In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]
(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

WELLS FARGO BANK, N.A.,

Appellee.

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

REPLY BRIEF OF APPELLANT

Respectfully submitted,

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Key:

- The Plaintiff/Appellee, WELLS FARGO BANK, N.A., will be referred to as "the Bank."
- The Defendant/Appellant, [redacted] will be referred to as "the Homeowner."

SUMMARY OF THE REPLY ARGUMENT

The Bank's Answer Brief asks this Court to draw inferences in its favor from "facts" outside the record, such as a purported explanation for the gaps in the loan history, and the contents of a deposition that was never filed. The Bank's abandonment of the record to make its arguments effectively confesses that the summary judgment was premature.

The plain language of Rule 1.510(e) requires that documents attached to sworn affidavits also be "sworn or certified." To hold that affiants need not specifically vouch for the authenticity of the attachments is to pretend these words have no purpose or meaning. In any event, Thomas was not qualified to authenticate them as business records because she did not disclose any actual work experience that would support her bald assertions of personal knowledge.

Because Thomas did not attest that she retrieved, selected, or printed the "data compilation" attached to her affidavit, the Homeowner was entitled to the remainder of the records—especially those supporting the computation of $ 26,265.12 in interest (awarded as additional "principal"). That the interest calculations were "suspect" according to the Bank's own documents on file was not an "issue" that could be waived, but rather an inference that the Court, reviewing the evidence *de novo*, is entitled to make. At the very least, it is a demonstration that the Bank's non-disclosure was prejudicial to the Homeowner.

STANDARD OF REVIEW

The Bank argues that the standard of review is abuse of discretion because the decision being challenged was, in effect, evidentiary to the extent that it treated the testimony of the affiant as admissible evidence.[1] A ruling on the sufficiency of a summary judgment affidavit under Fla. R. Civ. P. 1.510(e), however, is still reviewed *de novo*. *See Coleman v. Grandma's Place, Inc.*, 63 So. 3d 929, 932 (Fla. 4th DCA 2011) (*de novo* standard of review used to reverse summary judgment because "to comply with rule 1.510(e), the personnel files and other documents upon which [affiant] relied should have been sworn and attached to the affidavit …".) The cases cited by the Bank for an abuse of discretion standard arose from non-jury trials, not summary judgments.[2]

[1] Answer Brief, p. 10.

[2] *Mastan Co. v. Am. Custom Homes, Inc.*, 214 So. 2d 103 (Fla. 2d DCA 1968); *LEA Indus., Inc. v. Raelyn Intern., Inc.*, 363 So. 2d 49 (Fla. 3d DCA 1978).

RESPONSE TO THE BANK'S STATEMENT OF THE CASE

I. The Bank Injects Non-Record "Evidence" into this Appeal.

Aside from being improperly argumentative (*see Sabawi v. Carpentier*, 767 So. 2d 585 (Fla. 5th DCA 2000)),[3] the Bank's Statement of the Case and of the Facts injects assertions of alleged fact that have no basis in the record. Specifically, the Bank asserts that the missing pages in its predecessor banks' loan histories pertain to other borrowers.[4]

While the Bank might properly ask a fact-finder to infer this from the documents where there is no testimony to that effect, this Court must take all inferences in favor of the Homeowner. *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"). Here, the inference that the loan history is incomplete is bolstered by the documents attached to the other affidavits which also show gaps—missing pages that cannot be explained as pertaining to other borrowers. More importantly, the Court need not worry itself over the possible implications of the evidence, because the direct evidence is more than sufficient.

[3] For example: "the Borrower improperly infers from this statement…" (Answer Brief, p. 5) ; "while the Borrower apparently did not comprehend the pagination system…" (Answer Brief, p. 6); "Therefore, post default interest was not a material issue in this case." (Answer Brief, p. 7); "The issues raised [in] the Borrower's brief are raised for the first time in this appeal." (Answer Brief, p. 8).

[4] Answer Brief, p. 6.

The affiant, herself, attests that the attachment is only a "portion of the loan history for the Mortgage."

> 6. There is now due and owing to Wells Fargo from the Borrower under the Mortgage and Note, the total principal amount of $426,265.12. A copy of the pertinent portion of the loan history for the Mortgage is attached hereto as **Exhibit A**.

Oddly, the Bank tells this Court that the Homeowner has improperly inferred from the affiant's use of the word "pertinent" that the attached loan history is incomplete.[5] Of course, the operative word in the affiant's statement is "portion" not "pertinent." From this, the Homeowner does not make an inference, but rather, simply reads the plain meaning of the word.

II. The Deposition of the Affiant Does Not, and Cannot, Support the Summary Judgment.

The Bank asks this Court to draw another inference in its favor with respect to the deposition of the affiant, which was not before the trial court and not included in the record on appeal. The Bank contends that, had the deposition supported the Homeowner's position that Thomas was not qualified to introduce the records, the Homeowner would have presented it in opposition to the Bank's motion for summary judgment.[6] There is, however, an equal, if not more compelling inference that the Bank would have filed it had it supported their

[5] Answer Brief, p. 5.

