In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted]

Appellant,

v.

RBC BANK,
Appellee.

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

REPLY BRIEF OF APPELLANT

Respectfully submitted,

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ARGUMENT

A summary judgment movant bears a "heavy burden" to negate and overcome all reasonable inferences in favor of the non-movant and, as such, "summary judgments should be granted rarely." *Phillips v. Hartford Cas. Ins. Co.*, 373 So. 2d 415, 416 (Fla. 4th DCA 1979). Where, as here, "the record raises even the slightest doubt that an issue might exist, that doubt must be resolved against the moving party and summary judgment must be denied." *Taylor v. Bayview Loan Servicing, LLC*, 74 So. 3d 1115, 1117 (Fla. 2d DCA 2011).

Here, the record is riddled with doubt. Is the plaintiff RBC BANK (the "BANK") or RBC BANK (USA)? How are either of these entities related to the entity with which [redacted] actually contracted, RBC CENTURA BANK? How did the trial court know what is owed when the BANK failed to actually attach sworn or certified copies of the business records upon which its claims rely? None of these questions are answered by this record to the degree of certainty required to "show that there is no genuine issue as to any material fact." Fla. R. Civ. P. 1.510 (c). Nor were these very grave errors in the final judgment corrected on remand for entry of an order "correcting" the name of the Plaintiff. For all of the reasons set forth below, and in the Initial Brief, the final summary judgment must be reversed.

I. The BANK's Post-Hoc "Proof" of Standing Cannot Fix the Erroneous Summary Judgment Because the Judgment Did Not Contain a Mere Clerical Mistake, but Rather Reflected a Total Failure of Proof.

A. The BANK's summary judgment evidence did not prove standing to foreclose.

Although the Complaint was in the name of RBC BANK, and the attached notes were in the name of an entity entitled RBC CENTURA BANK, an entity calling itself RBC BANK (USA) represented that it was the Plaintiff in filing the motion for summary judgment.[1] Neither the Complaint, nor the Motion for Summary Judgment, nor the supporting evidence made any effort to explain any connection between RBC CENTURA BANK and either named plaintiff, RBC BANK or movant RBC BANK (USA).[2] Instead, the Motion merely alleged that [redacted] "delivered an Equity Line of Credit" in favor of "Plaintiff," which was listed as RBC BANK in the caption and RBC BANK (USA) in the signature block.[3] The sworn allegations of the affidavit, therefore, were contradicted by the main evidence of the debt, the notes themselves.[4] Even if the names of the plaintiff and the payee of the note are similar and seemingly related, a slight

[1] R. 45 (Motion for summary judgment captioned "RBC BANK (USA)"); R. 47 (attorney signature block stating that attorney represented "Plaintiff RBC Bank (USA)").

[2] R. 1 (complaint); R. 45-47 (Summary Judgment Motion); R. 59-65 (Affidavits).

[3] R. 45 at ¶ 1; R. 45 (Motion caption); R. 47 (attorney signature block).

[4] Compare R. 60-65 (affidavits) to R. 6-16 (notes attached to complaint).

difference in the entity names, if unexplained by competent and uncontradicted summary judgment evidence, simply precludes the entry of summary judgment. *Mazine v. M & I Bank*, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011) (reversing grant of summary judgment to "M & I Bank" where it failed to provide evidence of any connection to payee of the note, "M & I Marshall & Ilsley Bank"); *see also Duke v. HSBC Mortg. Services, LLC*, 79 So. 3d 778, 780 (Fla. 4th DCA 2011) (reversing summary judgment where the named payee on a Note does not match the named plaintiff and the complaint and supporting affidavit contain only the conclusory allegation that the plaintiff "owns and holds" the Note).

B. The trial court's "correction" on remand did not, and could not, fix the BANK's failure of proof.

On remand, the trial court entered an order correcting the "misnomer" of RBC BANK as the Plaintiff and directing that the Docket and judgment be amended to reflect RBC BANK (USA) as Plaintiff.[5] While [redacted] contends this change was error,[6] it, in any event, does not solve Plaintiff's failure, under any

[5] Supplemental Record Exhibit D (per this Court's December 13, 2012 order).

