In the District Court of Appeal
Fifth District of Florida

CASE NO.
(Circuit Court Case No.)

Appellant,

v.

U.S. BANK NATIONAL ASSOCIATION,
AS TRUSTEE, ETC. et al.,

Appellees.

ON APPEAL FROM THE FIFTH JUDICIAL
CIRCUIT IN AND FOR MARION COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

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Issue #1

Under Florida law, exhibits to a complaint control over its allegations. In this case, the note attached to the Complaint is specially endorsed to Option One Mortgage Corporation. The attached mortgage shows Advent Mortgage is the mortgagee. No assignment existed at the time of filing nor was there ever any evidence of any transfers. Did U.S. BANK National Association have standing to bring this suit?

Issue #2

It is reversible error for a court to grant summary judgment on grounds not raised by a motion for summary judgment. The BANK's motion did not raise the issue of the lost note or reformation of the mortgage and deed. Yet, summary final judgment was granted on those very issues. Was it reversible error to grant summary judgment on these grounds that were not raised by the motion?

STATEMENT OF THE CASE AND FACTS

I. The Plaintiff files a Complaint with Attachments that Conflict With the Allegations.

On May 21, 2009, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ASSET INVESTMENT LOAN TRUST, 2005-10 (the "BANK"), brought suit to foreclose on the property of [redacted] [redacted][1] The Complaint alleged that a promissory note and mortgage were executed and delivered to Advent Mortgage, LLC, a Kentucky LLC.[2] The Complaint further alleged that the original instruments had been lost,[3] but nevertheless attached what it claimed to be copies of the note and mortgage.[4]

The copy of the note contains an allonge showing that Advent Mortgage specially endorsed the promissory note to Option One Mortgage Corporation.[5] The attached copy of the mortgage shows Advent Mortgage as the mortgagee.[6] Although no assignment was attached, the Complaint alleges that Plaintiff is the

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[1] Complaint to Foreclose Mortgage and to Enforce a Lost Instrument and for Reestablishment of a Mortgage and for Reformation of Deed and for Reformation of Mortgage, filed May 21, 2009 (the "Complaint"). (R. 1-28).

[2] Complaint, ¶ 2 (R. 1-28).

[3] Complaint, ¶¶ 19-23, ¶¶ 27-29 (R. 1-28).

[4] Note and Mortgage attached to the Complaint (R. 1-28).

[5] *Id.*

[6] Mortgage attached to Complaint (R. 1-28).

"owner and holder of the Promissory Note and Mortgage by virtue of [an] assignment to be recorded."[7]

The Complaint also seeks to reform the mortgage and deed because of a mistake in the legal description.[8] The alleged correct legal description is provided.[9]

GEE answered the Complaint and denied the allegations regarding ownership and holdership of the note and mortgage, the lost note, reestablishment of the mortgage, and reformation of the mortgage and deed.[10] On August 12, 2009, the BANK filed an affidavit of Lost Original Instrument.[11]

II. The BANK moves for Summary Judgment.

The BANK filed a one and a half page summary judgment motion.[12] Attached and specifically incorporated in the motion were several affidavits including an affidavit of indebtedness, attorneys' fees, attorney fees and costs, and non-military service. The same day, the BANK filed an alleged copy of the assignment of mortgage which was executed on July 1, 2009, after the Complaint

[7] Complaint, ¶ 3 (R. 1-28).

[8] Complaint, ¶¶ 32-34, 38-40 (R. 1-28).

[9] Complaint, ¶¶ 35, 41 (R. 1-28).

[10] *Pro Se* Answer to Complaint ("Answer") filed June 22, 2009 (R. 60-62).

[11] Notice of Filing, Affidavit of Lost Original Instrument, filed August 12, 2009 (R. 68-70).