[6] Answer Brief, pp. 7, 20.

position—more compelling because the Bank carried the burden of proof. Again, to the extent that it is proper to draw an inference from an absence of evidence, the Court may only draw that which favors the Homeowner as the non-moving party.

In any event, the Homeowner asserts that the deposition does not, in fact, support the Bank's position and that it was improper for the Bank to characterize it otherwise in its brief. Accordingly, in this narrow sense, it is relevant to this appeal and the Homeowner moves the Court to permit that the record be supplemented with the deposition transcript.

ARGUMENT

I. The Bank's summary judgment affidavit is legally insufficient because the attached documents were neither sworn nor certified (Rule 1.510(e)).

A. Wells Fargo was not the "original lender."

The Bank argues that, because it purchased the assets of the original lender, World Savings Bank, FSB (after it had become Wachovia), a federal statute compels this Court to consider them one and the same, as if Wells Fargo had been present at the closing table and had itself generated the initial payment history.[7]

Of course, the statute addresses continuity of ownership—that the purchase of the old bank necessarily means that all its assets (such as notes, mortgages, and servicing rights) are transferred without further documentary proof, such as assignments or endorsements. At stake in this appeal is operational continuity—whether this witness was familiar with the specifics of how the old bank created and kept the data, and how the new bank incorporated or "boarded" that data and what, if anything, it did to verify the accuracy of the old bank's data. The statute does not require this Court to pretend that there was no purchase and no incorporation of data from one bank to another. The statute simply does not transform, or even purport to transform, the new bank's out-of-court statement about the old bank's records into something that is not rank hearsay.

[7] Answer Brief, pp. 16-17, citing 12 U.S.C. § 215a(e).

B. Someone must vouch for the authenticity of the copy.

The Bank contends that the directive of Rule 1.510(e)—that attached documents be sworn and certified—does not require anyone to swear under oath that the copies provided are "true and correct." The fallacy in this contention is perhaps best illustrated by the case cited by the Bank itself, *Coastal Caribbean Corp. v. Rawlings*, 361 So. 2d 719 (Fla. 4th DCA 1978).[8] While the documents in *Coastal* were attached to the Complaint rather than the affidavit, Rule 1.510(e) was satisfied precisely because the affiant swore that those documents (served with the Complaint) were true and correct copies. *Id*. at 721.

The verification of the affidavit itself as true and correct does not verify that attached documents are true and correct copies or subject Thomas to perjury for any false statements within them. To consider the documents as summary judgment evidence on the verification of the affidavit alone would allow Thomas to circumvent the penalties for perjury by attaching (or permitting others to attach) documents that contain falsehoods. This is especially germane to this case because Thomas does not say that she located, selected or even attached the documents.

It would also 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

[8] Answer Brief, p. 15.

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).

But even if the documents offered as summary judgment evidence could be authenticated by nothing more than a showing of a business records exception to hearsay, Thomas's affidavit fails to do that here. Thomas did not attest to any work experience that would give her the personal knowledge of record-making practices of Wells Fargo, much less, that of other servicers in the chain.

C. Thomas did not specify any work experience that would make her a records custodian or otherwise qualified witness.

The Bank contends that the loan history did not need to be <u>independently</u> authenticated or certified, because they were "properly authenticated by a records custodian as required under rule 1.510 and therefore admissible."[9] The Bank believes that Thomas is a "records custodian"[10]—something that even she does not claim to be—apparently because, in its view, anyone with access to the computer system would be a records custodian. This is akin to saying that, with respect to paper records, anyone trained to open a file cabinet drawer and retrieve a folder is a records custodian who could testify about the creation of the record. Ironically,

[9] Answer Brief, p. 13.

[10] Answer Brief, pp. 13, 16.

while she has access to the computer records, Thomas never even testifies that she retrieved the records herself.

Thus, the issue is not whether Thomas is a "records custodian," but whether she is an "otherwise qualified witness." On this point, the Bank points to her experience in loan originations and underwriting and her personal familiarity with "lending practices, operations and protocols with respect to the World-Wachovia loan portfolio."[11] Knowledge of the underwriting side of the banking business, however, does not impute knowledge of the record-making practices of the collections side. Even her passing reference to having held a position in "Loan Servicing" is too vague to determine whether she worked in customer service (modifying loans, for example) or in the accounting or payment processing department. Indeed, when the Bank claims in its brief that Thomas "had knowledge of how Wells Fargo's predecessors in interest kept and maintained its records,"[12] it does not cite to any passage in the affidavit, much less one that would show she had personal involvement or experience with how those records were made.

[11] Answer Brief, pp. 18, 23.

[12] Answer Brief, p. 18.

The Bank also claims that this case is similar to *Weisenberg v. Deutsche Bank Nat. Trust Co.*, 89 So. 3d 1111 (Fla. 4th DCA 2012),[13] in which this Court affirmed a trial court's decision not to strike an affidavit. But in that case, a deposition "demonstrated that she was familiar with the bank's record-keeping system and had knowledge of how the data was uploaded into the system." *Id*. at 1112 (emphasis added). This is far different than bald, self-serving statements by the affiant that she possesses such knowledge.

