In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

U.S. BANK NATIONAL ASSOCIATION
AS TRUSTEE FOR RASC 2007KS3,

Appellee.

ON APPEAL FROM THE NINETEENTH JUDICIAL
CIRCUIT IN AND FOR INDIAN RIVER COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

I. Introduction

In this foreclosure action, Plaintiff U.S. Bank National Association as Trustee for RASC 2007KS3 ("the Bank") obtained a judgment against Defendant [redacted] ("[redacted] based on an affidavit which the Bank itself later admitted was likely "improperly verified." It is perhaps no coincidence that this dubious affidavit was executed by the notorious robo-signer, Jeffrey Stephan, and that the Bank's confession of impropriety immediately followed the nationwide publicity of his perjurious practices. Although the Bank asked the Court to "ratify" the foreclosure judgment based on an entirely new affidavit, the Court never heard that motion, and instead sold [redacted] home based on the original judgment.

Within days of the sale, [redacted] retained counsel and sought to set aside the default and judgment. Besides the Bank's own admission that its affidavit was defectively executed, [redacted] also relied upon Stephan's sworn testimony in a Palm Beach County case in which he admitted to a routine practice of signing affidavits that falsely claimed he had personal knowledge of the facts. [redacted] also pointed out contradictions between the "evidence" and the pleadings as to several issues, including the amount owed. [redacted] motion was denied without an evidentiary hearing.

II. Statement of the Facts

The parties agree that [redacted] borrowed money from a lender and agreed to secure the loan with a mortgage on her Vero Beach home in November of 2006.[1] Both the Note and the Mortgage attached to the Complaint state [redacted] borrowed $231,000.00 at a fixed interest rate of 8.200%.[2]

The boilerplate allegations in the body of the Complaint filed by the Bank, however, allege that [redacted] owes the Bank $249,058.74 in principal.[3] The Complaint does not explain why the Bank is entitled to obtain a judgment on a principal balance nearly $18,000 more than the $231,000 [redacted] borrowed.[4] A March 19, 2009 debt collection notice attached to the Complaint states yet a third amount owed, $254,018.38, without explaining how the bank was seeking to recover $24,000 more than [redacted] borrowed.[5]

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[1] Note and Mortgage appended to Complaint, Appendix ("A. ") 26-46.

[2] Note (A. 43).

[3] Compl. ¶ 8 (A. 22).

[4] Compare Compl. ¶ 8 (A. 22) with Note (A. 43).

[5] Complaint Exhibit (A. 24).

A. The procedurally inadequate summary judgment proceedings.

The clerk entered a default against [redacted] and the Bank moved for summary judgment.[6] The Motion for Summary Judgment did not set forth the specific amount of the judgment requested; instead, it requested relief as set out in the affidavits filed with it.[7] It was accompanied by an Affidavit As To Amounts Due and Owing sworn to by Jeffrey Stephan and dated April 27, 2009 (the "First Stephan Affidavit") and purporting to provide the amounts due as of two months in the future, on June 24, 2009.[8] Stephan identified himself as a "Limited Signing Officer" of GMAC MORTGAGE, LLC ("GMAC"), which is not party to this matter. However, Stephan swore that GMAC "is the servicer of the loan."[9] He did not attach any copy of the loan to which he referred, or any other business records which he claimed to have "examined" in the course of preparing the affidavit.[10]

The First Stephan Affidavit mimics the allegation in the Complaint (but unsupported by the Note) that [redacted] owes $249,058.74 in principal "pursuant to the

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[6] Clerk's Default, dated June 10, 2009 (A. 52); Plaintiff's Motion for Summary Judgment Including a Hearing to Tax Attorney's Fees and Costs (the "Summary Judgment Motion") dated September 3, 2009 (A. 56-58).

[7] *Id.* (A. 57).

[8] Affidavit of Amounts Due and Owing dated April 27, 2009. at ¶ 4 (A. 49).

[9] *Id.* (A. 50).

[10] *Id.* (A. 50).

