In the District Court of Appeal
Second District of Florida

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

[redacted] and [redacted]
Appellants,

v.

BAYVIEW LOAN SERVICING, LLC,

Appellee.

ON APPEAL FROM THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

ICE LEGAL, P.A.
Counsel for Appellants
1015 N. State Road 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888

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ISSUE PRESENTED

BAYVIEW LOAN SERVICING, LLC (the "BANK"), sought to foreclose on the property of [redacted] and [redacted] (the "OWNERS"). The BANK pled it was the mortgagee based on an assignment. The OWNERS' denied that the BANK was the mortgagee by answer and affirmative defense. A year and a half into the case, at the summary judgment hearing, an alleged copy of an assignment post-dating the filing of the suit finally surfaced. Given that the record shows that another entity was the mortgagee at the time the Complaint was filed and no assignment existed at that time, does the BANK have standing to bring this suit?

STATEMENT OF THE CASE AND FACTS

I. Statement of the Facts

A. The BANK filed a complaint claiming it was the owner and holder of the note and assignee of the mortgage.

The BANK filed its Complaint against the OWNERS on August 1, 2007.[1] The Complaint alleged that on January 4, 2006, a promissory note was "executed and delivered to USMONEY SOURCE, INC D/B/A/ SOLUNA FIRST by the OWNERS."[2] An alleged copy of the note was attached to the Complaint indicating the lender was "USMONEY SOURCE, INC D/B/A/ SOLUNA FIRST"

[1] Complaint to Foreclose Mortgage, filed August 1, 2007 (the "Complaint"). (R. 4).

[2] Complaint, ¶ 2 (R. 4).

and that the borrower was [redacted][3] The Complaint further alleged that the "Plaintiff owns and holds said note by virtue of the endorsement/allonge".[4] The attached allonge shows [redacted] as the borrower and it purports to endorse the note over to BAYVIEW LOAN SERVICING, LLC on January 4, 2006.[5] Despite containing the allegation that the BANK holds the note, the Complaint goes on to plead that "the original promissory note was lost or destroyed subsequent to Plaintiff's acquisition thereof, the exact time and manner of said loss or destruction" was unknown to the BANK.[6]

The Complaint also alleges that the OWNERS "executed and delivered a mortgage securing" payment of the note to MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS").[7] Attached to the Complaint is an alleged mortgage showing MERS as the mortgagee.[8] The Complaint further alleges that Plaintiff "owns and holds . . . said mortgage by virtue of [an] assignment of mortgage,"[9] however, no assignment was attached to the Complaint.

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[3] Note attached to the Complaint (R. 24, 26).

[4] Complaint, ¶ 3 (R. 4).

[5] Allonge attached to Complaint (R. 28).

[6] Complaint, ¶ 4 (R. 4).

[7] Complaint, ¶¶ 3, 10-11 (R. 4-5)

[8] Mortgage attached to Complaint (R. 7).

[9] Complaint, ¶ 3, 10-11 (R. 4, 5).

B. The answer and affirmative defenses deny the BANK's allegations, challenge the BANK's standing as mortgagee, and allege that proper notice of default was not provided to the OWNERS.

The OWNERS answered the Complaint and pled that they were without knowledge and therefore denied the allegations regarding ownership and holdership of the note and mortgage.[10] The OWNERS also raised five affirmative defenses. The second affirmative defense denied that the OWNERS were given proper notice of default in the payments on the note and mortgage, and claimed that the BANK was stopped from accelerating the debt.[11] The third affirmative defense challenged the BANK's standing on the grounds that it was not the owner and holder of the mortgage.[12]

Ten months later, the BANK filed a reply to the OWNERS' affirmative defenses.[13] The reply alleges that the notice requirements were met and argues that the BANK was the mortgagee even without any assignment.

C. The BANK moved for summary judgment.

The BANK filed a two and a half page summary judgment motion.[14] At that time, the BANK also filed an affidavit of indebtedness.[15] After filing several

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[10] Answer to Complaint ("Answer") filed August 28, 2007, ¶¶ 2-4, 10-11 (R. 30-31).

[11] Answer, (R. 32).

[12] *Id*.