This Court recently clarified that a witness must have some responsibility for the record-making activity to be considered a qualified witness. *Lassonde v. State*, 112 So. 3d 660 (Fla. 4th DCA 2013). In this criminal case, the trial court had permitted a store clerk to testify regarding how a store receipt showing the value of the goods stolen was generated. The Court held that it was reversible error to admit the receipt as a business record because the clerk was not qualified to testify concerning the receipt. *Id*. at 661.

After outlining the basic requirements of the business records hearsay exception, the court noted that "[i]n order to prove a fact of evidence of usual business practices, it must first be established that the witness is either in charge of the activity constituting the usual business practice or is well enough acquainted with the activity to give the testimony." *Id.* at 662. Thus, because the store clerk

[13] Answer Brief, p. 20.

"had no responsibilities regarding the business practices of the [store]" he was not qualified to introduce the receipt as a business record. *Id*. This Court sympathized with the plight of the prosecution—in that the qualified witness, the manager, did not appear to testify (and was, as a result, held in contempt)—but steadfastly decreed that "the rules of evidence must be observed." *Id*.

The recent case of *Kelsey v. SunTrust Mortg., Inc.*, 3D12-2994, 2013 WL 6246461 (Fla. 3d DCA 2013) is also instructive. *Kelsey* was a foreclosure case in which documents were admitted at trial through a witness who, like Thomas, could profess no personal knowledge of the company's record-making practices. Unlike the Bank here, the bank in *Kelsey* confessed error (as was "proper," according to the appellate court), admitting that the documents were inadmissible hearsay. The court specifically agreed that the trial court committed error and reversed the judgment.

II. The Bank's summary judgment affidavit is legally insufficient because the Bank refused to provide the data from which the attached documents were compiled (§ 90.956, Fla. Stat.).

A. The Loan Summaries are abridged compilations covered by § 90.956, Fla. Stat.

The Bank tells this court that the Loan Summaries attached to the affidavit are complete,[14] despite the affiant's testimony that they represent only a "portion" and despite the fact that the other affiants produced entirely different records

[14] Answer Brief, p. 25.

(which were also incomplete on their face). The Bank goes on to admit that they are a data "compilation."[15] Not only does the case law treat a "compilation" as a "summary" subject to §90.956, Fla. Stat., it is inadmissible where, as in this case, it "was not authenticated by the party who prepared it." *McKown v. State*, 46 So. 3d 174, 175 (Fla. 4th DCA 2010). Indeed, the statute itself uses the word "compiled" to describe how a "summary" is constructed.

And while a "data compilation" (or "summary") may, in some cases, qualify as a business record in its own right, the abridged version must have a demonstrable business purpose, which was never shown here. Indeed, the affiant's use of the word "pertinent" suggests that the records were winnowed specifically for a litigation purpose.

The Bank also asks this Court to ignore its other affidavits on file, because the trial court's judgment was based only on the Thomas affidavit.[16] They should, however, be considered by the Court, not only because they are still "on file," but because the judgment should be based on complete and accurate information.

B. The Bank's calculations of additional principal are suspect.

The Bank does not attempt to demonstrate that its interest calculations are correct, because it is impossible to do so from the record. Instead, it argues that the

[15] Answer Brief, p. 24.

[16] Answr Brief, pp. 24-25.

additional $ 26,265.12 is a mere "cavil" and that the Homeowner waived this point by failing to contest the amount, and do so with an affidavit.[17]

As was clear from the Initial Brief, however, the Homeowner did not raise this as a separate point of error on appeal. The Homeowner merely pointed out the discrepancy to show that the incompleteness of the compilation was not a mere technicality that could never result in prejudice to the Homeowner. The Homeowner demonstrated that the shell game played by the Bank with its business records had a very real mathematical connection with the additional principal with which the Homeowner was saddled in the judgment—the "suspect" computation of the deferred interest.

Moreover, while objections or issues may be waived, it is nonsensical to say that inferences from facts may be waived, because it impermissibly shifts the burden from the movant who must conclusively prove the nonexistence of a genuine issue of fact with all reasonable inferences drawn in favor of non-movant. *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966). Under *de novo* review, this Court can, and should, draw its own inferences from the evidence.

Additionally, because this particular inference came from the information "on file" which had been submitted by the Bank itself, it was unnecessary for the

[17] Answer Brief, pp. 22, 25.

Homeowner to file an affidavit asserting that the deferred interest calculations were incorrect (which could not have been based on personal knowledge in any event).

CONCLUSION

Contrary to the Bank's argument,[18] the Homeowner challenges the trial court's conclusions of fact and its application of the rules of evidence that resulted in the entry of summary judgment against him. The judgment was based on an improper affidavit and inadmissible evidence, whether the error occurred at the earlier hearing on the Homeowner's Motion to Strike the affidavit, at the summary judgment hearing, or both.

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

Dated December 23, 2013

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[18] Answer Brief, p. 8.

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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this December 23, 2013 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.

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