Note and Mortgage which is the subject matter of this lawsuit," and requests an additional award of $8,228.04 in interest calculated at a 5.83 percent interest rate.[11] The First Stephan Affidavit lays out additional fees and costs, concluding that owed a total of $260,629.22.[12] The Affidavit on its face states that Stephan has personal knowledge of the facts contained in it, but does not explain how it arrived at a principal balance that exceeded the original principal on the face of the Note by nearly $18,000.[13] Nor does it explain why the Bank is claiming an interest rate different from that reflected on the Note.[14]

On December 9, 2009, the Bank filed a new Affidavit as to Amounts Due and Owing, also signed by Jeffrey Stephan, dated November 23, 2009 and purporting to swear that the amount due and owing as of the future date of January 17, 2010 "is" $281,662.59 (the "Second Stephan Affidavit"). The Second Stephan Affidavit, like the first, asserted that the principal owed on the Note was $249,058.74, but again gave no explanation how the principal could exceed the $231,000 principal actually borrowed, according to the Note. The Second Stephan

[11] First Stephan Affidavit ¶ 3-4 (A. 49).

[12] *Id.* at ¶ 4 (A. 49).

[13] *Id.* (A. 49).

[14] *Id.* (A. 49).

Affidavit claimed additional interest ($16,432.85), again at a rate different from that on the face of the Note (now 5.83938 percent), as well as additional charges for taxes and insurance.[15]

The Court entered summary judgment of foreclosure on February 1, 2010, apparently relying on the figures reflected in the Second Stephan Affidavit, as well as the June 16, 2009 Affidavit of Lisa Cullaro in support of the Bank's claim for attorneys' fees. (The Cullaro Affidavit). The Cullaro Affidavit candidly admits that Cullaro did not even review the records of this case prior to swearing that the attorneys' fees are reasonable.[16] Nonetheless, the Court awarded a final judgment of $284,825.14, based upon the claimed principal balance of $249,058.74, along with additional interest at a rate different from the rate reflected on the Note, attorneys' fees, and other fees and costs related to the foreclosure.[17]

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[15] *Id.* at ¶ 4. (A. 49).

[16] Cullaro Affidavit ¶ 6 (A. 55). Even though the evidentiary basis for the attorney fee award was faulty and should be open to question should this Court reverse the overall judgment, Appellant does not seek reversal on the ground that the award of $1,200 is unreasonable. Nonetheless, the irregularities found in the Cullaro Affidavit are symptomatic of the overall cavalier way the Bank prosecuted this case and its disregard for the integrity of the judicial system.

[17] Final Judgment dated February 1, 2010 (A. 135-36).

B. Stephan's casual and routine perjury taking place in this Court's backyard becomes national news.

Within months of the entry of judgment, and prior to the sale of [redacted] home, GMAC's fraudulent foreclosure practices captured national headlines.[18] By September, 2010, affiant Jeffrey Stephan was identified by name in *The Wall Street Journal* as a "robo-signer," a Bank employee who signed as many as 500 affidavits a day, claiming he had personal knowledge of each. In fact, Stephan had testified in at least two depositions—the first of which was taken in a Palm Beach County case—that he had not personally reviewed business records or calculated the amounts due and owing for any of the affidavits he signed over a several year period.[19] In the deposition transcript submitted to the Court in support of [redacted] motion, Stephan testified that he signed approximately 10,000 affidavits a month, without reviewing the underlying records upon which the affidavits were based:[20]

13	Q. So these documents wouldn't be actually
14	executed on your own personal knowledge?
15	A. Right.

[18] *See e.g.*, Supp Memo Ex A (WSJ Article) (A. 362).

[19] *Id.* (A. 362); *see also* Notice of Filing Deposition of Jeffrey Stephan dated October 19, 2011 (the "Stephan Deposition") (A. 156).

[20] Stephan Deposition at 9-10 (A. 166-67).

