In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted]

Appellant,

v.

RBC BANK,

Appellees.

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

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

RBC BANK (the "BANK") filed a complaint on October 22, 2009, against [redacted] ("[redacted] to collect a debt arising from two equity lines of credit.[1] Attached to the complaint were copies of two equity line of credit agreements from a different entity, RBC Centura Bank, the originals of which the BANK claimed to have lost.[2] In his answer, [redacted] admitted to executing two lines of credit to RBC Centura Bank, but, by way of an affirmative defense, challenged the authenticity of any documents that might later be proffered as the lost original instruments.[3]

An entity calling itself Plaintiff, but now using the name "RBC BANK (USA)," filed a motion for summary judgment[4] and two Affidavits of Indebtedness—one for each equity line.[5] The affiant, Cheryl Moore, identified herself as a vice president of "Plaintiff." In the affidavits, Ms. Moore stated,

[1] Complaint, October 22, 2009 (R. 1).

[2] Complaint (R. 6-17).

[3] Defendant's Answer to Complaint and Affirmative Defenses, March 2, 2011 (R. 33-39).

[4] Plaintiff's Motion for Summary Judgment, April 26, 2011 (R. 45-47)

[5] Plaintiff's Notice of Filing Affidavits of Indebtedness, May 5, 2011 (R. 59-65).

without elaboration, that "RBC BANK (USA) is the owner" of the equity lines.[6] She also stated, without elaboration, that she had "personal knowledge" and "familiarity" with [redacted] credit agreements, as well as familiarity with the business recordkeeping practices of the "Plaintiff."[7] Although she averred that "the contents of the affidavit [were] predic[a]ted upon Affiant's examination of such records,"[8] no sworn or certified copies of those records were attached as required by Rule 1.510(e) of the Florida Rules of Civil Procedure. Instead, for each loan, the BANK attached a single page "Review for Clearing" that summarily presented the total principal and interest allegedly due. That page was also not sworn or certified to be a true and correct copy of any BANK business record.

Also absent from the BANK's affidavit were sworn or certified copies of the equity agreements central to its claim. The affidavit did not identify the versions attached to the complaint—or any other documents in the file—as true and correct copies of the agreements. Aside from the lack of any sworn or certified copies to establish the terms of the agreements, the BANK presented no evidence as to

[6] Plaintiff's Notice of Filing Affidavits of Indebtedness (R. 60, 63).

[7] *Id.*

[8] *Id.*

whether the documents submitted as the "originals" were what they purported to be—the "originals."

Lastly, the BANK's motion for summary judgment did not explain how it allegedly became the owner of the unendorsed equity lines of credit. The BANK's affiant declared that "RBC BANK (USA)"—rather than the named Plaintiff—was now the owner and holder of the loans, but failed to identify how that entity came to own those debts.[9] The affiant similarly failed to specifically identify any records (much less sworn and certified records) from which she could have gleaned these alleged facts. After this deficiency was pointed out—and nine days before the hearing—the BANK produced Articles of Amendment that purported to explain the discrepancy.[10] This was in support of its first-time explanation that it became the owner of the equity lines when the original lender changed its name. The new name on those documents was—as the affiant had suggested—RBC BANK (USA), rather than the nominal Plaintiff, RBC BANK.[11]

The trial court granted the BANK's motion for summary judgment, and [redacted] filed a timely notice of appeal.

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[9] *Id.*

[10] Plaintiff's Response to Defendant's Motion for Continuance of Summary Judgment, July 11, 2011 (R. 139-140).

[11] *Id.*

SUMMARY OF THE ARGUMENT

The trial court erred in granting the BANK's motion for summary judgment because the BANK (a different entity than the original lender) did not introduce any admissible summary judgment evidence regarding its ownership of, or the specific amounts owed under, the equity lines of credit. The documents that the BANK relied upon to prove ownership of the equity lines of credit were not admissible as summary judgment evidence because: 1) they were not specifically identified in the motion; 2) the documents were not sworn or certified copies, and 3) they were served less than 20 days before the motion for summary judgment hearing.