[6] Plaintiff has not yet submitted an amended judgment, and thus the order is not yet ripe for appellate review. *See, e.g., Francisco v. Victoria Marine Shipping, Inc.*, 486 So. 2d 1386, 1391 (Fla. 3d DCA 1986) (order granting relief from judgment is nonfinal because further proceedings in the cause are contemplated after rendition of the order). This Court's review is of the Amended Final Judgment (amended to fix a clear calculation error on a prior remand) granting judgment to "RBC BANK" despite the fact that RBC BANK (USA) claimed to be the summary judgment

name, to provide competent summary judgment evidence that it is the successor to, or otherwise the owner of, the Notes made payable RBC CENTURA BANK.

1. The affidavits filed to support summary judgment do not show that either RBC BANK or RBC BANK (USA) owned the debt at the time the Complaint was filed.

A party seeking foreclosure must prove that it owns the debt both at the time of filing the Complaint and at the time of judgment. *Venture Holdings & Acquisitions Group, LLC v. A.I.M. Funding Group, LLC*, 75 So. 3d 773, 776 (Fla. 4th DCA 2011). Here, the Complaint gave no indication that Plaintiff owned the debts when it was filed, and neither did the summary judgment affidavits, which swore only that Plaintiff "is the owner"—in the present tense—of the debts at issue.[7] An affidavit dated after the date the suit was initiated that swears only to current ownership cannot establish that the plaintiff owned the debt at the time the complaint was filed. *Green v. JPMorgan Chase Bank, N.A.*, ___ So. 3d ___, No. 5D12-870, 2013 WL 1348399 at *5 (Fla. 5th DCA April 5, 2013) (reversing summary judgment in foreclosure action where "the affidavit did not establish that

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movant. 2d Supp. R. 4-5. In any event, for the reasons set forth in the Initial Brief at Part. I.D.–I.E., the trial court erred in granting the name change, and those post-hoc proceedings should not be considered in determining the only issue properly on appeal here: whether entry of Summary Judgment was proper to begin with.

[7] R. 60 at ¶ 2 ("RBC Bank (USA) is the owner…"); R. 63 at ¶ 2 (same).

the Bank held the note at the time it filed suit because the affidavit was dated more than two years later").

Nor did [redacted] waive this argument, as the BANK contends in what appears to be a boilerplate waiver argument with no reference to the actual record in this case.[8] [redacted] timely raised his objections to the affidavits by filing a motion to strike them, which the trial court heard and denied prior to the summary judgment hearing.[9] This definitive ruling, alone, was sufficient to preserve the objections to the evidence. § 90.104, Fla. Stat. Even though, when the trial court has "made a definitive ruling on the record admitting…evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal," *Id.*, [redacted] also raised the objections in his written opposition to summary judgment,[10] and again in his Motion for Rehearing.[11]

Finally, the error in relying on the summary judgment affidavits was not harmless. The BANK's only evidence of the amounts owed to it was the faulty affidavits. Without those, there is no evidence in the record to support the judgment figures, which are not reflected anywhere on the notes pointed to by the

[8] Reply Brief Part I.B.1. at page 19.

[9] R. 68-71 (motion to strike affidavits); 86-87 (order denying motion).

[10] R. 88-94.

[11] R. 148-53 at Part III.

BANK.[12] This is particularly true where, as here, the "Notes" are actually equity line of credit agreements, and indicate only a maximum credit limit, not an amount actually borrowed. This court has repeatedly reversed summary judgments where the trial court and plaintiff rely on affidavits that do not comply with Rule 1.510(e). *Bifulco v. State Farm Mut. Auto. Ins. Co.*, 693 So. 2d 707, 709 (Fla. 4th DCA 1997) (reversing grant of summary judgment because affidavit failed to attach sworn or certified copies of the referenced records); *Finnegan v. Deutsche Bank Nat. Trust Co.*, 96 So. 3d 1093, 1094 (Fla. 4th DCA 2012) (same).

