In the District Court of Appeal
Fourth District of Florida

CASE NO.
(Circuit Court Case No. CACE)

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and

Appellants,

v.

COUNTRYWIDE HOME LOANS, INC and SEQUOIA GARDENS CONDOMINIUM ASSOCIATION, INC.,

Appellees.

ON APPEAL FROM THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

REPLY BRIEF OF APPELLANTS

Respectfully submitted,

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Notes:

This Reply Brief uses the same abbreviated references as introduced in the Initial Brief, as follows:

- Record on Appeal: **(R. __)**;
- Supplement to the Record on Appeal: **(Supp. R. __)**.
- Appellee, COUNTRYWIDE HOME LOANS, INC.: "the BANK."
- Appellants, [redacted] and [redacted] collectively: the "OWNERS."
- Uniform Commercial Code: UCC

STANDARD OF REVIEW

The BANK takes the sanctionably irresponsible position that the trial court's "factual determinations" in entering summary judgment are to be reviewed for "an abuse of discretion."[1] It is elementary that, if the trial court made factual determinations, it erred in entering summary judgment. *Coquina Ridge Properties v. E. W. Co.*, 255 So. 2d 279, 280 (Fla. 4th DCA 1971) (Summary judgment reversed because "[t]he trial court may not try or determine factual issues in [summary judgment] proceedings; … substitute itself for the trier of fact and determine controverted issues of fact.")

Not surprisingly, all the cases cited by the BANK for this standard of review having nothing to do with summary judgment.[2] Even the BANK's quotation from *La Rossa* at page six of its Brief announces in the first line that the standard of review discussed there applies when the trial judge is "sitting as the trier of fact." *Id*. at 468.

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[1] Answer Brief, pp. 5-6.

[2] *King 205, LLC v. Dick Pittman Roof Servs., Inc.*, 31 So. 3d 242 (Fla. 5th DCA 2010) (appeal from judgment after non-jury trial); *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla.1980) (dissolution of marriage); *Delno v. Market St. Ry. Co*., 124 F.2d 965 (1942) (federal declaratory action); and *La Rossa v. Glynn*, 302 So. 2d 467 (Fla. 3d DCA 1974) (appeal of a final judgment—not final summary judgment—of foreclosure).

The BANK's stunningly frivolous assertion regarding the summary judgment standard of review is indicative of the BANK's lack of concern for accuracy and candor when addressing both this Court and the court below. More than a mere momentary lapse in judgment, counsel for the BANK made this same argument in another case pending before this Court.[3]

STATEMENT OF FACTS

The BANK's Statement of Facts is improper because it is unduly argumentative. *See Williams v. Winn-Dixie Stores, Inc.*, 548 So. 2d 829, 830 (Fla. 1st DCA 1989). It states as fact its position on the disputed issues at the heart of the controversy: 1) that it located the "original documents;" 2) that it is still in possession of the note; 3) that the lower court had the original note, mortgage, and assignment before it; 4) that the BANK "cooperated" to coordinate depositions; and 5) that the OWNERS refused to take the depositions.[4]

The BANK then incorrectly states that the "Judge ruled on each of the affirmative defenses in this matter one by one at the summary judgment hearing" and erroneously identifies that Judge as Meenu Sasser.[5] Judge Sasser, however, is a judge in the Fifteenth Judicial Circuit. This case arises out of the Seventeenth

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[3] *Glarum v. LaSalle Bank, N.A.*, Case No. 4D10-1372.

[4] Answer Brief, pp. 2-3.

[5] Answer Brief, p. 4.

Judicial Circuit in and for Broward County (not as stated on the cover of the Answer Brief, the "Ninth Judicial Circuit, Orlando, Orange County") and the Judge was the Honorable Patti Henning. Judge Henning's on-the-record response to the argument that the BANK had not disproven the affirmative defenses was limited to a single word: "Okay."[6]

The Court should view these gross misstatements of fact in the context that the Answer Brief was filed after the granting of two motions for extensions of time (the first of which was filed over a month late) and a Motion to Amend the Answer Brief to correct scrivener's errors. *See White v. White*, 627 So. 2d 1237 (Fla. 1st DCA 1993) (harsh action by the court justified where party afforded numerous opportunities to file a proper brief).