[13] Reply to Affirmative Defenses filed June 17, 2008 (R. 53).

affidavits, the BANK's last amended affidavit of amount due and owing was executed by Kathleen M. Sovic, a vice president with the BANK.[16] No documents were attached to the affidavit. Additionally, the word "assignment" is never mentioned in the affidavit.[17]

D. The BANK filed what it alleged to be the original note and mortgage.

Approximately two years after filing the summary judgment motion, the BANK filed a notice of filing in which its counsel claimed to file the "original Note and Mortgage" at issue.[18] This notice of filing was not accompanied by any affidavit or other testimony to otherwise support the representation that these were in fact the original loan documents.[19]

E. The trial court granted summary judgment.

At the summary judgment hearing on February 22, 2010, the BANK produced an assignment of mortgage for the first time. The notice of filing of the assignment of mortgage is dated February 10, 2010 but it was not docketed until

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[14] Plaintiff's Motion for Summary Judgment, served November 15, 2007 (R. 41-43).

[15] Affidavit as to Indebtedness, filed November 21, 2007 (R. 48).

[16] Notice of Filing Amended Affidavit of Amounts Due and Owing, filed on January 4, 2010 (R. 108).

[17] *See id.*

[18] Notice of Filing, filed on October 29, 2009 (R. 67).

[19] *See id.*

February 23, 2010, the day after the summary judgment hearing.[20] Even more important is the fact that the alleged assignment of mortgage was executed on August 7, 2007, which is after the Complaint was filed.[21] Nevertheless, the trial court granted summary judgment.[22] The OWNERS moved for rehearing on March 4, 2010 which was denied by the trial court on March 15, 2010. The OWNERS filed a timely notice of appeal.[23]

[20] Notice of Filing Copy of Assignment of Mortgage, filed February 23, 2010 (R. 125).

[21] *Id.* (R. 126)

[22] Uniform Final Judgment of Foreclosure, filed on February 23, 2010 (R. 128).

[23] Notice of Appeal (R. 139).

SUMMARY OF THE ARGUMENT

The trial court erred in granting summary judgment by shifting the burden to the nonmovants and ignoring the record. While the BANK pled it was the mortgagee based on an assignment, the record, including the BANK's own filings, show another entity to be the mortgagee at the time the suit was filed. To prove ownership of the mortgage, the BANK relied on an assignment which was late filed and unserved prior to the summary judgment hearing.

Even if timely filed, the assignment was not properly authenticated. No affidavit or other evidence was ever presented to authenticate it. In addition, counsel's unsworn statement that the document was a copy of an "original" is insufficient to establish authenticity. Notably, neither the affidavit relied on or the summary judgment motion even mention the word "assignment." Since summary judgment evidence must be admissible, this inadmissible unauthenticated assignment was as a matter of law insufficient to prove ownership of the mortgage and the BANK was not entitled to an evidentiary shortcut.

Even assuming the assignment was timely and authenticated, it still cannot prove the BANK's standing because it did not exist until *after the lawsuit was filed*. A complaint cannot state a cause of action at the time of filing based on a document that did not exist until later. The record shows MERS to be the

mortgagee at the time the suit was filed and nothing in the record contradicts this admission.

Even if there was contradictory evidence in the record, such conflicting evidence would merely preclude summary judgment and create an issue of fact for trial. Further, there is no allegation of a prior transfer of any sort in this case. Accordingly, the record is clear that the BANK was not mortgagee when this case was filed. On this ground alone summary judgment should be reversed with directions to dismiss based on lack of standing.

Additionally, the affidavit relied on by the BANK itself was legally insufficient because it did not attach the required sworn or certified copies of documents referred to.

Also, the BANK failed to prove that it provided notice of the default to the OWNERS. The BANK did not even attempt to introduce evidence on this issue. Without evidence and sufficient affidavits, the summary judgment must also be reversed on this ground.

Lastly, [redacted] did not sign the note and therefore should not be liable on the note. The judgment holding [redacted] personally liable under the note must be reversed.

Accordingly, the 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*. *Estate of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Care Ctr.*, 928 So. 2d 1272, 1274 (Fla. 2d DCA 2006); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2002). 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*, 928 So. 2d at 1274 (quoting Fla. R. Civ. P. 1.510(c)).

