In the District Court of Appeal
Fifth District of Florida

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

[redacted]
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

REPLY BRIEF OF APPELLANT

Respectfully submitted,

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I. Standing was Properly Raised in the Lower Court by Motion for Rehearing.

Standing must be raised in the lower court. *See Maynard v. Fla. Bd. of Educ. ex rel. Univ. of S. Fla.*, 998 So. 2d 1201, 1206 (Fla. 2d DCA 2009). The question is whether it was raised, not how it was raised. *Id.* This "does not necessarily require that standing be raised only by means of an affirmative defense." *Id.* In this case, standing was timely raised by [redacted] Motion for Rehearing and therefore is properly before this Court.[1]

II. There was No Summary Judgment Evidence of Any Assignment.

The BANK admits that its theory of ownership of the note and mortgage in the pleadings is through an "assignment to be recorded."[2] A verbal assignment would not suffice because it could not be recorded nor would it comply with Florida's recording law. *See* § 695.01, Fla. Stat. (2009). Accordingly, the BANK needed to submit admissible evidence of a written assignment to prove it held the note and mortgage at the time of filing.

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 Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 939 (Fla. 2d DCA

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

[2] Complaint, ¶ 3 (R. 1-28); Answer Brief, p. 9.

2010) (reversing summary judgment where unauthenticated assignment did not constitute admissible evidence and the bank submitted no other evidence to establish that it was the proper holder of the note and mortgage). The BANK's affidavits do not mention the word "assignment" at all.[3] Notwithstanding this fact, the BANK filed an alleged copy of an assignment. This assignment, which is, without question, an unverified out-of-court writing offered to establish the BANK's standing to foreclose, was never sworn to or certified as a true and correct copy by a qualified record's custodian.[4] Also, the unsworn, unverified statement of the BANK's attorney could not establish any fact, much less the authenticity of a document. *See Wright v. Emory*, 41. So. 3d 290, 292 (Fla. 4th DCA 2010).

III. A Copy is Not Automatically Authentic Merely Because it is a Copy.

The BANK argues that "the filing of the duplicate Assignment of Mortgage clearly establishes its authenticity."[5] Such an argument flies in the face of the basic tenets of evidentiary law. The issue is not whether a duplicate can be admitted, the issue is whether the assignment of mortgage was authenticated. To

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[3] *See* Affidavits attached to Plaintiff's Motion for Summary Judgment, served October 15, 2009 (R. 74-82).

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

[5] Answer Brief, p. 13.

authenticate is "[t]o prove the genuineness of (a thing)."[6] Moreover, authentication is defined as follows:

> 1. Broadly, the act of proving that something (as a document) is true or genuine, esp. so that it may be admitted as evidence; the condition of being so proved<authentication of the handwriting>.[7]

The requirement that evidence must be authenticated to be admissible is recognized in Florida's statutes and rules of evidence. *See* § 90.901, Fla. Stat. (2009); Fla. R. Evid. 90.901. In fact, Florida Rule of Civil Procedure 1.510(e) incorporates this by requiring that sworn or certified copies of all documents referred to, be attached or served with a summary judgment affidavit.

The same is true under Florida case law requiring documents to be sworn or certified in order to qualify as summary judgment evidence. *See Servedio v. U.S. Bank Nat'l Ass'n*, 46 So. 3d 1105, 1108 (Fla. 4th DCA 2010) (noting that documents must be "*authenticated*, filed, and served more than twenty days before hearing); *see also Bifulco v. State Farm Auto. Ins. Co.*, 693 So. 2d 707, 709-11 (Fla. 4th DCA 1997) ("[m]erely attaching documents which are not 'sworn to or certified' to a motion for summary judgment does not, without more, satisfy the procedural strictures inherent in Fla. R. Civ. P. 1.510(e)."). In fact, the BANK's own case, *Perry v. Fairbanks Capital Corp.*, 888 So. 2d 725, 727 (Fla. 5th DCA

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[6] Black's Law Dictionary 142 (8th ed. 2004).