Stephan, who testified about his practices over the five years he had worked at various GMAC entities, further explained that neither he nor his team took any steps to verify the accuracy of the affidavits he signed, which had been prepared by litigation counsel.[21]

In October, 2010, the attorneys general of all 50 states joined together in a probe of GMAC's practices, noting that it appeared affiants testified they had personal knowledge when they did not, and did not sign their sworn statements in the presence of a notary.[22]

C. The Bank itself brings the probable perjury of Stephan's affidavit to the attention of the trial court.

Recognizing its ethical duty to disclose this likely perjury, the Bank, on September 16, 2010, filed a document simply entitled "Notice," in which the Bank's attorneys, citing their ethical duty pursuant to Rule 4-3.3 of the Rules Regulating the Florida Bar, notified the Court that the Stephan Affidavit "may not

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[21] Stephan Deposition at 12:1-13:4 (A. 169-70) (neither Stephan nor his team takes any action to verify that documents prepared for his signature by the attorney is correct). Stephan signed the specific documents at issue in *GMAC v. Neu* during the same time period he signed the affidavits in this case. *Id.* at Exhibit A (assignment of mortgage dated March 5, 2009) (A. 232); Exhibit F (Affidavit of Lost Original Document dated May 21, 2009) (A. 254).

[22] *See* Supp Memo Ex B (*BusinessWeek* article) (A. 364).

have been properly verified by the affiant."[23] The Notice admits that "the undersigned law firm drafted the Affidavit," which is in keeping with Stephan's testimony a few months earlier that he merely swore to whatever documents his team placed in front of him without any review of, or knowledge of, the underlying records.[24]

A little over two months later (nine months after the judgment), the Bank filed a "Motion to Ratify Final Summary Judgment of Mortgage Foreclosure *Nunc Pro Tunc* and to Reschedule Judicial Sale." (the "Motion to Ratify").[25] Along with the Motion to Ratify, the Bank filed yet another Affidavit As to Amounts Due and Owing dated September 21, 2010 (the "Swaim Affidavit").[26] The Bank's memorandum in support of the Motion to Ratify relied upon Rule 1.540 Fla. R. Civ. P., and argued that it was accompanied by a "new, properly verified affidavit by affiant which shows that the amounts reflecting the indebtedness contained in the original affidavit were accurate when filed."[27]

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[23] Notice at ¶ 3 (A. 141).

[24] *Id.* ¶ 5 (A. 141); Stephan Deposition at 12:1-13:4 (A. 169-170).

[25] Motion to Ratify Final Summary Judgment of Mortgage Foreclosure *Nunc Pro Tunc* and to Reschedule Judicial Sale (A. 144).

[26] Affidavit as to Amounts Due and Owing, dated September 21, 2010 (A. 137).

[27] Motion to Ratify at ¶ 4 (A. 144).

The new affidavit, however, again without explanation, directly contradicted the principal amount and interest rate set forth in the Note.[28] Moreover, the Swaim Affidavit did not simply confirm the amounts due and owing set out in the Stephan Affidavit. Rather, it added interest through June 7, 2010—four months after the date of the judgment.[29] Swaim also added previously undisclosed additional fees for property inspections and prior foreclosure fees/costs.[30] Ultimately, Swaim swore that the amounts due and owing were $287,388.94, not counting attorneys' fees—several thousand dollars *more* than the Judgment.

Additionally, just as with the first two Stephan affidavits, the Swaim affidavit still did not comply with Rule 1.510(e) Fla. R. Civ. P. None of the GMAC records she claimed to have reviewed in order to obtain "personal knowledge" of the facts were attached—much less attached as sworn and certified copies.

The Bank never actually scheduled the Motion to Ratify for hearing. Instead, after an intervening Bankruptcy, the Bank simply rescheduled the

[28] Compare Note (A. 43) to Swaim Affidavit (A. 138).

[29] Swaim Aff. ¶ 5 (A. 138).

[30] *Id*. (A. 138).

foreclosure sale[31] and bought [redacted] home at auction. The Clerk issued a Certificate of Title to the Bank on October 11, 2011.

D. [redacted] seeks to set aside the final judgment.

Days later, [redacted] retained counsel and served an emergency motion to vacate the default, the judgment, the sale, and the certificate of title (the "Motion to Vacate").[32] Citing the same Rule as had been cited by the Bank in its Motion to Ratify (Rule 1.540(b)(3) Fla. R. Civ. P.), [redacted] joined in the Bank's own condemnation of the Stephan Affidavit, asserting it had not been properly verified.