Similarly, the BANK offered no admissible summary judgment evidence of the amount of the debt. The affiant expressly predicated her testimony upon books and records of the bank that were not specifically identified in the motion itself and were not attached to the affidavit (much less sworn and certified). Instead, the BANK proffered one-page summaries of the accounting records. And although a copy of this single page was attached to each affidavit, neither was sworn or certified to be true and correct.

The trial court erred, therefore, in granting summary judgment based on inadmissible evidence.

STANDARD OF REVIEW

"The standard for 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) (citing *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000)). In order to determine the propriety of a summary judgment, the court must resolve whether "there is no 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) (quoting *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966)). When considering the evidence contained in the record, including any supporting affidavits, "the court must draw every possible inference in favor of the non-moving party." *Edwards v. Simon*, 961 So. 2d 973, 974 (Fla. 4th DCA 2007). If there is the slightest doubt or conflict in the evidence, then summary judgment must be reversed. *See Carroll*, 7 So. 3d at 1145.

ARGUMENT

I. The Bank Did Not Provide Any Admissible Evidence that it was the Owner and Holder of the Equity Lines of Credit

It is axiomatic that a plaintiff must prove that it is the owner and holder of a debt in order to have standing to collect that debt. Florida courts have been clear to articulate this requirement, and have denied standing to any parties that failed to prove that they meet this minimal standard. *See, e.g., BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques,* 28 So. 3d 936, 938 (Fla. 2d DCA 2010) ("The proper party with standing to foreclose a note and/or mortgage is the holder of the note and mortgage or the holder's representative."); *Philogene v. ABN Amro Mortgage Group, Inc.*, 948 So. 2d 45, 46 (Fla. 4th DCA 2006) (affirming standing of lender "to bring and maintain a mortgage foreclosure action since it demonstrated that it held the note and mortgage in question"); *Booker v. Sarasota, Inc.*, 707 So. 2d 886, 889 (Fla. 1st DCA 1998) (holding that the trial court, when considering a motion for summary judgment, was not permitted to simply assume that the plaintiff was the holder of the promissory note in the absence of record evidence of such). For the reasons detailed below, the BANK failed to offer any admissible evidence that it was the proper party to bring an action to collect on the equity lines of credit in question.

A. The named Plaintiff is different than the "Lender" on the equity line of credit agreements.

The BANK filed this action in the name of "RBC Bank.[12] The copies of the line of credit agreements attached to its original complaint, however, list RBC Centura Bank as the "Lender."[13] These unendorsed instruments attached to the BANK's original Complaint contradict the BANK's allegations of ownership in the Complaint. Where "an exhibit facially negates the cause of action asserted," the Supreme Court of Florida instructs courts to view the exhibit as the controlling document. *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240, 1242 (Fla. 2000); *see* Fla. R. Civ. P. 1.130(b) ("Any exhibit attached to a pleading shall be considered a part thereof for all purposes."). The BANK's Complaint, therefore, demanded to recover debts owed to RBC Centura Bank, not RBC Bank (or for that matter, RBC Bank (USA)). The BANK alleged no facts regarding any transfers of the unendorsed promissory notes or how it otherwise became entitled to enforce them. Thus, the BANK has no standing to collect the debt.

A recent decision by this Court mirrors closely the facts and issues in this case. In *Duke v. HSBC Mortg. Services, LLC*, --- So. 3d ---, 36 Fla. L. Weekly

[12] Complaint (R. 1).

[13] Complaint (R. 6-17).

D2569 (Fla. 4th DCA 2011), HSBC sued to foreclose on a mortgage where it had not been the original lender. *Id*. at 2. The mortgage agreement, attached to the complaint, listed a separate entity, First NLC Financial Services, LLC, as the lender. *Id.* No assignment was attached. *Id.* While HSBC alleged that it was now the owner and holder of the mortgage, this Court held that HSBC had not resolved all genuine issues of material fact:

> [T]he mortgage attached to the complaint showed First NLC as the lender, creating discrepancies between the complaint and the attached exhibit. Thus, at the time of the argument on the summary judgment motion, genuine issues of material fact existed as to whether HSBC was the proper owner and holder of the note and mortgage where First NLC was named on the mortgage and evidence of an assignment was not included.
>
> We therefore reverse the trial court's order granting summary judgment because genuine issues of material fact remain in dispute regarding the owner and holder of the note and mortgage at the time the complaint was filed.