[12] Plaintiff's Motion for Summary Judgment, served October 15, 2009 (R. 74-82).

was filed.[13] No documents were attached to any of the affidavits. The motion and attached affidavits did not mention anything about a lost note, a lost mortgage, or reformation of a deed or mortgage, however, the motion did state that the promissory note, mortgage and assignment of mortgage would be filed on or before the hearing.[14]

III. The Court Grants Summary Judgment.

The BANK did not attend the summary judgment hearing held on January 26, 2010 and therefore, the lower court denied the BANK's motion.[15] The BANK then moved *ex parte* to reschedule the hearing.[16] The denied motion was re-noticed for a five minute hearing to be held on February 26, 2010.[17]

On February 23, 2010, Defendant served an affidavit in opposition to Plaintiff's motion for summary final judgment.[18] A portion of the February 26, 2010 summary judgment hearing was held before GEE was present in the

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[13] Notice of Filing Copy of Assignment of Mortgage, served October 15, 2009 (R. 71-73).

[14] Plaintiff's Motion for Summary Judgment with attached affidavits, served October 15, 2009 (R. 74-82).

[15] Transcript of Hearing before the Honorable Frances S. King held on January 26, 2010 (R. 380-83).

[16] Motion to Reschedule Hearing on Expedited Basis, filed January 25, 2010 (R. 86-87); Order on Motion to Reschedule Hearing, filed January 29, 2010 (R. 88).

[17] Re-Notice of Hearing, filed February 5, 2010 (R. 89-91).

[18] Defendant's Affidavit in Opposition to Plaintiff's Motion for Summary Final Judgment of Foreclosure and For Award of Attorney's Fees and Costs, served February 23, 2010 (R. 231-313).

courtroom.[19] During her absence, the BANK argued to the judge that the court should rely on the lost note affidavit and the assignment of mortgage.[20] The BANK also argued, and the court ruled that GEE's affidavit should be disregarded.[21] Later, when GEE arrived, the court announced, prior to hearing any argument from GEE on the issue, that her affidavit was untimely.[22] The BANK, too, argued that the court had already decided the issue before GEE arrived.[23]

The BANK presented the lost note affidavit and the assignment of mortgage in support of summary judgment.[24] GEE argued that there was no evidence before the court showing the BANK was the owner of the note and mortgage.[25] The trial court stated that, unless GEE could claim that she paid the amount owed, summary judgment would be granted.[26] On the BANK's objection, the court refused to consider any argument presented in GEE's affidavit.[27]

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[19] Transcript of Hearing before the Honorable Frances S. King held on February 26, 2010 ("Summary Judgment Hearing"), p. 2-9 (R. 353-79).

[20] Summary Judgment Hearing, p. 5 (R. 353-79).

[21] Summary Judgment Hearing, p. 2, 4 (R. 353-79).

[22] Summary Judgment Hearing, p. 11 (R. 353-79).

[23] Summary Judgment Hearing, p. 13 (R. 353-79).

[24] Summary Judgment Hearing, p. 10 (R. 353-79).

[25] Summary Judgment Hearing, p. 15 (R. 353-79).

[26] Summary Judgment Hearing, p. 14 (R. 353-79).

[27] Summary Judgment Hearing, p. 15 (R. 353-79).

The trial court granted summary judgment[28] and GEE timely moved for rehearing.[29] The motion raised the issues presented in this brief, as well as a plethora of procedural irregularities with the summary judgment hearing itself. A hearing was held on the Motion for Rehearing, but the trial court ultimately denied the motion on May 7, 2010.[30] GEE then filed a timely notice of appeal.[31]

[28] Final Judgment of Foreclosure, filed on March 1, 2010 (R. 217-224).

[29] Defendant [redacted] Motion for Rehearing of Summary Judgment under Rule 1.530, filed on March 10, 2010 (R. 318-352).

[30]Order Denying Rehearing, filed May 7, 2010 (R. 501).

[31] Notice of Appeal filed May 17, 2010 (R. 502-513).