In order to determine the propriety of a summary judgment, the 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, the OWNERS, and if there is the slightest doubt or conflict in the evidence, then summary judgment must be reversed. *See id*.

ARGUMENT

I. Summary judgment is improper when the record shows that the movant did not have standing to sue, the movant did not refute the affirmative defenses, and its affidavits are legally insufficient.

The trial court erred in granting summary judgment. The record and the BANK's own filings show that another entity was the mortgagee at the time the Complaint was filed and no assignment existed at that time. At the very least, the BANK failed to prove there was no genuine issue of any material fact.

A. The pleadings, affidavits, admissions, and other filings show that at the time the Complaint was filed the BANK was not the mortgagee.

The BANK filed this action on August 1, 2007.[24] The Complaint alleges that the OWNERS "executed and delivered a mortgage securing" payment of the note to MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS").[25] The attached mortgage shows MERS to be the mortgagee.[26] The Complaint goes on to allege that the BANK "owns and holds . . . said mortgage by virtue of [an] assignment of mortgage";[27] however, no assignment of mortgage was attached to the Complaint.

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[24] Complaint, (R. 4).

[25] Complaint, ¶ 10 (R. 5).

[26] Mortgage attached to Complaint (R. 7).

[27] Complaint, ¶¶ 3, 11 (R. 4, 5).

Despite claiming ownership of the subject mortgage based on an assignment from the original mortgagee,[28] no assignment was produced until two and a half years into the case. When finally produced, the alleged assignment, on its face, showed it was executed on August 7, 2007, which was *after* this case was filed.[29] Interestingly, the filing, which was docketed the day after the summary judgment hearing, was not accompanied by any affidavit or other evidence to authenticate the assignment nor did it contain a certificate of service.[30] At best, it was provided only twelve days before summary judgment in violation Fla. R. Civ. P. 1.510(c). *Verizzo v. Bank of New York*, 28 So.3d 976, 977-78 (Fla. 2d DCA 2010) (reversing final summary judgment based on late service and filing of summary judgment evidence).

Even if the assignment was timely filed, it was not properly authenticated. *See BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 939 (Fla. 2d DCA 2010) (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). The notice of filing of the alleged

[28] Complaint, ¶¶ 3, 11 (R. 4-5).

[29] Notice of Filing Copy of Assignment of Mortgage, filed February 23, 2010 (R. 125-26).

[30] *Id.*

assignment was not accompanied by any affidavit or other evidence to authenticate the attachment.[31] The unsworn statement by the BANK's attorney that the document was a copy of an "original" is insufficient to establish its authenticty. *Hewitt, Coleman & Assocs. v. Lymas*, 460 So. 2d 467 (Fla. 4th DCA 1984) (unsworn statements of attorneys do no not establish facts). Moreover, the amended affidavit of amounts due and owing and the motion for summary judgment fail to even mention the word "assignment." The affidavit, 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. Fla. R. Civ. P. Rule 1.510 (c) (summary judgment evidence must be admissible); *BAC Funding*, 28 So. 3d at 939 (finding an unauthenticated assignment not to be admissible evidence). 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.

Overlooking the fact that the assignment was late filed and not properly authenticated, it was still impossible for the BANK to prove it had 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

[31] *See id.*

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 the complaint should have been dismissed. *Id.* This Court has held the same in similar situations. *See BAC Funding*, 28 So. 3d at 938-39.

Here, this Court is faced with a virtually identical situation as that in *Jeff-Ray Corp*. The BANK 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.

Furthermore, a party is bound by the party's 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); *City of Deland v. Miller*, 608 So. 2d 121 (Fla. 5th DCA 1992).

In this case, attached to the Complaint is a mortgage showing MERS as the mortgagee.[32] 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. *BAC Funding*, 28 So. 3d at 938; *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240 (Fla. 2000) Thus, the BANK was and is bound by its pleadings and such allegations are accepted as facts without the necessity of further proof. *Cessna Aircraft Co. v. Avion Techs., Inc.*, 990 So. 2d 532, 536-37 (Fla. 3d DCA 2008) citing *Miller*, 608 So. 2d at 122. Specifically, the record showed that MERS was the mortgagee at the time the suit was filed based on the mortgage attached to the Complaint. Nothing in the record contradicted this admission.