2. The Articles of Amendment were neither identified as summary judgment evidence nor timely filed.

The only alleged evidence showing a link between RBC CENTURA BANK and RBC BANK (USA) was filed with the trial Court *nine days* before the summary judgment hearing.[13] It was never mentioned in the Motion for Summary Judgment[14] and was, in any event, inadmissible.[15] It simply cannot form the basis for a judgment without trial.

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[12] Compare Amended Final Judgment (2d Supp. R. 4-5) granting judgment for $115,112.40 on an agreement which had a credit limit of $110.535.00 (R. 6) and $266,595.85 on an agreement which had a credit limit of $250,000.00 (R. 13).

[13] R. 129-138.

[14] R. 45-47.

[15] Initial Brief at Part I.C.

First, summary judgment evidence must be both identified in the motion for summary judgment, and must be served at least twenty days before the summary judgment hearing. Rule 1.530(c); *see also Servedio v. U.S. Nat. Bank Ass'n*, 46 So. 3d 1105, 1108 (Fla. 4th DCA 2010) (reversing summary judgment of foreclosure where evidence was not filed and served at least twenty days prior to the summary judgment hearing). The Articles of Amendment document was not identified as supplemental summary judgment evidence, but rather was filed to support the BANK's opposition to continuing the summary judgment motion.[16] The BANK did not reference the Articles of Amendment as summary judgment evidence in its motion for summary judgment[17] or in any of its supporting affidavits.[18] It did not make any legal argument regarding the Articles of Amendment at the summary judgment hearing.[19] Without having given any indication that it was relying on this late-filed evidence to support summary judgment, it simply cannot be considered as "summary judgment evidence" as that term is defined by the rules of civil procedure. Fla. R. Civ. P. 1.510(c) ("The motion shall state with particularity the grounds upon which it is based and the

[16] R. 136-38.

[17] R. 45-47.

[18] R. 59-65.

[19] R. 188-202.

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.").

Rule 1.510(c) requires that summary judgment may only be granted if both the "pleadings and the summary judgment evidence on file" entitles the party to judgment as a matter of law. The rule, which for due process reasons must be strictly construed, does not allow a trial court to grant summary judgment based upon unidentified and untimely "evidence" that happens to be in the court file. *Bifulco v. State Farm Mut. Auto. Ins. Co.*, 693 So. 2d 707, 709 (Fla. 4th DCA 1997) ("procedural strictures [of Rule 1.510] are designed to protect the constitutional right of the litigant to a trial…[and] are not merely procedural niceties nor technicalities").

3. [redacted] did not waive his challenge to RBC BANK's ownership of the debt.

[redacted] did not waive the right to challenge the standing of either RBC BANK or RBC BANK (USA). First, "[w]here defendant denies that the party seeking foreclosure has an ownership interest in the mortgage, the issue of ownership becomes an issue the plaintiff must prove." *Lizio v. McCullom*, 36 So. 3d 927, 929 (Fla. 4th DCA 2010); *see also Lindsey v. Wells Fargo Bank, N.A.*,

No. 1D12-2406, 2013 WL 692825 at n. 1 (Fla. 1st DCA Feb. 27, 2013) (rejecting waiver argument because issue of ownership of the loan is part of the Plaintiff's prima facie case). [redacted] answer admitted entering into agreements with RBC CENTURA BANK, but demanded proof that named plaintiff RBC BANK was, in fact, the "owner and holder" of the agreements.[20] Under *Lizio*, by virtue of the denial in the answer, the burden was on Plaintiff RBC BANK to prove it was the proper entity to foreclose on the line of credit as part of its case-in-chief, and not on [redacted] to plead lack of standing as an affirmative defense. *Id.*

Second, in an abundance of caution, [redacted] timely sought leave to amend his answer to further plead as an affirmative defense that named Plaintiff RBC BANK lacked standing to foreclose,[21] and sought to have that motion heard prior to the summary judgment hearing.[22]

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[20] R. 33 ¶ 2 (admitting contract with RBC Centura Bank); R. 35 ¶ 17 (same); R. 34 ¶ 5 (demanding proof that Plaintiff owns and holds debt); R. 36 ¶ 20 (same).