ARGUMENT

I. The Trial Court Erred In Granting Summary Judgment.

A. Rule 1.510(e) requires that an affiant provide sworn or certified copies of the portions of the BANK's books and records the affiant consulted because the affidavit would otherwise be pure hearsay.

The BANK concedes that sworn or certified copies of the books and records the affiant consulted in creating the affidavit were not attached to, or served with,

[6] Transcript of Hearing on Motion for Final Summary Judgment, p. 8 **(R. 292)**.

its summary judgment affidavit.[7] It is undisputed that the documents the BANK later produced in response to a discovery request seeking the records upon which the affiant relied were never sworn or certified. If these were the "books and records" which the affiant claims were the source of all the information in the affidavit, she never said so, much less did she say so under oath.

Astonishingly, in the face of the recent nationwide scandal concerning bank employees "robo-signing" summary judgment affidavits, the BANK argues for less court supervision of these affidavits, and more reliance on the bare, unsupported statements of these affiants. The BANK brazenly suggests that the affidavit—prepared specifically for this litigation and based entirely upon records that it does not provide or verify—is a document of independent evidentiary significance that alone entitles it to summary judgment.[8] Perhaps the BANK sincerely believes that it can create evidence in this way, but it is, of course, unadulterated hearsay.[9] *See Zoda v. Hedden*, 596 So. 2d 1225, 1226 (Fla. 2d DCA 1992) (testimony based upon public records, authenticated copies of which were not provided, was hearsay—Rule 1.510(e) required reversal of summary judgment); *Topping v. Hotel George V*, 268 So. 2d 388 (Fla. 2d DCA 1972) (attorney's affidavit that he was

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[7] Answer Brief, p. 34-35.

[8] Answer Brief, p. 35-36.

[9] Initial Brief, pp. 31-35 and cases cited therein.

familiar with his client's records and that the records reflected certain information constituted pure hearsay—summary judgment reversed under Rule 1.510(e)).

So, while it is true that "Rule 1.510(e) does not require sifting through every paper in an office or company to determine if it might contain information that was used to create a document,"[10] it does require supplying every paper (by way of a sworn copy) that was actually used to create a summary judgment affidavit.

B. Rule 1.510(e) also requires the affiant to identify and authenticate the instruments.

Citing to *Coastal Caribbean Corp. v. Rawlings*, 361 So. 2d 719, 721 (Fla. 4th DCA 1978), the BANK claims that the affidavit's passing reference to "the Note and Mortgage described in the Plaintiff's Complaint" sufficiently complied with Rule 1.510(e)—at least as to those two documents.[11] *Coastal Caribbean*, however, excused compliance with the attachment requirement "because the affidavit swore that the copies of said note and mortgage ATTACHED TO THE COMPLAINT were true and correct copies." *Id*. at 721 (emphasis original). Here, the affiant did not swear that any documents in the case were "true and correct copies" whether they were attached to the Complaint or not (and the note was not). And because the BANK says that it had abandoned its lost note claim, the affiant

[10] Answer Brief, p. 35.

[11] Answer Brief, p. 37.

would need to swear that the instruments on file were what they purported to be—the originals.

Moreover, the affiant's unsupported statement that "Plaintiff is the owner and holder of the Note and Mortgage" is a mere conclusion of law which will not support summary judgment. *Heitmeyer v. Sasser*, 664 So. 2d 358, 360 (Fla. 4th DCA 1995) (conclusions of law in an affidavit do not satisfy a movant's burden of proving the nonexistence of a genuine material fact issue); *770 PPR, LLC v. TJCV Land Trust*, 30 So. 3d 613, 619 (Fla. 4th DCA 2010) (a party does not create evidence merely by placing his assertions in affidavit form.)