Id. Other courts in Florida have also rejected a plaintiff's standing to collect on a debt based on inconsistencies between the Complaint and other supporting documents. *See, e.g., Khan v. Bank of America, N.A.*, 58 So. 3d 927, 928 (Fla. 5th DCA 2011); *Mazine v. M & I Bank*, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011) (rejecting standing for plaintiff "M & I Bank" where name on the note and mortgage was "M & I Marshall & Ilsley Bank).

In the instant case, the BANK has similarly failed to explain discrepancies between the allegations in its Complaint and the documents attached to the Complaint. Like the plaintiff in *Duke*, the BANK asked the trial court to rely on mere allegations when deciding the motion for summary judgment, and to ignore major inconsistencies within the pleadings and evidence. Thus, there remain genuine issues of material fact in dispute as to the ownership of the equity lines of credit, and it was inappropriate for the trial court to grant the BANK's motion for summary judgment.

B. The affiant's conclusory statement of ownership is not only insufficient for summary judgment, but identifies the wrong party.

In addition to the discrepancies on the face of its complaint, the BANK also failed to identify any summary judgment evidence that it was the owner and holder of the lines of credit. The BANK's only attempt to adduce such evidence was the conclusory, unsupported statements by the affiant that a third entity, "RBC Bank (USA)," is the owner of the equity lines.[14] Even if the affiant had stated that the Plaintiff was the owner, "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

[14] Plaintiff's Notice of Filing Affidavit of Indebtedness (R. 59-65).

1995); *Nour v. All State Pipe Supply Co.*, 487 So.2d 1204, 1205 (Fla. 1st DCA 1986). The affiant, however, did not identify the Plaintiff as the owner. Because of this discrepancy, even if the affiant's statement could rise to the level of admissible evidence, it would merely prove that a third party—which is neither the lender nor the Plaintiff—is now the owner of the note.

C. No other documents pertaining to ownership of the credit agreements were before the trial court.

This Court's inquiry should end there. But because it is anticipated that the BANK will ask this Court to consider documents never properly before the trial court—three photocopied pages purporting to show that the original lender had changed its name to that of the nominal Plaintiff (the BANK)—those documents will be addressed here.

First, it is clear from the transcript of the summary judgment hearing that the trial court never considered these documents. Instead, the trial court dismissed the standing argument on counsel's representation that "[t]he note is in the file."[15] Leaving aside that statements by counsel are not evidence, *Leon Shaffer Golnick Advertising, Inc. v. Cedar*, 423 So. 1015, 1017 (Fla. 4th DCA 1982), possession of the notes would only be relevant to show standing if the BANK were the original

[15] Notice of Filing Transcript of Hearing Held on 07/20/2011, p. 9 (R. 198).

lender or if the notes were endorsed to the BANK (or in blank)—neither of which is true.

Second, even if the Court had been asked to consider the documents, they were inadmissible and untimely.

1. The unsworn, uncertified photocopies of documents purporting to show that the Lender changed its name were inadmissible hearsay.

Rule 1.510(c) of the Florida Rules of Civil Procedure requires that "summary judgment evidence" be admissible. "[O]nly competent evidence may be considered by the court in ruling upon a motion for summary judgment," *Daeda v. Blue Cross & Blue Shield of Florida, Inc.*, 698 So. 2d 617, 618 (Fla. 2d DCA 1997). "[I]t is apodictic that summary judgments may not be granted…absent the existence of 'summary judgment evidence' in the record." *TRG-Brickell Point NE, Ltd. V. Wajsblat*, 34 So. 3d 53, 55 (Fla. 3d DCA 2010).