SUMMARY OF THE ARGUMENT

Under Florida law, exhibits to a complaint control over its allegations. The copy of the note attached to the Complaint here contains an allonge indicating that Advent Mortgage specially endorsed the promissory note to Option One. A specially endorsed instrument becomes payable to the identified person and may be negotiated only by the endorsement of that person. Here, the BANK cannot be a holder unless it is the named payee in the endorsement — which it is not. As a matter of law, the BANK did not have standing to sue when the Complaint was filed.

Further, a complaint cannot state a cause of action at the time of filing based on a document that did not exist until later. It is undisputed that the assignment was executed after the Complaint was filed. Therefore, the BANK had no standing to bring suit and cannot acquire standing after filing. Although there is no allegation of an earlier transfer, the assignment purports to be "effective" as of a date earlier than the Complaint. Accordingly, an evidentiary hearing is necessary to resolve the conflict on the face of the assignment, i.e., whether the BANK acquired an interest in the mortgage prior to the filing of the complaint.

Even if the assignment existed at filing, it was not properly authenticated. Summary judgment evidence must be admissible. No affidavit even mentioned the word "assignment." Thus, nothing was ever presented to authenticate the

assignment. Counsel's unsworn statement that the document was a copy is simply insufficient to establish authenticity. The inadmissible unauthenticated assignment in this case was as a matter of law insufficient to prove ownership of the mortgage and the BANK was not entitled to an evidentiary shortcut.

The BANK argued matters at the hearing not raised in its motion for summary judgment. Worse, certain matters were neither raised by motion or argued at the hearing were nevertheless ruled on in the BANK's favor. The dispositive legal issues not raised in the BANK's motion were:

1) The BANK's standing as owner and holder of a note that was endorsed to a completely different entity;
2) The re-establishment of a lost note (Count II of the Complaint); and
3) The reformation of the deed and mortgage (Counts IV and V of the Complaint).

The court went so far as to grant summary judgment on the reformation counts despite the fact that the issues were not raised by the motion or oral argument.

Accordingly, this Court must reverse the final summary judgment and remand to the trial court for further proceedings.

STANDARD OF REVIEW

The standard of review of an order granting summary judgment is *de novo*. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2002); *Carlucci v. Demings*, 31 So. 3d 245, 247 (Fla. 5th DCA 2010). The summary judgment standard is well-established. "A movant is entitled to summary judgment 'if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file 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.' " *Estate of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Care Ctr.*, 928 So. 2d 1272, 1274 (Fla. 2d DCA 2006) (quoting Fla. R. Civ. P. 1.510(c)).

In order to determine the propriety of a summary judgment, this Court must resolve whether there are any "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. *Estate of Githens*, 928 So. 2d at 1274. The Court must consider the evidence contained in the record, including any supporting affidavits, in the light most favorable to the non-moving party, GEE, and if there is the slightest doubt or conflict in the evidence, then summary judgment must be reversed. *See id*.

ARGUMENT

I. The Pleadings, Affidavits, and Admissions Show that, at the Time the Complaint was Filed, the BANK did not have Standing to Sue.

A. The special endorsement on the allonge shows Option One was the owner of the note and the attached mortgage shows Advent Mortgage was the mortgagee.

The copy of the note attached to the Complaint contains an allonge with a special endorsement.[32] The endorsement indicates that the original lender, Advent Mortgage specially endorsed the promissory note to Option One Mortgage Corporation ("Option One").[33]

A special endorsement is an endorsement by a holder of an instrument that identifies a person to whom it makes the instrument payable. § 673.2051(1), Fla. Stat. (2009). When specially endorsed, an instrument becomes payable to the identified person and may be negotiated only by the endorsement of that person. *Id; see also Riggs v. Aurora Loan Servs., LLC*, 36 So. 3d 932 (Fla. 4th DCA 2010) (distinguishing a special endorsement which specifically identifies the person to whom it is made payable from a blank endorsement which is made payable to bearer and is negotiated by transfer alone).

In this case, the BANK cannot be the holder of the promissory note unless it is the named payee in the endorsement — which it is not. The chain of title ends at

[32] Note attached to Complaint (R. 1-28).

