgment evidence. Which under 1.510, anything used today is supposed to be identified for the use of today's hearing.[13]

And the Homeowners also argued that summary judgment was improper because the Bank failed to prove compliance with the notice provisions of the mortgage—especially in light of the Homeowners' competing affidavit disputing that the notice was sent.[14] Additionally, the Homeowners argued that the records attached to the Bank's affidavits were insufficient for summary judgment purposes because they were not certified or authenticated.[15]

After consideration of the arguments, the trial court granted the Bank's motion and entered summary judgment in its favor.[16] This appeal follows.

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[13] Transcript of Summary Judgment Hearing Before Eli Breger, July 21, 2014 (Supp. R. 1; "T. __"), at 4.

[14] T. 5, 15.

[15] T. 8, 13, 14.

[16] T. 16.

SUMMARY OF THE ARGUMENT

Initially, the trial court should have summarily denied the Bank's motion because the motion's two paragraphs did not state with any particularity the ground on which the motion was based nor did it identify with any degree of specificity the materials upon which the Bank would rely. And because the motion failed to do this, the Homeowners were not afforded a full and fair opportunity to argue the many evidentiary defects in the affidavits and the attached notices.

One such defect was that the attachments to the affidavits were not admissible summary judgment evidence because they were not sworn and certified copies of the documents relied upon by the affiants as required by Fla. R. Civ. P. 1.510(e). Without swearing to their authenticity—that they were true and correct copies—the affiants failed to present admissible evidence that could be considered by the trial court.

But even if the Bank could rely on the affidavits and the attachments, it still failed to prove that it complied with Paragraph 22 of the mortgage because there were conflicting inferences as to whether the notice of acceleration was actually mailed (or that it was mailed in the manner required by Paragraph 15) and the notice itself did not meet the terms of the mortgage.

Therefore, the final summary judgment should be reversed.

STANDARD OF REVIEW

The standard of review of an order granting summary judgment is *de novo*. *Allenby & Assocs., Inc. v. Crown St. Vincent Ltd.*, 8 So.3d 1211, 1213 (Fla. 4th DCA 2009) (citation omitted). When reviewing a ruling on summary judgment, an appellate court must examine the record in the light most favorable to the non-moving party. *Id.* Summary judgment cannot be granted unless the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, conclusively show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id.* (citing Fla. R. Civ. P. 1.510(c)). "[T]he burden is upon the party moving for summary judgment to show conclusively the complete absence of any genuine issue of material fact." *Id.* at 1213 (citation omitted).

ARGUMENT

I. The Bank's motion should have been summarily denied on procedural grounds.

It is black letter law that a motion for summary judgment must state with particularity the grounds on which the motion is based, the substantial matters of law to be argued, and specifically identify any documents—including affidavits—that the movant relies on in support of the motion. Fla. R. Civ. P. 1.510(c). The purpose of the Rule is to eliminate ambush so that litigants are provided a full and fair opportunity to argue the specific issues addressed in the motion. *Williams v. Bank of America Corp.*, 927 So. 2d 1091, 1093 (Fla. 4th DCA 2006); *City of Cooper City v. Sunshine Wireless Co., Inc.*, 654 So. 2d 283, 284 (Fla. 4th DCA 1995); *Swift Indep. Packing Co. v. Basic Food Intern., Inc.*, 461 So. 2d 1017, 1018 (Fla. 4th DCA 1984); *State Farm Mut. Auto. Ins. Co. v. Mashburn*, 15 So. 3d 701, 706 (Fla. 1st DCA 2009). Therefore, "[i]t is reversible error to enter summary judgment on a ground not raised with particularity in the motion." *Williams*, 927 So. 2d at 1093 and the cases cited therein.

