

**In the District Court of Appeal
Fourth District of Florida**

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

[REDACTED] and [REDACTED]
Appellants,

v.

BANKUNITED, FSB,

Appellee.

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

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

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ISSUE PRESENTED

Florida Rule of Civil Procedure 1.510(e) requires sworn or certified copies of all papers or parts thereof referred to in a summary judgment affidavit to be attached or served with the affidavit. The Bank's affidavits on their face rely upon records which were not attached or served with the affidavits. Further, the Bank's affidavit of indebtedness is self-contradictory. **Do the Bank's affidavits comply with Rule 1.510(e)?**

STATEMENT OF THE CASE AND FACTS

BANKUNITED, FSB (the “Bank”), filed a Complaint to foreclose on the property of [REDACTED] [REDACTED] and [REDACTED] [REDACTED] (the “Owners”) on November 10, 2008.¹ The Owners’ answer denied the BANK’s allegations and raised several affirmative defenses.² The BANK subsequently filed a one and a half page summary judgment motion.³ Along with the motion, the BANK filed an affidavit of indebtedness.⁴ No documents were attached to the affidavit.⁵

At the summary judgment hearing, the Owners argued that summary judgment was precluded because the Bank’s affidavits did not attach sworn or certified copies of the books, records, and documents referred to in the affidavits.⁶ The Bank agreed that sworn or certified copies were not attached but argued that

¹ Complaint for Mortgage Foreclosure, filed November 10, 2008. (R. 1).

² Second Amended Answer and Affirmative Defenses, Exhibit A to Defendants [REDACTED] [REDACTED] and [REDACTED] [REDACTED] Motion for Leave to File Second Amended Answer served March 16, 2010 (R. 304); Agreed Order on Motion for Leave to File Second Amended Answer and Motion to Substitute Party Plaintiff, filed April 15, 2010 (R. 646).

³ Motion for Summary Judgment of Foreclosure and Award of Attorney’s Fees, served October 6, 2009 (R. 90-96).

⁴ Affidavit of Plaintiff’s Claim, dated March 11, 2009 attached to Motion for Summary Judgment (R. 90-96).

⁵ *Id.*

⁶ Tr. of Proceedings held before the Honorable Meenu Sasser, dated April 16, 2010, p. 27-31 (R. 658-709).

the affiant only looked at a computer screen so there was no document to attach or provide.⁷ The lower court granted summary judgment for the Bank.⁸

The Owners moved to vacate and reissue the judgment on July 22, 2010 which was granted by the trial court and the judgment was reissued on August 17, 2010.⁹ The Owners filed a timely notice of appeal.

⁷ *Id.* at 28-29 (R. 658-709).

⁸ Final Judgment of Mortgage Foreclosure, filed on April 21, 2010 (R. 652).

⁹ Defendants, [REDACTED] [REDACTED] and [REDACTED] [REDACTED] Motion to Vacate and Reissue Final Judgment, served on July 22, 2010; Agreed Order on Defendants' Motion to Vacate and Reissue Final Judgment, filed August 17, 2010 (R. 743-45).

SUMMARY OF THE ARGUMENT

The trial court erred in granting summary judgment based on the Bank's legally insufficient affidavits. Florida Rule of Civil Procedure 1.510(e) requires sworn or certified copies of all papers or parts thereof referred to in a summary judgment affidavit to be attached or served with the affidavit. The Bank's affidavits on their face rely upon records which were not attached or served with the affidavits, therefore, the affidavits do not comply with Rule 1.510(e). Moreover, the Bank's affidavit of indebtedness is self-contradictory.

Based on the non-compliant and internally inconsistent affidavits, 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*. *Reeves v. North Broward Hosp. Dist.*, 821 So. 2d 319, 321 (Fla. 4th DCA 2002); *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.” 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. *Palm Beach Pain Management, Inc. v. Carroll*, 7 So. 3d 1144, 1145 (Fla. 4th DCA 2009) (citing *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966)). 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. The Bank's affidavits are legally insufficient.

The submission of summary judgment affidavits is governed by Florida Rule of Civil Procedure 1.510(e).

A. Rule 1.510(e) requires that sworn or certified copies of records referred to in a summary judgment affidavit be attached or served with the affidavit.

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, an admissible version of that document must be attached or otherwise provided to the court. 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:

‘* * * 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.)

Id. (emphasis added).