[33] *Id.*

Option One and the endorsement is evidence that the BANK does *not* own the subject promissory note. At the very least, the endorsements to an entity other than the BANK created an issue of fact that precludes summary judgment.

Further, not only did the note attached to the Complaint show Option One was the noteholder but the attached mortgage showed Advent Mortgage was the mortgagee.[34] Exhibits attached to a pleading become a part of the pleading for all purposes. *See* Fla. R. Civ. P. 1.130(b). When exhibits are attached to a complaint, the contents of the exhibit control over the allegations of the Complaint. *See BAC Funding*, 28 So. 3d at 938 (holding that where exhibits to the complaint conflict with its allegations concerning standing, and the exhibit do not show that plaintiff has standing to foreclose the mortgage, as a matter of law the plaintiff has not established entitlement to foreclose); *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240 (Fla. 2000).

Further, a party is bound by its own pleadings. There does not have to be testimony from either party concerning facts admitted by the pleadings. *Fernandez v. Fernandez*, 648 So. 712, 713 (Fla. 1995). Admissions in the pleadings are accepted as facts without the necessity of further evidence at the hearing. *Id.* citing *Carvell v. Kinsey*, 87 So. 2d 577 (Fla. 1956); *Cessna Aircraft Co. v. Avion Techs.*,

[34] Mortgage attached to Complaint (R. 1-28).

Inc., 990 So. 2d 532, 536-37 (Fla. 3d DCA 2008) citing *City of Deland v. Miller*, 608 So. 2d 121, 122 (Fla. 5th DCA 1992).

Accordingly, the pleadings and admissions show that Option One was the noteholder and Advent Mortgage was the mortgagee at the time the suit was filed based on the exhibits to the Complaint. Nothing in the record contradicted these admissions.

B. The only document which the BANK alleged as the basis for its standing – the assignment – did not exist when it filed the Complaint.

The Complaint here was filed on May 21, 2009.[35] The assignment was executed July 1, 2009 – over a month after the case was filed.[36] Therefore, the BANK could not prove standing as the mortgagee on the date the Complaint was filed based on an assignment that did not exist until *after the lawsuit was filed*. This issue was already decided by the Fourth District. In *Jeff-Ray Corp. v. Jacobson*, 566 So. 2d 885 (Fla. 4th DCA 1990), a lender attempted to foreclose with an assignment dated four months after the lawsuit was filed. The Fourth District held that the "complaint could not have stated a cause of action at the time it was filed based on a document that did not exist until some four months later." *Id*. at 886. As a result, the court reversed final summary judgment and found that

[35] *See* Complaint (R. 1-28).

[36] *See* Notice of Filing Copy of Assignment of Mortgage, served October 15, 2010 (R. 71-73).

the complaint should have been dismissed. *Id*; *see BAC Funding*, 28 So. 3d at 938-39 .

Like the plaintiff in *Jeff Ray Corp.*, the BANK in this case sought to state a cause of action based on an assignment of mortgage, but later produced an assignment that did not exist at the time the Complaint was filed. Accordingly, the Complaint could not have stated a cause of action at the time it was filed and summary judgment should have been denied.

Even if the BANK were to argue that the mortgage followed the note and there was an earlier transfer based on the assignment's effective date this would, at best, require an evidentiary hearing. *See WM Specialty Mortgage v. Salomon*, 874 So. 2d 680, 681-83 (Fla. 4th DCA 2004) (finding an evidentiary hearing on whether a bank acquired an interest in a mortgage prior to the filing of a complaint to be the appropriate forum to resolve a conflict where an assignment showed different transfer and execution dates). In other words, even assuming there was evidence to contradict the BANK's own pleadings and filings, such conflicting evidence would merely preclude summary judgment and create an issue of fact for trial.

Ultimately, to be entitled to summary judgment the BANK was required to show that there was no genuine issue of fact that it was the mortgagee at the time the case was filed. The record shows the opposite. Therefore, the Court need not

read any further. The judgment must be reversed with directions to dismiss this case under *Jeff-Ray Corp*.