Even if the BANK were to argue on appeal that the mortgage followed the note and there was an earlier transfer 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

[32] Mortgage attached to Complaint (R. 7).

preclude summary judgment and create an issue of fact for trial. Since there is no allegation of a prior transfer of any sort in this case, the record is clear that the BANK was not mortgagee when this case was filed.

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*.

B. The trial court incorrectly shifted the burden on the OWNERS to prove their affirmative defenses at summary judgment.

"The party moving for summary judgment must factually refute or disprove the affirmative defenses raised, or establish that the defenses are insufficient as a matter of law. *Stop & Shoppe Mart, Inc. v. Mehdi*, 854 So. 2d 784 (Fla. 5th DCA 2003); *Knight Energy Servs., Inc. v. Amoco Oil Co.*, 660 So.2d 786, 788 (Fla. 4th DCA 1995); *Cufferi v. Royal Palm Dev. Co.*, 516 So. 2d 983, 984 (Fla. 4th DCA 1987) (In a foreclosure action, "[a] summary judgment should not be granted where there are issues of fact raised by affirmative defense which have not been effectively factually challenged and refuted.").

A party opposing summary judgment need not come forward in any way if the moving party has not supported his motion to the point of showing that the

issue is sham. *Greer v. Workman*, 203 So. 2d 665, 667 (Fla. 4th DCA 1967). Until this burden is met, the non-moving party is under no obligation to prove any matter. *Frost v. Regions Bank*, 15 So. 3d 905 (Fla. 4th DCA 2009) (summary judgment entered in error where movant's affiant failed to address all affirmative defenses); *see also Zoda v. Hedden*, 596 So. 2d 1225, 1226 (Fla. 2d DCA 1992); *Spradley v. Stick*, 622 So.2d 610 (Fla. 1st DCA 1993) (movant's proof of the nonexistence of a genuine issue of fact must be "conclusive").

The OWNERS' second affirmative defense denies that notice of default was given. The law is settled that the BANK was required to factually refute these allegations. In fact, the Fourth District decided this exact issue in *Frost v. Regions Bank*. 15 So. 3d 905. *Frost* was a mortgage foreclosure action where the defendant's answer raised the defense that the bank failed to satisfy the condition precedent of providing notice of the alleged default and a reasonable opportunity to cure. *Id.* at 905-06. While the defense did not refer to any language from the mortgage, attached to the complaint, however, was the mortgage that contained language requiring notice of default. *Id.* at 906.

The bank moved for summary judgment relying on an affidavit of indebtedness. *Id.* The defendants did not file any papers or affidavits in opposition to the summary judgment motion. *Id.* The Fourth District nonetheless reversed the trial court holding that the bank's affidavits, motions, pleadings and

papers failed to refute the defendant's affirmative defenses, and thus summary judgment was improper. *Id*. at 907.

Another recent decision revisits this issue with the same results. In *Lazuran v. Citimortgage, Inc.*, 35 So. 3d 189 (Fla. 4th DCA 2010), the bank's complaint alleged that all conditions precedent to the mortgage notes acceleration had been fulfilled. *Id.* The bank's summary judgment affidavit stated that each and every allegation in the complaint was true. *Id.* In reversing the trial court, the Fourth District held that such conclusory language was insufficient to refute the defendant's affirmative defense that the bank failed to provide notice as required by the mortgage. *Id.* at 189-90.

In this case, paragraph 22 of the mortgage requires notice of default.[33] The OWNERS' second affirmative defense denied that the OWNERS were given proper notice of the default in the payments on the note and mortgage.[34] Once the issue was raised, the BANK had the burden of factually refuting or disproving the claim that notice was not given. Despite such a burden, summary judgment was erroneously granted without requiring the BANK to factually refute the affirmative defenses. Nowhere in the record did the BANK attempt to adduce even a scrap of evidence that the required notice of default was given.

[33] Mortgage attached to Complaint, ¶ 22 (R. 19).

[34] Answer, (R. 32).

Similarly, the third affirmative defense denies that the BANK has standing as a mortgagee.[35] As discussed above, the record actually proves the BANK did not have standing as a mortgagee. Accordingly, the BANK failed to meet its burden and the granting of summary judgment was reversible error.