The Bank's motion was all of two paragraphs in which it conclusory asserted that there was no genuine issue of material fact and therefore the mortgage

should be foreclosed.[17] It cited no law at all and asserted that the only substantial matters of law that it would argue were the "validity, enforceability and priority of the note and mortgage."[18] Nor did it identify any affidavits or other materials the Bank was relying on whatsoever—much less the Bank's "Supplemental Affidavit" which it served nine months before it filed its summary judgment motion and nearly a year before the hearing on the motion. Even the Supplemental Affidavit itself does not aver that it was filed for purposes of summary judgment.[19]

This failure is fundamental because the Bank relied on its lawyer's Supplemental Affidavit to prove that it complied with Paragraph 22 of the mortgage.[20] But since the affidavit was not identified in the motion, the Homeowners could not reasonably be expected to defend against it. *See Gee v. U.S. Bank Nat. Ass'n*, 72 So. 3d 211, 215 (Fla. 5th DCA 2011) (trial court erroneously considered movant's affidavit on an issue not identified in the motion for summary judgment).

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[17] Motion for Summary Judgment, April 11, 2014 (R. 273).

[18] *Id.*

[19] Supplemental Affidavit Regarding Service of Notice of Default and Acceleration, July 1, 2013 (R. 237-244).

[20] T. 9-10.

And the Homeowners made this exact point during the hearing when they argued that they were blindsided by the Bank's failure to identify the affidavit summary judgment evidence:

> MR. ACKLEY: With regard to the affidavit, Your Honor, one of the very first points I raised this morning was this affidavit that he's referring to regarding the acceleration letter, is not properly before the Court today. It was not noticed as evidence for summary judgment. We were not provided an opportunity to defend against it. Moreover, not having that preparation, I can't address the v[e]racity of the claims made within that affidavit…[21]

Thus, summary judgment was entered on grounds not raised with any degree of particularity in the Bank's motion—and over the Homeowners' express objection to that specific flaw in the motion. The judgment was therefore in error and must be reversed.

II. The trial court erred in granting summary judgment of foreclosure.

But even if the Bank had met its procedural obligations, the summary judgment should still be reversed because the Bank failed to prove compliance with Paragraph 22 of the mortgage; it failed to factually dispute the Homeowners' fifth affirmative defense or show that this defense was legally insignificant; and because the affidavit made in support of the Bank's motion was based upon impermissible hearsay.

[21] T. 10-11.

A. The documents attached to the Bank's affidavits were inadmissible because they were not sworn and certified copies.

Subsection (c) of Fla R. Civ. P. 1.510 requires that all summary judgment evidence be admissible. *See also*, Authors' Comment--1967 to Fla. R. Civ. P. 1.510 (it is "the duty of the trial judge to exclude facts which would be inadmissible in evidence")..

Subsection (e) of that rule 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:

> Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Fla. R. Civ. P. 1.510(e); *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).

Thus, where an affiant's knowledge is based on a separate document, an admissible version of that document (i.e. a sworn or certified copy) 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).

In *Ferris v. Nichols*, 245 So. 2d 660, 662 (Fla. 4th DCA 1971), this Court 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). Notably, this Court held in *Coastal Caribbean Corp. v. Rawlings*, 361 So. 2d 719, 721 (Fla. 4th DCA 1978) that a movant could comply with the rule by reference to documents already in the court file, as long as the affiant swore that the earlier filed documents "were true and correct copies." Accordingly, the critical portion of this sentence in Rule 1.510(e) is not the "attached thereto or served therewith" but the "sworn and certified." Stated simply, the affiant must authenticate the document by swearing it is a true and correct copy.

Merely attaching a document, without authenticating it, does not make it admissible. Without such authentication, it cannot be summary judgment evidence as defined by Fla. R. Civ. P. 1.510(a). This Court has also held that failure to comply with this rule is a basis for denying summary judgment. *Bifulco v. State Farm Ins. Corp.*, 693 So. 2d 707 (Fla. 4th DCA 1997); *Mack v. Commercial Indus. Park Inc.*, 541 So. 2d 800 (Fla. 4th DCA 1989). Further, non-compliant affidavits should be stricken from the record. *Starkey v. Miami Aviation Corp.*, 214 So. 2d 738 (Fla. 3rd DCA 1968).

Here, the Bank's affiant (for its Affidavit in Support of Motion for Summary Judgment) was Jeremiah Herberg, a Vice President of Loan Documentation working for Wells Fargo Bank, N.A. And the only statement he gives regarding the documents attached to his affidavit is that the exhibits attached are "copies."[22] He did not state under oath that these documents are genuine or "true and correct" copies of the Bank's records. Nor did anyone with personal knowledge otherwise vouch for their authenticity—in the affidavit or elsewhere in the record.