Even if the BANK could rely on a post-filing assignment, the assignment provided in this case merely transfers the mortgage, not the note.[37] Worse, the legal description on the assignment is the same as that in the deed and mortgage – one which the BANK itself claims is incorrect (and which is different than that in the judgment).

C. The assignment was not admissible summary judgment evidence because it was never authenticated.

Rule 1.510(c) limits "summary judgment evidence" to materials "as would be admissible in evidence." Fla. R. Civ. P. 1.510(c); *See BAC Funding*, 28 So. 3d at 939 (reversing summary judgment where unauthenticated assignment did not constitute admissible evidence establishing bank's standing to foreclose, and the bank submitted no other evidence to establish that it was the proper holder of the note and mortgage).

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[37] Notably, the case of *Taylor v. Deutsche Bank Nat. Trust Co.*, ___ So.3d ___, 35 Fla. L. Weekly D1770 (Fla. 5th DCA 2010) does not hold to the contrary. The holding in *Taylor*—that the assignment transferred an unendorsed note—explicitly rests upon specific language in the assignment that it was assigning both "the Mortgage *and Note*." *Id*. at *3 (emphasis original). The assignment in this case contains no such language transferring the note.

In this case, the BANK was required to establish through admissible evidence that it held the note and mortgage and so had standing to foreclose the mortgage before it would be entitled to summary judgment in its favor. The notice of filing of the alleged assignment was not accompanied by any affidavit or other evidence to authenticate the assignment as a true and correct copy.[38] Moreover, the affidavits fail to even mention the word "assignment."[39] Nor did anyone ever testify by affidavit that the copy filed by the BANK qualified for the business record exception to hearsay.[40] Further, the unsworn statement by the BANK's attorney that the document was a "copy" of the assignment of mortgage is insufficient to establish its authenticity. *Hewitt, Coleman & Assocs. v. Lymas,* 460 So. 2d 467 (Fla. 4th DCA 1984) (unsworn statements of attorneys do not establish facts). The affidavits, therefore, could not have authenticated the assignment.

Since the assignment was never authenticated, it could not be "summary judgment evidence" upon which the trial court could base its judgment. *See* Fla. R. Civ. P. Rule 1.510(c). In fact, nothing presented to the trial court was authenticated. Accordingly, the BANK was not entitled to an evidentiary shortcut based on unauthenticated inadmissible evidence.

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[38] *See* Notice of Filing Copy of Assignment of Mortgage, served October 15, 2010 (R. 71-73); Plaintiff's Motion for Summary Judgment with attached affidavits, served October 15, 2009 (R. 74-82)

[39] *Id.*

[40] *Id.*

II. It was Reversible Error to Enter Summary Judgment on Grounds not Raised in the Motion.

Rule 1.510(c) requires that a motion for summary judgment specifically state what legal issues will be decided and what evidence will be presented:

> The motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall specifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence ("summary judgment evidence") on which the movant relies.

Fla. R. Civ. P. 1.510(c). It is reversible error to enter summary judgment on a ground not raised with particularity in the motion. *Williams v. BAC*, 927 So. 2d 1091 (Fla. 4th DCA 2006); *Deluxe Motel, Inc. v. Patel*, 727 So. 2d 299 (Fla. 5th DCA 1999) (In considering motion for summary judgment, trial court could not rely on arguments made at hearing but not in motion). Accordingly, the BANK cannot raise grounds at the summary judgment hearing when it failed to raise those grounds in its motion for summary judgment. *Cooper City v. Sunshine Wireless Co.*, 654 So. 2d 283 (Fla. 4th DCA 1995). Nevertheless, that is exactly what happened here.