[7] *Id.*

2004), recognizes that mortgages, duplicates or not, must be authenticated to be admissible:

> A mortgage, on the other hand, does not fit into the definition of the documents required by section 90.952 to be produced in their original form, and may thus be proved by using a properly *authenticated* duplicate.

(emphasis added). Accordingly, even if such documents were previously notarized and recorded, it does not eliminate the requirement that documents be authenticated to qualify as summary judgment evidence.

Here, the BANK admittedly did not authenticate any assignment, whether proffered as a duplicate or not. Despite this fact, the BANK asks this Court to reverse over one hundred and fifty years of case law to hold that presenting a copy automatically equals authentication. *See Spann v. Baltzell*, 1 Fla. 301, 338 (1847). In other words, the BANK argues that the statute permitting the use of copies in place of originals somehow overrides the statute requiring authentication. §§ 90.953, 90.901, Fla. Stat. (2009). This position neglects the most important language of the statute which limits the admission of a duplicate "to the same extent as the original." § 90.953, Fla. Stat. (2009). Under the BANK's rationale, any forgery can get into evidence simply by making a copy of it first. This Court must reject an interpretation of the statute that would create such an absurd result. *See Quarantello v. Leroy*, 977 So. 2d 648, 654 (Fla. 5th DCA 2008).

It is undisputed that the assignment was not sworn to or certified as a true and correct copy. Accordingly, the unauthenticated assignment could never be "summary judgment evidence" upon which the lower court could base its judgment. *See* Fla. R. Civ. P. Rule 1.510(c). Therefore, the BANK could not and did not prove it owned and held the note and mortgage. The note contains a special endorsement made out to Option One and the attached mortgage identifies Advent Mortgage as the [redacted] neither of which is the BANK.[8]

IV. The BANK did not Plead There was an Equitable Transfer Nor is There any Evidence to Support Such a Theory.

The Complaint contains no allegation of an equitable transfer.[9] The BANK nevertheless argues that there was an equitable transfer. Also, it is undisputed that no assignment existed at the time the Complaint was filed. Having failed to plead or submit any evidence of an equitable transfer, the BANK is estopped from arguing any theory based on an equitable transfer and any reference thereto should be stricken.

If the BANK wants to proceed under such a theory, the case should be remanded so the BANK can plead an equitable lien theory. But, even if the BANK had both pled there was an equitable transfer and submitted a properly authenticated post-filing assignment, at best, this would require an evidentiary

[8] Note attached to Complaint (R. 1-28); Mortgage attached to Complaint (R. 1-28).

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

hearing. *See WM Specialty Mortgage v. Salomon*, 874 So. 2d 680, 681-83 (Fla. 4th DCA 2004).[10] Accordingly, summary judgment must be reversed.

V. The Lower Court Erred in Entering a *Sua Sponte* Summary Judgment.

There was no motion and no notice that the BANK was moving for summary judgment on the lost note count and reformation counts. *See Kelly v. Militana*, 595 So. 2d 113, 114 (Fla. 3d DCA 1992) (summary judgment may not be granted where there is no motion pending and no notice or opportunity to present opposing affidavits) (citing *Muncey v. Sary Brite Distributors, Inc.*, 378 So. 2d 1326, 1327 (Fla. 3d DCA 1980) (same)). Therefore, [redacted] had no opportunity to be heard on these issues. This is exactly why 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. Fla. R. Civ. P. 1.510(c); *see also Deluxe Motel, Inc. v. Patel*, 727 So. 2d 299 (Fla. 5th DCA 1999) (lower court cannot not rely on arguments made at hearing but not in motion); *Williams v. BAC*, 927 So. 2d 1091 (Fla. 4th DCA 2006) (reversible error to enter summary judgment on grounds not raised in the motion); *Cooper City v. Sunshine Wireless Co.*, 654 So. 2d 283 (Fla. 4th DCA 1995).

[10] *See* Initial Brief section I.B. for discussion on *WM Specialty*, p. 13.