Similarly, the affiant of the Bank's stealth, pre-motion "Supplemental Affidavit" also failed to identify the notices of acceleration as genuine or "true and correct" copies. Thus, the documents cannot be considered for summary

[22] Affidavit in Support of Motion for Summary Judgment, Affidavit in Support of Motion for Summary Judgment, April 11, 2014, ¶¶ 3, 4 (R. 277-278).

judgment. *Ferris v. Nichols*, 245 So. 2d at 662. And without these documents, there is no stated basis for the affiant's allegations that the notices of acceleration were sent.

And the fact that the affidavits themselves were "sworn" and claimed that the documents attached were "copies" does not change this analysis. In fact, holding otherwise would ignore the plain wording of Rule 1.510(e) which specifically requires that "sworn or certified" documents be attached when mentioned in an "affidavit"—which, by definition, is already sworn. To say that the mere act of swearing to an affidavit that refers to documents also vouches for the authenticity of the attached copies, is to read the "sworn or certified" requirement completely out of the rule. Provisions in rules of procedure should not be interpreted to be superfluous. *See Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999).

Stated differently, one can be certain that the attachments were not authenticated by sworn testimony because if it were to turn out that the attachments to the Affidavit in Support of Motion for Summary Judgment and the Supplemental Affidavit were <u>not</u> true and correct copies of business records—that they were partly or completely fabricated—the affiants would not be subject to

prosecution for perjury. Both affiants merely "swore" that the attachments are copies of documents.

B. The Bank failed to refute the Homeowners' defense that the Bank had not complied with Paragraph 22 of the mortgage.

Paragraph 22 of the Homeowners' mortgage provides that the borrower must be given thirty days' notice to cure a default before the lender may bring a foreclosure action:

> 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. 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.[23]

It is black letter law that this language in the mortgage is clear, unambiguous, and creates conditions precedent to foreclosure. *Konsulian v. Busey Bank, N.A.*, 61 So. 3d 1283 (Fla. 2d DCA 2011). Where, as here, a mortgage

[23] Paragraph 22 of the Mortgage (R. 377).

contains specific requirements for the contents of the pre-acceleration notice that must be given, a plaintiff is not entitled to foreclosure unless the evidence shows that it provided notice in a form that included all of the required contents. *Kurian v. Wells Fargo Bank, N.A.*, 114 So. 3d 1052, 1055 (Fla. 4th DCA 2013) (finding notice insufficient for failing to "advise of the default, provide an opportunity to cure, or provide thirty days in which to do so"); *Haberl v. 21st Mortg. Corp.*, 138 So. 3d 1192, n.1 (Fla. 5th DCA 2014) (finding notice insufficient for failing to meet mortgage's requirements of informing the borrower of "the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or other defense of borrower to acceleration and foreclosure"); *Samaroo v. Wells Fargo Bank*, 137 So. 3d 1127, 1129 (Fla. 5th DCA 2014) (finding notice insufficient for failing to inform borrowers "of their right to reinstate after acceleration").

Accordingly, even if the trial court could properly consider the Supplemental Affidavit or the unsworn documents attached, the proffered notice of acceleration does not comply with Paragraph 22, the summary judgment must be reversed.

The Homeowners' sworn statements that they had not received the notice raised an inference that prevented entry of summary judgment

Even if the affiants had sworn that the notices of acceleration attached to the affidavits were true and correct copies of their records, the Homeowners 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 as to whether the letter was sent.

The Bank argued below that it need not prove that the letter was received, but only that it was sent.[24] 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…"[25] However, evidence that the Homeowners never received the letter provides an inference that it was never sent. Indeed, it is the reliability of the U.S. postal system which makes the contractual presumption of receipt (upon proof 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.

[24] T. 10.

[25] Mortgage, ¶ 15 (R. 25).

In reality, the Bank never proved that the letter was sent. It has only offered an inference that it was sent. The Bank's affiant did not swear that these particular letters were sent or sent on a particular date, only that they "would have been sent" on the date it was written (i.e. the date on the letter) if it is assumed that the "custom and practice" of the affiant's office was followed in this instance, which was more than a year before the affidavit was executed:[26]

> 4. In accordance with the custom and practice of this firm, said letters would have been sent immediately by regular and certified US Mail, to the addressees at the addresses set forth on the letters, and on the date set forth on the letters.