A. The argument on the lost note was not raised at all in the summary judgment motion.

The BANK's motion for summary judgment made no argument in support of the lost note count and identified no evidence to support its claim that the instrument was, in fact, lost. Instead, the motion declared the opposite – that "[t]he

original promissory note, mortgage and assignment of mortgage will be filed on or before the hearing."[41] Despite the motion, the BANK's counsel directed the Court to the lost note affidavit during the portion of the summary judgment hearing held *ex parte*:

> THE COURT: … I'm looking in the court file and am not able to put my hands on the original note and mortgage.
>
> MS. DATZ: There should be a lost note affidavit that has been filed with you.
>
> THE COURT: When was that filed?
>
> MS. DATZ: That was filed, if I may review my notes, on August 12th of '09. And you should have an assignment filed on October 19.
>
> THE COURT: I have the copy of the assignment.
>
> MS. DATZ: Okay.
>
> THE COURT: Before -- the next thing before that is the August 7th affidavit, nonmilitary affidavit. Oh, here is the -- okay. I have the affidavit of lost original —[42]

Not only did the summary judgment motion fail to raise the lost note as an issue, it specifically indicated a contrary intention — that the original note would be produced at or before the hearing. Moreover, while the BANK had earlier filed

[41] The Plaintiff's Motion for Summary Judgment, served October 15, 2009 (R. 74-82).

[42] Transcript of Hearing held before the Honorable Frances S. King held on February 26, 2010, p. 5 (R. 353-79)

a lost note affidavit,[43] it did not "specifically identify" that affidavit in its motion as required by Rule 1.510(c). This failure to identify the affidavit cannot be mere oversight because the BANK named four other affidavits it would rely upon, and because it declared it would file the original note.

The court commented that, because the lost note affidavit had been filed almost six months before the hearing, GEE should have raised her objection earlier.[44] This position, aside from disregarding the rules of procedure, assumes that GEE would have reason to attack an issue not raised by the summary judgment motion. In other words, since the motion said the note would be produced, there would have been no reason to object to an unreferenced lost note affidavit.

B. Neither the motion for summary judgment nor argument on the motion made any mention of the BANK's two counts for reformation.

The motion for summary judgment and its incorporated affidavits made no mention that, in order to foreclose on the subject property, it needed the court to reform the deed and mortgage to correct the legal description. The Complaint expends two counts on the issue,[45] both of which were denied by GEE.[46] No

[43] Affidavit of Lost Original Instruments, executed by Kathy Smith on July 31, 2009 and filed August 12, 2009 (R 68-70).

[44] Summary Judgment Hearing, pp. 22-23 (R. 74-82).

[45] Counts IV and V, Complaint, pp. 4-5 (R. 1-28).

affidavits filed with the court contain a single word about reformation. Yet, the BANK unilaterally slipped an allegedly correct legal description into the proposed judgment. And although the court never heard or decided the reformation issue, and although not a scintilla of evidence on the subject is anywhere in the file, the judgment now states that the BANK's lien encumbers the property with the requested reformed legal description.[47] Because the mortgage, which has never been reformed, has a different legal description, this statement in the judgment is simply incorrect.

The BANK's changing of the legal description based on un-raised and un-heard grounds violates due process. This is particularly troubling in an equitable action such as foreclosure.

III. The Affidavit of Lost Original Instruments was Defective because no Sworn or Certified Copies of the Note, Mortgage, or Assignment were Attached or Even Identified.

Even if the lost note affidavit had been identified in the BANK's summary judgment motion, the affidavit was defective because no "sworn or certified copies" of the documents referenced in the affidavit were attached. Rule 1.510(e) clearly states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." In other words,

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[46] Answer , ¶¶ 36, 42 (R. 60-62).

[47] Proposed Final Judgment of Foreclosure, ¶5 (R. 230).

where an affiant's knowledge is based on a separate document, that document must be attached. 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), the court addressed summary judgment affidavits in the context of an action to enforce a promissory note. Although the movant had supplied two affidavits, the Fourth District 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.)

Ferris v. Nichols, 245 So.2d at 662 (emphasis added).

The trial court here correctly recognized this deficiency, but then decided that the affidavit's reference to documents attached to the Complaint was "adequate."[48] The affiant, however, explicitly based her testimony on "the loan

[48] Summary Judgment Hearing, p. 5 (R. 353-379).

payment records of plaintiff"[49] – documents that were not attached to the Complaint (and that would seem to be irrelevant to the lost note issue).