Had the unauthenticated photocopies of the name-change documents actually been presented to the trial court, they would have been classic hearsay for which no exception was identified or proven. *Amos v. Gartner, Inc.*, 17 So. 3d 829, 833 (Fla. 1st DCA 2009) ("Where no proper foundation is laid, a record cannot be admitted under an exception to the hearsay rule."); *see also* § 90.901, Fla. Stat. (1976) (requiring authentication of documents). For purposes of summary

judgment, authenticity and exceptions to hearsay may be established by affidavit. *Buzzi v. Quality Service Station, Inc.*, 921 So. 2d 14, 15 (Fla. 3d DCA 2006). But here, the documents were never even mentioned in the BANK's affidavits. Indeed, the documents were never mentioned in the BANK's summary judgment motion—itself, a breach of Rule 1.510(c) which requires the movant to "specifically identify" the documents upon which it relies. *Casa Inv. Co., Inc. v. Nestor,* 8 So. 3d 1219, 1221 (Fla. 3d DCA 2009) (stating that the purpose of requirement to "specifically identify" grounds for summary judgment is to prevent ambush of the nonmoving party). The failure to mention these documents in the motion most likely stems from the fact that they were not injected anywhere into this case until nine days before the hearing.

2. The unsworn, uncertified photocopies of documents purporting to show that the Lender changed its name were untimely.

In addition to being inadmissible as evidence, the name-change documents were not provided at least twenty days before the motion for summary judgment hearing, in violation of the Florida Rules of Civil Procedure. Rule 1.510(c) requires the moving party to "serve the motion at least 20 days before the time fixed for the hearing, and…also serve at that time a copy of any summary judgment evidence on which the movant relies that has not already been filed with

the court." Fla. R. Civ. P. 1.510(c). Without this twenty day period, the opposing party would not have adequate time to prepare a challenge to the evidence being presented at the hearing. *Marlar v. Quincy State Bank*, 463 So. 2d 1233, 1233 (Fla. 1st DCA 1985). Florida appellate courts—including this Court—have repeatedly insisted on strict compliance with this rule, reversing summary judgment orders where the movant failed to comply. *See, e.g., Servedio v. U.S. Bank Nat. Ass'n*, 46 So. 3d 1105, 1108 (Fla. 4th DCA 2010); *Verizzo v. Bank of New York*, 28 So. 3d 976, 977-78 (Fla. 2d DCA 2010); *Mack v. Commercial Indus. Park, Inc.*, 541 So. 2d 800, 800 (Fla. 4th DCA 1989).

Accordingly, while the trial court never considered the name-change documents, it would have been error—and a denial of due process—to enter summary judgment based on them. Under the so-called "tipsy coachman" doctrine, an appellate court may "affirm a trial court that 'reaches the right result, but for the wrong reasons' so long as 'there is any basis which would support the judgment *in the record*.'" *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) (emphasis added) (quoting *Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999)). However, there must be a sufficient evidentiary basis upon which the appellate court may make its decision. *State, Dept. of Revenue ex rel. Rochell v Morris*, 736 So. 2d 41, 42 (Fla. 1st DCA 1999). For the

reasons outlined above, the name-change documents never rose to the level of summary judgment evidence, and thus would not be a part of a sufficient evidentiary basis. Accordingly, the summary judgment cannot be affirmed on the basis of these documents.

II. The Bank's Affidavits of Indebtedness are Legally Deficient

For each loan, the BANK offered only one affidavit to prove whether [redacted] owed money on the agreement, and if so, exactly how much money he owed. On this issue of indebtedness, both these affidavits are legally deficient, and should not have been considered by the court when deciding the BANK's motion for summary judgment. Specifically, the affidavits are deficient for two reasons.

A. The single page attachment to each affidavit was not a sworn and certified copy of the documents referenced by the affiant.

First, the affidavit refers to, and is expressly based upon, the business records of the BANK:

> The business records of Plaintiff *upon which this Affidavit was based* were made at or near the time of the events recorded therein. … The contents of this Affidavit are predict[a]ted upon Affiant's examination of such records.[16]

[16] Notice of Filing Affidavits of Indebtedness (R. 60, 63) (emphasis added).

Section (e) of Rule 1.510 requires that any papers "referred to" in a summary judgment affidavit must be provided to the opposing party in the form of sworn or certified copies at least twenty days before the hearing. Fla. R. Civ. P. 1.510(e).