Despite the claim that the letter was sent by "certified US Mail," the affiant does not reference a certified mail receipt or any log (from his office or the postal service) showing the letter was sent. Accordingly, at summary judgment, the court was required to infer that the customary mailing practice was followed on this occasion. Therefore, when this inference is juxtaposed against that raised by the Homeowners' affidavits, there were competing inferences as to whether the Bank sent the notice, and if so, when.

[26] Supplemental Affidavit Regarding Service of Notice of Default and Acceleration, June 24, 2013 (R. 237).

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). This court may not indulge inferences suggested by the Bank—the movant here. This is particularly true when the only affiant to speak to the issue of when they were mailed did not swear to a specific date. Instead, he adopted a date that can only be found on the unsworn and uncertified attachments.

Moreover, the presumption upon which the Bank seeks to rely is a rebuttable one, which may be controverted by a simple denial of receipt unless the Bank provides "convincing evidence of mailing." *Best Meridian Ins. Co. v. Tuaty*, 752 So. 2d 733, 737 (Fla. 3d DCA 2000). In *Best Meridian*, this Court 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 <u>not</u> convincing evidence of mailing:

> 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, even this extensive evidence of routine practice—far more than was provided here—did not meet the "'convincing evidence' threshold." *Id*. *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]…").

The case of *Roman v. Wells Fargo Bank*, 143 So. 3d 489 (Fla. 5th DCA 2014) does not conflict with these cases. In *Roman*, the Fifth District—citing to decisions from Alabama, Connecticut, Maryland, Ohio and Michigan, but not a single Florida decision—held that a denial of the receipt of the notice of acceleration did not prevent summary judgment because "the express language of the mortgage only required that [the bank] mail notice, not that the [borrowers] receive it." *Id*. at 490. But nothing in *Roman* suggests that the borrowers specifically contested the sending of the notice, only the receipt of the notice, which the Homeowners would agree is, by itself, irrelevant. For example, suggesting that the letter was lost in the mail would be unavailing.

Here, however, the Homeowners specifically disputed that the notices were ever mailed, not only in their pleadings, but in the affidavits themselves:[27]

> 3. I have never received a notice of acceleration from the Plaintiff, or any other entity, and dispute that it was ever mailed.[28]

Accordingly, the Homeowners offered proof of non-receipt, not as an independently material fact, but as an inference that the Bank never sent the notice. At the very least, this raises the "possibility" of an issue of fact which should have precluded summary judgment. *Tamm v. Bradley*, 696 So. 2d 816, 817 (Fla. 2d DCA 1997) ("If the record reflects the existence of any genuine issue of material fact, or the possibility of an issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper.") (Citations omitted).

The Homeowners were entitled to a trial where the factfinder could evaluate the credibility of the sender when he claims that his office "would have" sent the letter by "regular and certified" mail, but offers no evidence of such sending that certified mail would provide. That credibility, shaped by the essential due process right of cross-examination, must be weighed against the Homeowners' credibility in asserting that they have never seen such a letter.

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[27] Notice of Filing Affidavit, July 16, 2014 (R. 417).

[28] R. 421, 423 (emphasis added).

Even without the Homeowners' competing affidavits, the Bank's affidavit failed to prove compliance with the notice provisions of the mortgage

As previously stated, the Bank's affidavit generally averred that the notices were sent by "regular and certified" mail—without referencing a certified mail receipt or any log (from the affiant's office or the postal service) showing the letter was sent. Nor does the affidavit explain what the phrase "regular and certified" mail actually means to the affiant—whether a single piece of mail was sent in a way that was both "regular and certified" or if two notices were sent (one "regular" and one certified). Most importantly, the affidavit does not (and cannot) allege that the Homeowners actually received the notices. And these deficiencies alone require reversal of the summary judgment because the Bank failed to prove that it complied with the notice provisions of the mortgage.