[21] R. 109-121 at R. 117 (proposed third affirmative defense).

[22] R. 127-128 (motion seeking continuance of summary judgment hearing, in part, because motion for leave to amend was pending and hearing on that motion could not be scheduled prior to summary judgment hearing). The trial court denied the continuance and refused to hear the motion for leave to amend, preserving the issue for review. R. 145 (Order denying continuance). *See LeRetilley v. Harris*, 354 So. 2d 1213, 1214 (Fla. 4th DCA 1978) (error preserved where trial court refuses to rule on issue raised by party despite party's efforts to secure a ruling).

Third, [redacted] also argued the issue in his motion for rehearing pursuant to Rule 1.530, which additionally preserved the issue for appellate review.[23] *Brander v. Stoddard*, 78 So. 3d 101, 103 (Fla. 4th DCA 2012) (Rule 1.530 "provides the trial court an opportunity to correct any error it has committed" and appellate court may review issues raised in such motion). For all of these reasons, [redacted] challenge to the BANK's standing is clearly preserved.

II. The Post-Hoc Proceedings Do Not Moot this Appeal.

An appeal is moot only "when the controversy has been so fully resolved that a judicial determination can have no actual effect." *Godwin v. State*, 593 So. 2d 211 (Fla. 1992). Here, even with the (erroneous) name change from RBC BANK to RBC BANK (USA), this Court must still determine whether Plaintiff (by any name) proved not only that it owned the notes at the time the complaint was filed, but also all of the other elements of a foreclosure action by competent evidence without even the slightest doubt about the material facts. As pointed out in both Parts I and II of the Initial Brief, the BANK has not done so.

Moreover, as a direct appeal of an erroneous summary judgment, this case is not in the same procedural posture as *Lake Charleston Homeowners Ass'n, Inc. v.*

[23] R. 148-153.

Haswell, 77 So. 3d 922, 923 (Fla. 4th DCA 2012). In *Lake Charleston*, this Court reviewed an order on a Rule 1.540(b) motion, not a direct appeal of a judgment. *Id.* The court held that the trial court's finding that the plaintiff lacked fraudulent intent in misnaming itself in the complaint precluded the trial court from granting the foreclosure defendant relief from the judgment under Rule 1.540(b). *Id.* at 924. Neither *Lake Charlston* nor any other case stands for the proposition that a party can moot the substance of a direct appeal pointing out multiple faulty issues with the judgment simply by obtaining a post-judgment order "correcting" a purported misnomer.

Nor is the appeal mooted by this Court's denial of [redacted] Petition for Writ of Mandamus.[24] "The writ of mandamus does not supersede legal remedies, but rather, supplies the want of a legal remedy." *State v. Greer*, 102 So. 739, 741 (Fla. 1924). An appellate court will issue a writ of mandamus only when a petitioner establishes that "he has a clear legal right to the performance of a clear legal duty by a public officer and that he has no other legal remedies available to him." *RHS Corp. v. City of Boynton Beach*, 736 So. 2d 1211, 1213 (Fla. 4th DCA 1999). Without a discussion of the merits of the case, the denial of a writ of mandamus does not fully resolve the issues on appeal in this direct appeal, as the

[24] See Answer Brief at Part I.D.

mootness doctrine requires. It merely means any remedy must be sought right here: on plenary review of the final judgment. *See also McCarty v. Booth*, 69 So. 2d 655, 657 (Fla. 1954) (denial of petition for mandamus without determining merits does not create law of the case).

III. The "Tipsy Coachman" Doctrine Cannot Support the Judgment Where, as Here, Its Application Would Necessarily Rely on Evidence Outside of the Summary Judgment Record.

In a last ditch attempt to salvage the hopelessly tattered flotsam of its summary judgment, the BANK argues that this Court should employ the Tipsy Coachman doctrine and, in essence, find that there's enough information in the record somewhere to support the judgment. The error here cannot be cured by that "doctrine of appellate efficiency," *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002), and this Court should decline the BANK's invitation.