In addition to relying on the Bank's own "Notice" and Motion to Ratify as a basis for arguing the judgment should be set aside for fraud, [redacted] submitted further evidence in the form of Stephan's own sworn deposition testimony, in which he admitted that he signed about 10,000 affidavits per month, all previously-prepared

[31] Motion to Reschedule Foreclosure Sale, dated August 23, 2011 (A. 152); Order Rescheduling Foreclosure Sale dated August 24, 2011 (A. 150); and Notice of Rescheduled Foreclosure Sale, filed September 7, 2011 (A. 154).

[32] Emergency Motion to Vacate Final Judgment, Motion to Vacate Foreclosure Sale, Motion to Vacate Certificate of Title, and Motion to Vacate Default and Memorandum Regarding Plaintiff's Motion to Ratify Final Summary Judgment, dated October 19, 2011 (A. 322).

for him without any actual knowledge as to information contained in those affidavits.[33] Stephan admitted:[34]

> Q. So these documents wouldn't be actually executed on your own personal knowledge?
> A. Right.

also noted that the affidavits' claimed principal amount of $249,058.74 and interest rate of 5.83938% expressly contradicted the $231,000.00 principal and 8.200% interest rate reflected on the face of the Note, with no explanation.[35]

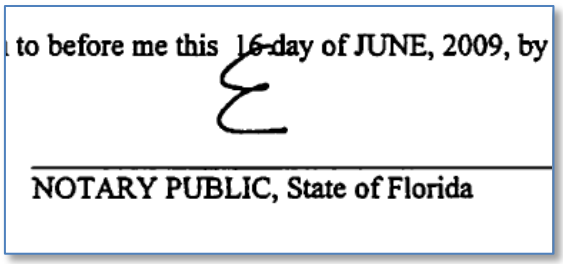
also pointed to further indicia of fraudulent practices underpinning her foreclosure judgment. The purported signature of Notary Erin Cullaro on the expert affidavit in support of the Bank's claim for attorneys' fees was, on its face, materially different from other exemplars of that same notary's signature in other cases:[36]

[33] Stephan Tr. at 10:1-15 (A. 167).

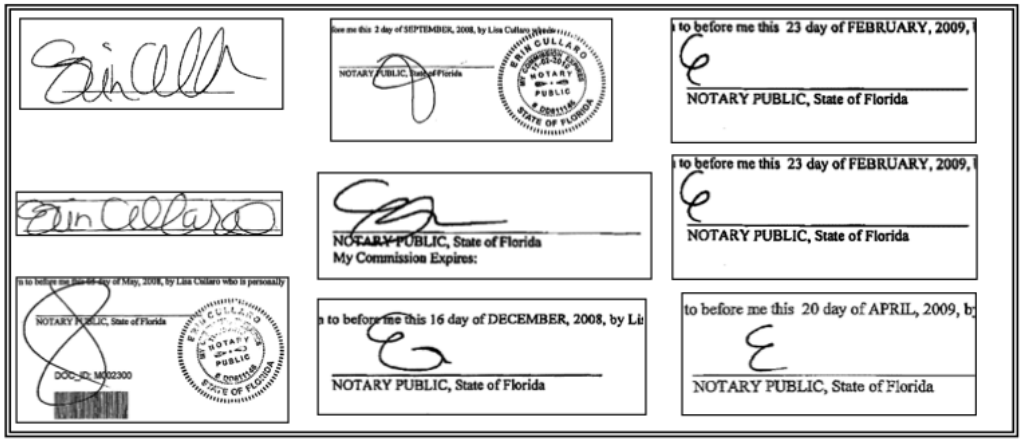
[34] Stephan Tr. at 10:13-15 (A. 167).

[35] Motion to Vacate at 3-4 (A. 324-25).

[36] Motion to Vacate at 5 (A. 326).



ERIN CULLARO SIGNATURE ON FEE AFFIDAVIT IN THIS CASE



PROFFERED CULLARO EXEMPLAR SIGNATURES

[redacted] offered to submit a similar illustration of affiant Lisa Cullaro's signature at the motion hearing.[37]

[redacted] scheduled both her Emergency Motion to Vacate and the Bank's still unresolved Motion to Ratify for hearing on October 25, 2011. At the hearing, however, the Bank made an *ore tenus* request to withdraw its Motion to Ratify,

[37] *Id.* (A. 326).

which the court permitted.[38] There is no indication in the record that the Bank's attorneys withdrew the ethically-required "Notice" that the affidavit was potentially defective.