This is because delivery of any notices made pursuant to the mortgage (including Paragraph 22 notices) is governed by Paragraph 15 of the security instrument. That section states that notices are "deemed" to have been given when mailed by <u>first class mail</u> or actually delivered to the Homeowners' notice address if sent by other means.[29] Therefore, when a borrower makes a specific denial that the lender has complied with Paragraph 22 of the mortgage and specifically pleads

[29] Mortgage, ¶ 15 (R. 374-375). A similar requirement is found in the subject note at Paragraph 8 (R. 250).

that the borrower has not received the notice, the lender must prove that it either complied with the notice provisions or the borrower actually received the notice in order to foreclose. *Ramos v. CitiMortgage, Inc.*, 146 So. 3d 126 (Fla. 3d DCA 2014).

But the mortgage does not state that the legal fiction of Paragraph 15 is applicable where notices are sent certified mail or regular mail (whatever "regular" mail may mean to the affiant). Rather, there must be evidence that the notices were sent by first class mail. And even though "certified mail" is a service applied to first class mail, in agreeing to Paragraph 15's one-sided provision that notices from the lender (but not the borrower) are "deemed to have been given …when mailed by first class mail," the Homeowners never agreed to the delays (or the risk of non-delivery) caused by the use of something other than simple, unadorned first class mail.[30]

And to the extent that the Bank intended the mortgage term "first class mail" to mean "certified mail," the term must be construed against the Bank since it was the party who drafted the contract. *See USB Acquisition Co., Inc. v. Stamm*, 660

[30] Certified mail is a special service mail offered on first class mail which has the effect of delaying the delivery because a letter carrier must attempt to obtain the recipient's signature. If the recipient is not home, the carrier will leave a note requiring the recipient to go to the post office to claim it—a process the carrier will repeat three times before the letter is sent back as unclaimed.

So. 2d 1075, 1079 (Fla. 4th DCA 1995) ("[T]o the extent any ambiguity existed, the contract must be construed most strongly against the party who drafted the instrument.")

Having failed to prove that the notices were sent by first class mail (without the certified mail service) the Bank could not rely on the presumption of delivery in Paragraph 15. Instead, it would need to prove "when [notice was] actually delivered to Borrower's notice address if sent by other means."[31] At this juncture, the Homeowners' affidavits once again become relevant, because they are the only evidence in the case on the subject of actual delivery. That testimony is unrefuted that actual delivery did not, in fact, occur.

And without the "same-day delivery" presumption of Paragraph 15 (which, again, can only be established by proof that the notice was sent by first class mail), the Bank failed to prove that it gave a full thirty days to cure the default as required by Paragraph 22. Because the notice gave only thirty days to cure from the date of the letter, to comply with the thirty-day grace period to cure, the Bank would need to prove actual delivery on that same day (e.g. by email or hand delivery).

Thus, even if the Homeowners had not filed competing affidavits, the Bank's affidavit still failed to prove it was entitled to summary judgment because

[31] Mortgage, ¶ 15 (R. 24).

the affidavit fails to prove that the Bank complied with the mailing provisions of the mortgage or that the Homeowners actually received the notices.

The notice improperly included a breach that had not even occurred in the cure amount.

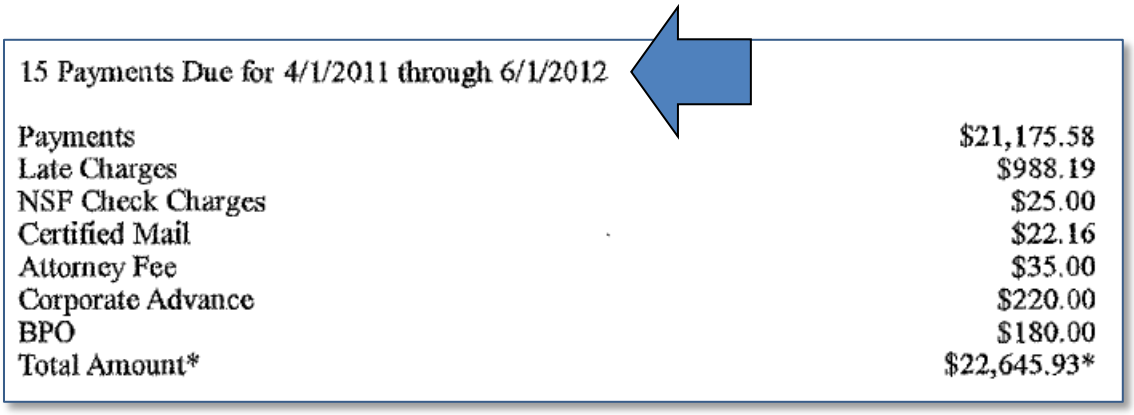
The plain language of Paragraph 22 of the mortgage required that the Bank send the Homeowners a notice following their alleged breach which specifies the breach they allegedly committed and which specifies a date not less than thirty days after the notice was sent which the Homeowners could cure the breach.