C. The mortgage and assignment of mortgage are not self-authenticating.

1. The evidence rule for the self-authentication of "commercial papers" (§90.902(8)) is expressly limited to that which the UCC declares to be self-authenticating.

The BANK takes the unprecedented position that mortgages and assignments of mortgage are self-authenticating under §90.902(8) Fla. Stat. (2009) because they are "related to" commercial paper.[12] The only case cited by the BANK is *United States v. Varner*, 13 F.3d 1503 (11th Cir. 1994), which is a federal court decision interpreting a federal rule of evidence. That rule—Fed. R. Evid. 902(9)—differs from the Florida rule in one critical respect. The federal

[12] Answer Brief, pp. 16; 20-21.

self-authentication rule includes documents relating to commercial paper to the extent provided by general commercial law**.** In stark contrast, the Florida Rule embraces related documents only to the extent provided in the UCC.

The *Varner* decision was specifically predicated on the phrase that is more expansive than the Florida rule, holding that "[t]he language of Fed. R. Evid. 902(9) encompasses a broader range of self-authenticating documents than does Article 3 of the UCC." *Id*. at 1510. The BANK's invitation to extend Florida's self-authentication rule to mortgages and assignments should be rejected.

2. The assignment is not self-authenticating under §90.902(10) merely because it is notarized.

The BANK next argues that the assignment was self-authenticating under §90.902(10), Fla. Stat. (2009), which applies to "[a]ny document properly certified under the law of the jurisdiction where the certification is made." Without citation to authority, the BANK assumes that "certification" is equivalent to "notarization."[13] In context, however, a "certification" means that the document is certified as authentic. *See*, Black's Law Dictionary (2004) ("certification" means attest, which in turn, is to affirm to be genuine or authentic). This meaning comports with the use of "certification" in other sections of §90.902, such as the certification of copies of public records and business records (subsection (4) and

[13] Answer Brief, p. 22.

(11)). Notarization of a signature does not certify that the document is authentic. The mere fact, therefore, that a notary's mark appears on a document does not suffice for laying the proper foundation for its admission into evidence.

D. The promissory note is not self-authenticating when its authenticity is disputed in the pleadings.

Apparently conceding that the OWNERS had denied the authenticity of the note and signatures (which distinguishes this case from *Riggs v. Aurora Loan Services, LLC*, 36 So. 3d 932 (Fla. 4th DCA 2010)), the BANK argues that it is nevertheless entitled to a rebuttable presumption of authenticity.[14] In doing so, the BANK ignores—and thus, tacitly concedes—the OWNERS' point that the plain wording of the UCC self-authenticating provision (§673.3081(1)) confines its scope to the signatures on the negotiable instrument. The unambiguous language of that section cannot be stretched to include a presumption that the instrument itself is an original.

Moreover, the plethora of record evidence suggesting the note is not authentic would overcome any presumption that the BANK might have enjoyed: 1) two affidavits—including one from on an expert—that the plaintiff BANK is not the owner of the note (presumably, the true owner would have the original);

[14] Answer Brief, pp. 29-31.

2) the BANK's endorsement of the note in blank (from which it may be inferred that it had negotiated the original note to another bank); 3) the sudden, unexplained appearance of the purported original note although the BANK could not determine its "whereabouts" prior to filing the case (especially suspect given the public acknowledgement by the Florida Bankers Association that originals are "deliberately eliminated"); 4) the assignment attached to the Complaint which purports to transfer the note from MERS even though the endorsements on the note show that it was never in MERS' possession; and 5) the execution of the assignment in the same location where the BANK executed its summary judgment affidavit, rather than where MERS is located.[15]

The BANK attempts to distinguish *United States v. Carriger*, 592 F.2d 312 (6th Cir. 1979) as having been decided prior to Florida's adoption of the current UCC self-authentication rule.[16] But the point in *Carriger*—that the admission of evidence under the self-authentication rule did not foreclose a party from disputing authenticity—was based, not upon the UCC, but upon Rule 902 Fed. R. Evid.. (equivalent to Florida's evidentiary rule §90.902 Fla. Stat (2009)). Indeed, *Carriger* quoted an Advisory Committee Note nearly identical to that explicating

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[15] Initial Brief, pp. 2, 12-13, 20-21, 23, 29-30.