The Tipsy Coachman doctrine allows an appellate court to affirm a trial court's ruling, even where the reasoning of the ruling is incorrect, "if there is any theory or principle of law *in the record* which would support the ruling." *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002), *quoting Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999) (emphasis in *Robertson*). Here, as in *Robertson*, the appellee is arguing for a Tipsy Coachman affirmance based upon evidence filed without the requisite notice to

and never properly placed before the trial court as timely record evidence, and likely not considered by the trial court at all. As in *Robertson*, this Court must reject the argument and decline to apply the doctrine.

The Florida Supreme Court, in *Robertson*, overturned a district court's affirmance of the trial court's ruling on Tipsy Coachman grounds, explaining that the appellate court cannot go beyond the materials in the record before the trial court at the time the trial court's decision was made. *Id.* In *Robertson*, as here, the evidence that the appellate court was asked to rely upon for a Tipsy Coachman affirmance was not properly before the trial court because, in order to have a trial court rely on such evidence, the proponent of the evidence was required to give advance notice of intent to use it and the trial court was required to make a ruling on the use of such evidence. *Id.*

While *Robertson* concerned a criminal rule of procedure, the civil summary judgment rule imposes similar requirements: a court may consider late-filed summary judgment evidence only after first filing a duly-noticed motion and obtaining either consent of the opposing party or an order from the trial court after an opportunity to be heard. *Florida Dept. of Fin. Services v. Associated Indus. Ins. Co., Inc.*, 868 So. 2d 600, 602 (Fla. 1st DCA 2004) ("a movant may file supplemental affidavits less than twenty days prior to the summary judgment

hearing only upon written stipulation and agreement by the adverse party affected or upon leave of court granted by written order after written application, notice to the adverse party, and the opportunity for a hearing"). It is critical that this procedure be followed, because the notice provisions of Rule 1.510 guarantee a party due process, and are designed to prevent judgment by ambush. *Swift Indep. Packing Co. v. Basic Food Intern., Inc.*, 461 So. 2d 1017, 1018 (Fla. 4th DCA 1984) (reversing summary judgment where movant argued at hearing a theory and evidence different from that in the pleadings and motion, because "Such an ambush is exactly what Rule 1.510(c), Florida Rules of Civil Procedure, was designed to prevent.").

And because it is not summary judgment evidence, the Articles of Amendment and other post-hoc "evidence" of the fictitious name usage cannot form the basis of a Tipsy Coachman affirmance. As explained in detail in the initial brief, [redacted] was never given proper notice that such Articles of Amendment were to be considered as summary judgment evidence. Moreover, there is no indication the trial court considered it as summary judgment evidence. And the purported evidence was, in any event, inadmissible hearsay.[25] The BANK argues that [redacted] waived any objection to the Articles by failing to object to

[25] Amended Initial Brief at pp. 17-21, Part I.C.

their consideration at the summary judgment hearing, but [redacted] can't be deemed to have waived his objection to consideration of the Articles as summary judgment evidence when the BANK never argued to the trial court that they should be relied upon in the first place.[26] *Bueno v. Workman*, 20 So. 3d 993, 998 (Fla. 4th DCA 2009) ("an appellate court cannot employ the tipsy coachman rule where a lower court has not made factual findings on an issue and it would be inappropriate for an appellate court to do so.").

Here, the BANK never proffered the Articles of Amendment as summary judgment evidence, and the trial court's summary judgment ruling cannot be affirmed based upon the document's mere presence in the court file for a different purpose. As the Third District Court of Appeal has explained, "the 'Tipsy Coachman' doctrine does not rescue parties from their own inattention to important legal detail." *E.K. v. Dep't of Children & Family Services*, 948 So. 2d 54, 57 (Fla. 3d DCA 2007) (declining to apply the doctrine).

CONCLUSION

For all of the foregoing reasons, the final summary judgment must be REVERSED.

[26] See R. 188-202 (transcript of summary judgment hearing).

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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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I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this April 12, 2013 to all parties on the attached service list.

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