The notices the Bank attached to its affidavits, however, do not comply with the mortgage's notice requirements because they expressly include a future breach—one that had not yet occurred as part of the amount that must be cured within thirty days:[32]

> *Please note that since this quote is effective through the due date of your next monthly mortgage payment, that payment has been included in the Total Amount* due.

The notices, dated May 16, 2012, specifically states that the "Payments Due" includes the payment for June 1, 2012:

[32] Letter dated May 16, 2012 (R. 297)



15 Payments Due for 4/1/2011 through 6/1/2012	
Payments	$21,175.58
Late Charges	$988.19
NSF Check Charges	$25.00
Certified Mail	$22.16
Attorney Fee	$35.00
Corporate Advance	$220.00
BPO	$180.00
Total Amount*	$22,645.93*

The notices also state that "[u]nless our office receives the above Total Amount*, no later than June 15, 2012 by certified check made payable to WELLS FARGO BANK, NA, the entire loan will automatically become due and owing."[33] Accordingly, the Bank asserted that it would accelerate the loan if an amount, which was not yet due were not cured in less than thirty days from when it would become due.

Because the May notice includes in the cure amount a breach that could not occur until June, the Homeowners had only fourteen days from the date of the notice to cure this additional breach. In other words, the Bank impermissibly tried to start the thirty-day clock to cure a default of the June 1, 2012 payment fifteen days before the payment was even due. And because the notices do not state a different, lesser amount if the default is cured before June 1st, a borrower

[33] R. 298.

attempting to immediately cure, would be forced to pay an amount they were not yet obligated to pay.

To make matters worse, by including unnecessary (and not-yet-true) information—the reference to a potential future breach—the Bank's law firm rendered the alleged notice defectively ambiguous. The notice was designed, according to the parties' express agreement in the mortgage, to "specify"[34] the default and to precisely identify the action to cure. The alleged notice does not specify "the default," but, in effect, refers to two that it claims must both be cured by the deadline.

It is black letter law that the thirty day notice must be strictly observed. *See Konsulian v. Busey Bank, N.A.*, 61 So. 3d at 1285 (reversing summary judgment where suit was filed three days after the bank sent an acceleration letter); *Laurencio v. Deutsche Bank Nat. Co.*, 65 So. 3d 1190, 1191 (Fla. 2d DCA 2011) (summary judgment reversed where suit filed two days after default letter); *Kurian*, 114 So. 3d at 1055 (Fla. 4th DCA 2013) (summary judgment reversed where notice stated that acceleration had already occurred and was dated only six days before the complaint was filed).

[34] Specify means to mention specifically or to state precisely in full and explicit terms or detail so that misunderstanding is impossible. *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992).

* * *

Therefore, even if the notices were proper summary judgment evidence, they do not comply with Paragraphs 22 and 15 of the mortgage and the trial court should have denied the Bank's motion for summary judgment.

CONCLUSION

The Court should reverse the final summary judgment with instructions that the trial court hold a trial on the merits.

Dated: March 2, 2015

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

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.

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this March 2, 2015 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 March 2, 2015.

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

SERVICE LIST

Michael K. Winston
Dean A. Morande
CARLTON FIELDS JORDEN BURT,
P.A.
CityPlace Tower – Suite 1200
525 Okeechobee Boulebard
West Palm Beach, FL 33401
dmorande@cfjblaw.com
kcasaza@cfjblaw.com
wpbecf@cfdom.net
Attorney for Appellee