[16] Answer Brief, pp. 32-33. Notably, the prior rule, (§673.307) was, in relevant part, identical to the current rule since at least 1966.

the Florida version. LAW REVISION COUNCIL NOTE—1976 to § 90.902, Fla. Stat. (2009) ("However, the opposing party is not foreclosed from challenging the authenticity of the document once it is admitted in evidence.") Accordingly, even if the note is self-authenticating, a genuine issue of fact still exists as to whether it is an original.

E. The OWNERS need not plead fraud to dispute authenticity of documents proffered by the BANK.

Not surprisingly, the BANK cited no authority for the curious assertion that a party need not comply with the authentication requirement of Florida's Evidence Code if the opposing party has not pled fraud. There simply is no such exception to §90.901 Fla. Stat. (2010).

F. The BANK's attempt to jettison the embattled assignment post-judgment should be rejected.

As often occurs when a proffered assignment of mortgage encounters evidentiary snags, the BANK now claims that it does not need the assignment to prevail in this case.[17] The BANK, however, attached the purported assignment to the Complaint,[18] and specifically alleged that the "Note and Mortgage were

[17] Answer Brief, p. 16.

[18] Exhibit B to Complaint (**R. 30**).

assigned to Plaintiff" by virtue of that document.[19] It even refers to the original lender as "Plaintiff's Assignor."[20] Having failed to adduce evidence to support its allegations of standing, the BANK cannot now change to a different allegation of standing during the appeal.

G. The OWNERS did not, and could not, authorize MERS to transfer that which it did not have.

The BANK claims that the assignment of the note by MERS was valid, despite the fact that MERS never owned the note, because the OWNERS "expressly agreed to give MERS the authority to make the assignment."[21] Neither the quoted excerpt from the mortgage, nor any other portion of the mortgage, authorizes MERS to exercise rights it does not have, such as transferring notes it does not own or possess.

Mortgage Elec. Registration Sys., Inc. v. Azize, 965 So. 2d 151 (Fla. 2d DCA 2007), cited by the BANK, merely held that MERS may be able to establish standing to foreclose if, in addition to being the mortgagee, it can prove it is the holder of the note or that it is acting as the note owner's agent. Here, the endorsement chain contradicts any claim that MERS was ever in possession of the

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[19] Complaint, ¶ 3 **(R. 2)**.

[20] Complaint ¶ 2 **(R. 1)**.

[21] Answer Brief, p. 24.

note.[22] *Verizzo v. Bank of New York*, 28 So. 3d 976, 978 (Fla. 2d DCA 2010) (at least one genuine issue of material fact exists where MERS purportedly assigned note and mortgage to plaintiff, but the note was never endorsed to MERS).

Because the BANK is itself taking contrary positions as to how it obtained the right to enforce the note, and in fact, pled that MERS was the payee on the note, not an agent of the payee,[23] summary judgment based on an unmentioned agency theory would be reversible error. *Kobel v. Schlosser*, 614 So. 2d 6 (Fla. 4th DCA 1993) (issues of agency are ordinarily questions of fact not susceptible to summary judgment).

H. The BANK introduces a new argument on appeal—that it is a holder <u>in due course</u>.

Citing to a section of Florida's UCC provisions,[24] the BANK asserts that the borrower's only defense is "proof of fraud or illegality affecting the note."[25] That

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[22] This alone prevents MERS from being a "nonholder <u>in possession</u>" as was found in *Taylor v. Deutsche Bank Nat. Trust Co.*, 44 So. 3d 618 (Fla. 5th DCA 2010), cited in the Answer Brief, fn. 4.

[23] MERS cannot be the both the agent and the principal with respect to the same right. Written Testimony of Professor Christopher L. Peterson before the United States House of Representatives Committee on the Judiciary Hearing on "Foreclosed Justice: Causes and Effects of the Foreclosure Crisis," December 2, 2010, p. 5 (http://judiciary.house.gov/hearings/pdf/Peterson101202.pdf) (*citing*, Restatement (Third) of Agency Law §§1.01, 1.02) and cases cited therein.