A. The BANK never moved for summary judgment on the lost note.

The BANK admits its motion is defective.[11] The motion made no mention of a lost note and identified no evidence to support its claim but instead, declared the opposite – that "[t]he original promissory note, mortgage and assignment of mortgage will be filed on or before the hearing."[12] Notwithstanding, the BANK now argues that because the lost note affidavit had been filed before the hearing the motion did not need to raise the lost not count issue and that any objection by [redacted] to the defect should have been raised sooner.[13] The BANK cites *Bifulco v. State Farm Auto. Ins. Co.*, for the proposition that an affidavit can authenticate a note that is not attached to the affidavit so long as the note is attached to the Complaint and is sworn to or certified as a true and correct copy by the affidavit. 693 So. 2d at 710. The language the BANK points to in *Bifulco* is actually from *Coastal Caribbean Corp. v. Rawlings*, 361 So. 2d 719, 721 (4th DCA 1978).

Regardless of the BANK's confusion about the cases, the argument misses the point. The *sua sponte* summary judgment on the lost note count robbed [redacted] of the opportunity to be heard on this issue. Aside from disregarding the rules of procedure, this position assumes that [redacted] would have reason to attack an issue not

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[11] Answer Brief, p. 15.

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

[13] Answer Brief, p. 14.

raised by the summary judgment motion. Moreover, since the motion said the note would be produced, there was no reason to object to an unreferenced lost note affidavit.

Additionally, *Bifulco* and *Coastal Caribbean* actually support [redacted] position. The *Bifulco* court reversed a summary judgment because documents submitted as evidence were not sworn to or certified. 693 So. 2d at 710-11. In *Coastal Caribbean*, the court found no error where an affidavit swore that copies of the note and mortgage attached to the complaint were true and correct copies. Meaning, *Coastal Caribbean* merely held that the documents were properly authenticated; nowhere did it dispense with the requirement that the plaintiff's motion actually state the particular issues which it is requesting summary judgment on. While the question of whether the plaintiffs ever moved for summary judgment on particular issues was not before the courts in *Bifulco* or *Coastal Caribbean*, presumably the motions in both cases requested summary judgment on particularly stated issues. Here, there was no request for summary judgment on the lost note count. Additionally, [redacted] objection to summary judgment on the lost note count, or on any issue, could not be waived. Rule 1.510(c) applies to summary judgment evidence, not argument.

B. The issue of reformation was never raised or addressed.

It is undisputed that no motion, affidavit, or argument ever addressed reformation of the deed and mortgage. While both counts for reformation were denied by [redacted],[14] the BANK, without submitting evidence, unilaterally changed the legal description by including it in the proposed judgment without notice or a hearing.[15] The BANK now asks this Court to set an unprecedented standard by allowing summary judgments to be granted without a motion or any proof whatsoever. As it stands, the court never heard or decided the reformation issues. Yet, there is now a judgment which is simply incorrect. Such a result does not comply with the law. The BANK goes on to invoke the Court's equitable jurisdiction in an attempt to excuse its admitted lack of evidence; however, there is nothing inequitable about giving [redacted] due process and her day in court.

Furthermore, the BANK's own case recognizes that the granting of summary judgment brings a sudden and drastic end to a lawsuit, thus foreclosing the litigant from the right and benefit of a trial. *See Bifulco*, 693 So. 2d at 709. "It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed." *Id.* Here, the granting of

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[14] Answer , ¶¶ 36, 42 (R. 60-62).

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

summary judgment violated the essential requirements of the law including the rules of civil procedure, evidence, and basic due process rights.

CONCLUSION

The record in this case is devoid of any admissible evidence on the issues the BANK needed to prove:

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; and
3) The reformation of the deed and mortgage.

The court went so far as to grant summary judgment on the reformation counts despite the fact that the issues were not raised by motion, affidavit or oral argument. Based on the foregoing, the BANK failed to meet its burden and the Court must reverse the final summary judgment and remand to the trial court for further proceedings.

Dated January 20, 2011

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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 January 20, 2011 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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