Even the affiant's reference to the note attached to the Complaint is ambiguous since the form affidavit gives two options, indicated in back-to-back brackets, from which the affiant was undoubtedly expected to choose:

> The original Promissory Note, [a copy of which is attached to the Complaint] [the terms of the Promissory Note are attached to the Complaint], has been lost or destroyed and cannot be located by plaintiff.[50]

The affiant did not select one of these options, leaving it unclear as to whether an actual copy of the note was attached, or simply something which contained the terms of that note (or whether the affiant carefully read the affidavit before executing it). Nor does the affiant swear or certify that the copy attached to the Complaint is true and correct, or otherwise authentic, as Rule 1.510(e) requires of the documents to which the affidavit refers.

As to the allegedly lost mortgage, the affiant does not even assert that a copy is attached to the complaint. Again, for the mortgage to be considered as summary judgment evidence it must be admissible, i.e. a qualified records custodian must identify it as a true and correct copy of the original.

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[49] Affidavit of Lost Original Instruments, ¶ 1 (R. 68-70).

[50] Affidavit of Lost Original Instruments, ¶ 3 (R. 68-70).

Moreover, the affiant of the lost note affidavit merely parrots the allegations of the complaint, making unsupported legal conclusions, such as: "plaintiff is the owner and holder of the Promissory Note" and "Plaintiff…was entitled to enforce it when loss of possession occurred."[51] She does not state how the BANK became the owner and holder, or any underlying facts to support the notion that the BANK was entitled to enforce it. Moreover, because she "caused" the search for the note, it is apparent that she did not personally conduct the search for the note, and therefore fails to support her bald declarations of personal knowledge. Nor does she disclose any details about the search, or even any general descriptions of what was done other than the self-serving portrayal of the search as "extensive."

She also states that she has read the Complaint, and every allegation therein is true and correct.[52] But such conclusory statements, like the others in the affidavit, are legally inadequate. *Nour v. All State Pipe Supply Co*., 487 So. 2d 1204, 1205 (Fla. 1st DCA 1986) ("affidavit which in legal effect amounts to nothing more than a statement by an officer of the company that the allegations of the complaint are true" is insufficient for summary judgment).

[51] Affidavit of Lost Original Instruments, ¶ 3 (68-70).

[52] Affidavit of Defendant' Indebtedness, ¶ 4 (R. 74-82), Affidavit of Lost Original Instruments, ¶ 2 (68-70).

IV. The trial court applied the wrong legal standard.

The trial court mistakenly believed the only issue on summary judgment was whether GEE had paid the note:

> THE COURT: [I] guess the one thing that I would consider today on this motion for summary judgment is if you came in, and said: Judge, there's a huge mistake. I've been paying my mortgage all along. But they're claiming that you haven't paid your mortgage for over a year.[53]

As discussed above, there were several procedural and substantive issues before the court. It was the BANK's burden to prove there was no genuine issue of material fact as to all of those issues. It was the BANK's burden to disprove all the affirmative defenses raised by GEE or otherwise show them to be legally insufficient. The BANK failed to meet its burden. The trial court erred in applying a standard where payment is the only issue.

[53] Summary Judgment Hearing, p. 14 (R.).

CONCLUSION

The record in this case is devoid of any admissible evidence on the issues that the BANK needed to prove. First, the BANK had to prove it was the holder of the note and the mortgagee at the time the case was filed. The record actually shows the BANK was neither. On this ground alone, the judgment should be reversed and remanded with directions to dismiss the Complaint.

Second, the trial court impermissibly granted summary judgment on grounds not raised or identified in the motion for summary judgment. Worse, some of those issues were not raised by motion, affidavit, or oral argument.

Based on the foregoing, the Court must reverse the final summary judgment and remand to the trial court for further proceedings.

Dated October 4, 2010

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this October 4, 2010 on all parties on the attached service list.

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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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