[24] §673.2031(2) Fla. Stat. (2009).

provision, however, applies only to holders in due course. The BANK here never pled that it was a holder in due course, nor could it ever achieve that status since it professes to have come into possession of the note after it was in default. § 673.3021(1)(b)(3) Fla. Stat (2010).[26]

I. The OWNERS were diligent in seeking discovery.

The BANK claims that it "cooperated" to coordinate depositions, even though it refused to voluntarily produce its own expert without a subpoena.[27] Apparently conceding that the OWNERS were expeditious in asking for discovery, the BANK argues instead that the OWNERS should have acted more quickly to obtain court orders compelling the BANK to respond to their requests.[28] In short, the BANK asks this Court to bless its use of the procedural shortcut of summary judgment while it was, at the same time, dragging its feet on discovery. *See Lubarsky v. Sweden House Props. of Boca Raton, Inc.*, 673 So. 2d 975, 977 (Fla. 4th DCA 1996) (As a general rule, a court should not enter summary judgment when the opposing party has not completed discovery).

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[25] Answer Brief, p. 19.

[26] Compare Assignment date of October 28, 2008 (purporting to transfer mortgage and note) **(R. 30)** with alleged default date of June 1, 2008 in Complaint, ¶5 **(R. 2)**.

[27] Answer Brief, p. 41.

[28] Answer Brief, pp. 40-41.

J. No evidence or legal basis was presented to trial court for the loan interest or reformation of the mortgage.

The BANK's Answer Brief does not address the point that there was no legal basis for the interest computation in the final judgment. As for the reformation of the mortgage, the BANK responded that the change to the lien that it inserted into the judgment without argument to, or ruling from, the trial court merely tracked what a Florida statute required of the deed.[29] But the BANK pled in its Complaint that it was the parties' intent that the lien extend to additional property described in the change—the OWNERS' interest in the "common elements" of the condominium.[30] While the statute may later pose a problem for the BANK if the property goes to auction without including the common elements (which is exactly why it sought to reform the mortgage), the BANK made no mention of the reformation count in any of the three summary judgment motions it filed and identified no evidence as to the intent of the parties.

II. The Motion to Dismiss Should Have Been Granted Because the BANK Failed to Amend After Allegedly Locating the Promissory Note.

The BANK counters that *Hughes v. Home Sav. of Am., F.S.B.*, 675 So. 2d 649 (Fla. 2d DCA 1996) held that the failure to attach documents to a complaint

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[29] Answer Brief, p. 44.

[30] Count II of the Complaint **(R. 4-5)**.

was cured by the Notice of Filing of the alleged instruments. *Hughes* (and its progenitor, *Eigen v. Fed. Deposit Ins. Corp.*, 492 So. 2d 826 (Fla. 2d DCA 1986)), however, simply held that an oversight in attaching documents referenced as exhibits may be cured by a later filing. Here, the note was absent from the Complaint, not because of neglect or oversight, but because the pleading itself claimed the note was lost. The sudden, unexplained appearance of the purported original note in this case undermined the very allegations of the Complaint.

To simply deem the note attached, therefore, would be nonsensical because it is inconsistent with the Complaint and would negate its allegations—not just the lost note count, but the claim that the BANK or its assignor (MERS) was the payee on the note.[31] The "cure" of deeming the note attached would rob the OWNERS of an opportunity to challenge the new combination by a motion to dismiss. This is the rationale behind this Court's decision in *Safeco Ins. Co. of Am. v. Ware*, 401 So.2d 1129 (Fla. 4th DCA 1981).

CONCLUSION

The summary judgment in this case should be reversed and the case remanded for the entry of an order dismissing the case without prejudice to amend.

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[31] *See*, cases and argument at Initial Brief, pp. 5, 43.

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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 December 13, 2010 to all parties on the attached service list.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

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