The only document attached to each affidavit of indebtedness was a one-page printout from its Recovery Management System entitled "Review for Clearing" which purports to show a "Total Clearing Amount."[17] The affidavit for each loan does not specifically identify or even mention the Review for Clearing, nor does it claim that this single page represents the sum total of the "business records" referenced by the affiant. This Court need not, however, speculate about the matter because the copy of the "Review for Clearing" accompanying each affidavit is neither sworn nor certified. Accordingly, both affidavits fail to meet the requirements of Rule 1.510(e) and summary judgment was improper. [redacted] objected to the use of these documents as evidence in his Memorandum in Opposition to Summary Judgment,[18] as well as in his Motion for

[17] Notice of Filing Affidavits of Indebtedness (R. 62, 65).

[18] Defendant, [redacted] Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, May 19, 2011 (R. 88).

Rehearing.[19] This Court has held that failure to comply with this rule is basis for a denial of summary judgment. *Bifulco v. State Farm Mut. Auto. Ins. Corp.*, 693 So. 2d 707, 710 (Fla. 4th DCA 1997); *Mack*, 541 So. 2d at 800.

B. The BANK failed to attach sworn and certified copies of *all* documents referenced in the affidavit.

Second, each Review for Clearing is, on its face, a summarization of other records used to arrive at the total amount to "clear" the equity line of credit. The BANK's "business records" necessarily would consist of a host of documents other than a half-page printout displaying three dollar values. Notably, the dollar values for each listed "account balance" are different than the amounts of the original credit lines:

Loan Number	Credit Line	Alleged "Account Balance"
8102400124	$110,535.00	$110,315.35
8102173902	$250,000.00	$251,602.18

The account balance in the Review for Clearing, therefore, presupposes a computation of debits and credits—a list of transactions related to the account—none of which are included in the documents attached to the affidavits. Bearing in mind that the instruments attached to the Complaint are credit agreements (not

[19] Defendant, [redacted] Motion for Rehearing of Summary Judgment Under Fla. R. Civ. P. 1.530 (R. 150-52).

promissory notes), they would evidence only a right to borrow money (not that money was borrowed). *See* §687.0304(1)(a) Fla. Stat. (1989) (defining "Credit agreement" as "an agreement to lend…money, goods, or things in action, to otherwise extend credit"). Thus, the most important record would be the date and time of any initial drawdowns from the credit lines.

Accordingly, there can be no question that the BANK's "business records" regarding these loans—records specifically referenced in the affidavit—comprise a plethora of documents that were never attached, much less sworn and certified. The failure to provide sworn and certified copies of the documents to which the affiant expressly referred (and upon which the testimony was expressly based) effectively nullified the affidavit. This is because mere conclusory statements about the information contained in those documents are hearsay and inadmissible as evidence in a summary judgment proceeding. 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).

The records also do not fall under the business records exception to hearsay. "[A]n 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 v. Paxson Elec. Co.*, 534 So. 2d 787 (Fla. 1st DCA 1988) (citing *Thomasson v. Money Store/Florida, Inc.*, 464 So.2d 1309 (Fla. 4th DCA 1985)); *see also Thompson v. State*, 705 So. 2d 1046, 1048 (Fla. 4th DCA 1998) ("[T]he business-records exception to the hearsay rule…does not authorize hearsay testimony concerning the contents of business records which have not been admitted into evidence."). Here, the affidavits did no more than say that the documents on which the affiant relied were part of the BANK's business records. Thus, the affidavits and their attachments are inadmissible hearsay that was inappropriate for use in a summary judgment proceeding.

CONCLUSION

The documents offered by the BANK to show that it was the legal owner and holder of the equity lines of credit, and how much was owed on those lines of credit, are procedurally deficient and do not rise to the level of summary judgment evidence. The trial court did not properly weigh the admissibility of the documents, nor did it correctly allocate the burdens of proof, when it granted the BANK's motion for summary judgment. In 2010, the Second District Court of Appeal advised trial courts on the importance of appropriate procedure in cases of this nature:

> [S]ummary judgment is appropriate only upon record proof – not assumptions. Given the vastly increased number of foreclosure filings in Florida's courts over the past two years, which volume has taxed both litigants and the judicial system and increased the risk of paperwork errors, it is especially important that trial courts abide by the proper standards and apply the proper burdens of proof when considering a summary judgment motion in a foreclosure proceeding.

Jean-Jacques, 28 So. 3d at 939.

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

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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 2, 2012 to 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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