Even when affiants do not specifically identify the documents which, by necessity, were reviewed or relied upon in the process of preparing the affidavit, the failure to produce those documents renders the affidavit a legal nullity. This is because mere conclusory statements about the information contained in those documents are hearsay. *See Zoda v. Hedden*, 596 So. 2d 1225, 1226 (Fla. 2d DCA 1992) (unauthenticated documents referred to in, but not attached to, the affidavit constituted incompetent hearsay not sufficient to support summary judgment). “[A] corporate officer’s affidavit which merely states conclusions or opinion [is insufficient] even if it is based on personal knowledge.” *Alvarez v. Florida Ins. Guar. Ass’n*, 661 So. 2d 1230, 1232 n. 2 (Fla. 3d DCA 1995); *Nour v. All State Pipe Supply Co.*, 487 So. 2d 1204, 1205 (Fla. 1st DCA 1986). Furthermore, an affidavit in support of summary judgment that does no more than indicate that the documents 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.

This Court has held that failure to comply with this rule is basis for a denial of summary judgment. *Bifulco v. State Farm Ins. Corp.*, 693 So. 2d 707 (Fla. 4th DCA 1997); *Mack v. Commercial Indus. Park Inc.*, 541 So. 2d 800 (Fla. 4th DCA

1989). Further, non-compliant affidavits may be stricken from the record. *Starkey v. Miami Aviation Corp.*, 214 So. 2d 738 (Fla. 3rd DCA 1968).

B. The Bank’s affidavits refer to and rely on records that were not attached or served with the affidavit.

In the affidavit of claim, Ms. Bado admits that she reviewed all the records kept by the Bank on this loan: “your Affiant has examined *all* books, records and documents kept by Plaintiff” concerning the loan.¹⁰ The affidavit goes on to list the specific amounts of principal balance, accrued interest for certain months, late charges, taxes, inspection fees, insurance premiums, and transmittal fees.¹¹ In fact, the numbers are presented to the second decimal place—making it self-evident that Ms. Bado referenced records. She could not possibly have all this information memorized down to the penny, so her “personal knowledge” could only have been obtained by reading records.

The affidavit for costs list amounts for service of process, title search report, copies, postage, and federal express charges. The table below identifies the documents referred to in the affidavits, or which were necessarily reviewed in order to create the affidavits:

¹⁰ Affidavit of Plaintiff’s Claim attached to Motion for Summary Judgment (R. 90-96) (emphasis added).

¹¹ *Id.*

**NAME OF
AFFIDAVIT**

**DOCUMENTS REFERENCED OR NECESSARILY
RELIED UPON**

Affidavit of
Plaintiff's Claim

"all books, records, and documents kept by Plaintiff concerning transactions herein with the Defendants."¹²

[Bills, receipts for payment or other supporting documentation re:]

- 2008 Real Property Taxes
- Mortgage Insurance Premiums
- Late Charges
- Transmittal Fees
- Inspection Fees

Affidavit for Costs

[Bills, receipts for payment or other supporting documentation re:]

- Service of Process
- Title Search Report
- Copies, Postage, & Federal Express (Courier) Charges

Despite the fact that the affidavits on their face rely upon these records, no records were attached, much less sworn to or certified records. The language of Rule 1.510(e) is clear and the trial court erred in refusing to enforce this rule.

II. The Bank's affidavit is self-contradictory.

The Bank's affidavit of indebtedness claims interest of \$25,601.07 from March 1, 2008 to March 11, 2009, which is a period of three hundred and seventy six (376) days. The affidavit also claims the interest is calculated at a per diem rate

¹² Affidavit of Plaintiff's Claim, attached to Motion for Summary Judgment, p. 2, ¶ 2 (R. 90-96).

of fifty three dollars and twenty two cents (\$53.22).¹³ If properly calculated, 376 days of interest at a per diem rate of \$53.22 equals \$20,010.72, not \$25,601.07. This is a difference of over \$5,000. Accordingly, the interest in the affidavit is inconsistent with the listed per diem rate.

The same is true for the final judgment. Using the same \$53.22 per diem rate of interest for the seven hundred and seventy seven (777) day period in the judgment equals \$41,351.94. This is over a \$5,000 difference from what the judgment actually charges.¹⁴ Accordingly, the unlisted per diem rate in the final judgment differs from the rate listed in the affidavit.

Because the Bank's affidavit is internally inconsistent, it creates an issue of fact on its face. Therefore, it was error to grant summary judgment based on this legally deficient affidavit.

¹³ Affidavit of Plaintiff's Claim, attached to Motion for Summary Judgment (R. 90-96).

¹⁴ See Final Judgment of Mortgage Foreclosure (R. 652).

CONCLUSION

The Bank's affidavits do not comply with Florida Rule of Civil Procedure 1.510(e). Further, the affidavit of indebtedness is internally inconsistent. Accordingly, this Court should reverse the final summary judgment and remand to the trial court for further proceedings.

Dated February 28, 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 February 28, 2011 on all parties on the attached service list.

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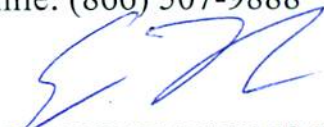
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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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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