At this hearing, the Bank's counsel sought, for the first time, to justify the discrepancy in the principal and interest amounts by alluding to his "understanding" that there had been a loan modification.[39] Yet, no specific terms of any such agreement were ever mentioned or proffered. The court reserved ruling pending an additional memorandum from [redacted].[40]

Days after the hearing, the continued unfolding of the robo-signing scandal culminated in the federal government announcing a foreclosure review program requiring independent review of foreclosure judgments such as [redacted] obtained on primary residences between January 1, 2009 and December 31, 2010 where GMAC and other banks serviced the loans.[41] In a Supplemental Memorandum

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[38] Hearing Before the Honorable Cynthia L. Cox, October 25, 2011, pp. 6-7 (A. 341-42).

[39] Hearing Before the Honorable Cynthia L. Cox, October 25, 2011, p. 11 (A. 346).

[40] *Id*. at 13-14 (A. 348-49).

[41] Defendant, [redacted] [redacted] Supplemental Memorandum in Support of Defendant's Emergency Motion to Vacate Final Judgment, Motion to Vacate Foreclosure Sale, Motion to Vacate Certificate of Title, and Motion to Vacate Default, and Memorandum Regarding Plaintiffs Motion to Ratify Final Summary

served three days after the announcement, [redacted] argued it would be inequitable to continue to allow the judgment to have effect, pursuant to Rule 1.540(b)(5), in the wake of this further acknowledgment of the wide-ranging fraud underlying foreclosure judgments involving GMAC and Stephan, both generally and specifically in this case. [redacted] reiterated her request that the Court, at the very least, order an evidentiary hearing and allow discovery on the issue of the propriety of the Stephan affidavits as a basis for summary judgment.[42]

The trial court denied [redacted] motion.[43] The court concluded that [redacted] failed to demonstrate entitlement to relief pursuant to Rule 1.540. This timely appeal follows.

Judgment, dated November 4, 2011 (the "Supplemental Memorandum") Ex. C-D (A. 366-73).

[42] Supplemental Memo at 1-4 (A. 354-57).

[43] March 13, 2012 Order Denying Defendant's Emergency Motion to Set Aside Final Judgment, Vacate Default, Foreclosure Sale, Certificate of Title (A. 389).

SUMMARY OF THE ARGUMENT

[redacted] defaulted to a pleading whose attachments (which supplant the written allegations) indicate a different principal and interest rate than that upon which judgment was granted. In the wake of a nationwide scandal arising from the illicit practices of its loan servicer, GMAC MORTGAGE, LLC, the Plaintiff itself grudgingly notified the Court that its summary judgment was based upon affidavits which may not have been properly verified. Citing Rule 1.540(b), it asked the court to "ratify" the judgment based on a substitute affidavit, but that affidavit, too, conflicted with the pleadings on the applicable principal and interest rate. None of the Bank's affidavits were accompanied by sworn and certified copies of alleged business records upon which the affiants relied. When [redacted] agreed with the Bank that its affidavits were defective, it withdrew its motion to ratify.

At a minimum, [redacted] highlighted sufficient improprieties to show "colorable entitlement" to an evidentiary hearing on the judgment's validity. She submitted sworn testimony of the bank's own affiant that he never had personal knowledge of the facts in the affidavits he routinely signed. [redacted] also pointed out the discrepancy between the principal amount and interest rate in the judgment (and affidavits) and those in the Note attached to the Complaint. The trial court abused its discretion in refusing to at least order an evidentiary hearing, and its order must be vacated.

STANDARD OF REVIEW

A trial court's denial of 1.540(b) relief is reviewed for an abuse of discretion. *SunTrust Bank v. Puleo*, 76 So. 3d 1037, 1039 (Fla. 4th DCA 2011). That discretion, however, is not limitless. Here, the trial court erred in failing to grant an evidentiary hearing and related discovery on the Rule 1.540(b) motion. *Schleger v. Stebelsky*, 957 So. 2d 71, 73 (Fla. 4th DCA 2007). Denial of a Rule 1.540(b) motion without an evidentiary hearing is, as a matter of law, an abuse of discretion unless the motion fails to allege a "colorable entitlement" to relief. *See id.; Stella v. Stella*, 418 So. 2d 1029 (Fla. 4th DCA 1982); *Southern Bell Tel. & Tel. Co. v. Welden*, 483 So. 2d 487, 489 (Fla. 1st DCA 1986) (where party makes colorable claim for relief, "a formal evidentiary hearing on the motion, as well as permissible discovery prior to the hearing, is required.").