C. The amended affidavit of amounts due and owing was and is legally insufficient.

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, 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:

[35] *Id.*

> '* * * 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).

In the amended affidavit of amounts due and owing filed in this case, Ms. Sovic admits that she reviewed records: "I have personally reviewed the records of BAYVIEW LOAN SERVICING, LLC."[36] The affidavit further states that "the information given is contained in the original books and records maintained in the office of said agent."[37] The affidavit goes on to list the specific amounts of principal balance, accrued interest for certain months, late charges, taxes, inspection fees, insurance advance, BPO, legal fees, and borrower credit.[38]

Clearly, the affidavit referred to separate documents; however, no such documents were attached, much less sworn or certified. Furthermore, an affidavit in support of summary judgment that does no more than indicate the documents that appear in the files and records of a business is not sufficient to meet the business records exception to the hearsay rule. *Crosby*, 534 So. 2d at 789.

The language of Rule 1.510(e) is clear and the trial court erred in refusing to enforce this rule.

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[36] Amended Affidavit of Amounts Due and Owing, (R. 109).

[37] *Id.*

[38] *Id.* (R. 110).

II. [redacted] cannot be liable on a note he did not sign.

A person cannot be liable on a note unless that person signed the note. *See ROSL, Inc. v. Des Jardins*, 756 So. 2d 1078, 1079 (Fla. 4th DCA 2000) (reversing the trial court and finding that it was not proper to find a defendant liable on a note that she did not sign); *Moschini v. Inter-Gold Italia, Inc.*, 694 So. 2d 774, 775 (Fla. 2d DCA 1997) (finding reversible error where trial court found a defendant liable even though it did not sign the note and the signor did not intend to sign on that defendant's behalf).

It is undisputed that [redacted] did not sign the note in this case nor was it signed on his behalf.[39] The Judgment, however, does not differentiate between a borrower and mortgagor. Coupled with the fact that the trial court retained jurisdiction for deficiency judgments, the Judgment appears to hold [redacted] liable on the note. Since [redacted] cannot be liable on the note, the Judgment must be reversed.

[39] Note attached to Complaint, (R. 24, 26); Notice of Filing Original Documents, (R. 68, 70).

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 mortgagee at the time the case was filed. The record actually shows the BANK was not the mortgagee. On this ground alone, the judgment should be reversed and remanded with directions to dismiss the Complaint.

Second, the BANK had to prove that it provided notice of the default to the OWNERS. The BANK did not even attempt to introduce evidence on this issue. In the absence of evidence coupled with insufficient affidavits, this is a separate ground for reversal.

Lastly, the record is clear that [redacted] did not sign the note and therefore should not be liable on the note. This Court must reverse the judgment holding [redacted] TAYLOR personally liable under the note.

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

Dated July 28, 2010

ICE LEGAL, P.A.
Counsel for Appellants
1015 N. STATE RD. 7, SUITE D
ROYAL PALM BEACH, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888

By:
ENRIQUE NIEVES III
Florida Bar No. 41736

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this July 28, 2010 on all parties on the attached service list.

ICE LEGAL, P.A.
Counsel for Appellants
1015 N. STATE RD. 7, SUITE D
ROYAL PALM BEACH, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888

By: 
ENRIQUE NIEVES III
Florida Bar No. 41736

SERVICE LIST

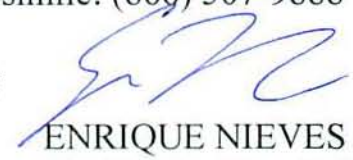
Brian L. Rosaler, Esq.
LAW OFFICES OF POPKIN & ROSALER, P.A.
1701 W Hillsboro Blvd
Suite 400
Deerfield Beach, FL 33442-1572
Telephone: (954) 360-9030
Facsimile: (954) 420-5187
Appellee's counsel

Elizabeth L. Hapner, Esq.
304 S. Plant Ave.
Tampa, FL 33606
Telephone: (813) 250-0357
Appellant's counsel below

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.

ICE LEGAL, P.A.
Counsel for Appellants
1015 N. STATE RD. 7, SUITE D
ROYAL PALM BEACH, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888

By: 
ENRIQUE NIEVES III
Florida Bar No. 41736