A trial court also abuses its discretion when it refuses to set aside a foreclosure judgment in the face of the Bank itself notifying the Court that the underlying evidence is faulty. *Jaffer v. Chase Home Finance LLC*, ____ So. 3d ___, No. 4D11-1572, 2012 WL 2013725 (Fla. 4th DCA June 6, 2012). Finally, it is an abuse of discretion to refuse to vacate a judgment that is void based upon a fatally defective complaint. *Southeast Land Developers Inc. v. All Florida Site and Utilities Inc*., 28 So. 3d 166 (Fla. 1st DCA 2010).

ARGUMENT

I. [redacted] Showed Colorable Entitlement to an Evidentiary Hearing on Her Rule 1.540 Motion Through the Bank's Own Admissions in its Pleadings and Post-Judgment Filings.

A. The Bank's Notice and Motion to Ratify admitted its summary judgment evidence was faulty.

The Bank itself first alerted the Court to the defect in the judgment when it filed its "Notice" admitting that the affidavit of amounts due and owing the Bank submitted in support of its summary judgment motion "may not have been properly verified by the affiant" and had, in fact, been drafted by counsel.[44] It then further acknowledged that its summary judgment evidence did not meet the requirements of Rule 1.510[45] when it filed its Motion to Ratify. That Motion asked the court, pursuant to Rule 1.540(b)(3), to find that while there "may" have been an improper verification in this case (and thus grounds to set aside the judgment based upon fraud, misrepresentation, or other misconduct), there was no need to set aside

[44] Notice at ¶ 3, 5 (A. 141). Given Stephan's deposition testimony in the *Neu* case, the Bank's Notice that the Affidavit "may not have been properly verified" is an understatement at best. *See* Stephan Deposition at 12:1-13:4 (A. 169-70).

[45] "Supporting and opposing affidavits shall be made on *personal knowledg*e, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. *Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.*" Florida Rule of Civil Procedure 1.510(c)(emphasis added).

the judgment because the new Swaim Affidavit supposedly confirmed that the Stephan Affidavit "accurately stated the amount of debt owed to Plaintiff."[46] Although not titled a Rule 1.540(b) motion, the Bank's Motion to Ratify clearly relied upon that rule, and should have been treated by the Court as a timely motion made pursuant to that rule. *Garcia v. Stewart*, 906 So. 2d 1117, 1120 (Fla. 4th DCA 2005) (treating motion questioning foreclosure judgment as Rule 1.540(b) motion even though it was not titled that way).

Notably, however, the Bank did not actually set a hearing on the Motion to Ratify— did, when she appeared through counsel for the first time, and effectively joined in the Bank's motion by filing her own Rule 1.540 motion. pointed out that the issues already identified by the Bank were, in fact, more pernicious than the Bank had let on, filing with her motion the Stephan Deposition transcript, which demonstrated that Stephan had no personal knowledge of any of the affidavits or other documents he signed. At the duly-noticed hearing, counsel for the Bank stated it was "not going forward with that motion,"[47] and the Court's order does not mention the Bank's Motion to Ratify.

[46] Motion to Ratify at ¶¶ 2-3, 8, 11 (A. 144-45).

[47] Hearing Transcript at 6:3-4 (A. 341).

The Bank attorneys, however, had an ethical duty to "go forward with that motion." A Florida Bar Staff Opinion dated January 7, 2011, which submitted to the Court in her supplemental briefing, counsels that an attorney who knows (either directly, or from the circumstances of the case) that a party's affidavit was improperly verified and notarized has an ethical duty to disclose that knowledge to the Court and "guidance should be requested from the Court."[48]

To the extent, if any, that the trial court was influenced by the Bank's claim that the Stephan Affidavit was confirmed by the Swaim Affidavit, that assertion placed this new testimony squarely into the evidentiary arena such that was entitled to contest its assertions and cross-examine the affiant. This is especially true given that having only defaulted to the principal amount and interest rate stated in the Note and Mortgage—had never defaulted to the materially different figures stated in all the affidavits. *State Farm Mut. Auto. Ins. Co. v. Horkheimer*, 814 So. 2d 1069, 1073 (Fla. 4th DCA 2001) (a defendant may not be held liable for amounts in excess of those allowed by the pleadings); *Garcia v. M & T Mortg. Corp.*, 980 So. 2d 538, 542 (Fla. 4th DCA 2008) (same); *Hooters of Am., Inc. v. Carolina Wings, Inc.*, 655 So. 2d 1231, 1233 (Fla. 1st DCA 1995)

[48] Supplemental Memo Exhibit E at 7 (A. 380).

(damages will be awarded only to the extent supported by the well-pleaded allegations of the complaint).

Moreover, even if [redacted] were defaulted to the allegation of the principal amount in the body of the Complaint, the damages were never liquidated because they could not be calculated from the note. *See Asian Imports, Inc. v. Pepe*, 633 So. 2d 551, 553 (Fla. 1st DCA 1994) (damages were liquidated for purposes of default judgment because the "exact sums owing on the unpaid principal" were set out in the complaint and in the "attached and incorporated copies of the mortgage deed [and] promissory note…"); *Gulf Maint. & Supply, Inc. v. Barnett Bank of Tallahassee*, 543 So. 2d 813, 818 (Fla. 1st DCA 1989) (denial of Rule 1.540 motion by defaulted party reversed where damages "could not be arrived at by mathematical calculation from anything attached to the complaint…"). Accordingly, [redacted] was still entitled to contest the amount of the judgment.

The requirements of Rule 1.510(e) are not merely "procedural niceties, nor technicalities." *Bifulco v. State Farm. Mut. Auto Inc. Co.*, 693 So. 2d 707, 709 (Fla. 4th DCA 1997). Rather, these procedural strictures are required because they "protect the constitutional right of the litigant to a trial on the merits." *Id.* Where, as here, the Bank admits that the affidavits filed are not based on the personal knowledge of the affiant, and thus violate Rule 1.510's fundamental requirements

for entry of summary judgment, the trial court is obligated to re-consider the entry of summary judgment. *Jaffer v. Chase Home Finance LLC*, ____ So. 3d ___, No. 4D11-1572, 2012 WL 2013725 (Fla. 4th DCA June 6, 2012). In *Jaffer*, as here, the Plaintiff reported to the Court the deficiency of the affidavit upon which summary judgment was based. This Court held that the trial court was obligated to consider the effect, if any, of the improperly-verified affidavit, and committed error in refusing to reconsider the judgment.[49]

B. submitted additional evidence confirming that the judgment's reliance on an improper affidavit violated due process.

Second, proffered additional evidence showing that the affiant's lack of personal knowledge of the matter undermined the judgment awarded. proffered sworn deposition testimony of Jeffrey Stephan in a Palm Beach County case, in which Stephan admitted under oath that he never had personal knowledge of the facts found in any of the thousands of affidavits he signed in support of foreclosures.[50]

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[49] *Id.*

[50] Stephan Transcript at 10 (A. 167). It was this very deposition which, when used to depose Stephan again in a Maine case, triggered GMAC's self-imposed foreclosure sale moratorium—ground zero for the robo-signing scandal. *See, Some answers to why the foreclosure crisis has arisen*, Tampa Bay Times, October 15, 2010, *available at*, http://www.tampabay.com/news/business/realestate/some-

also pointed out to the Court that the amounts sworn to in both Stephan Affidavits exceed the principal stated on the face of the Note and contradict the contractual interest rate.[51] There is nothing about the terms of the Note that would explain how the *principal* exceeded the amount borrowed by $18,000, or how the interest rate changed.[52]

Plaintiff's attempt to fix its prior misrepresentations with a new affidavit does not, as represented by Plainitff in its Motion to Ratify, simply confirm the numbers set forth in the Stephan affidavits. Rather, the Swaim Affidavit sets out a third calculation for the amounts due and owing, not only adding interest past the

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answers-to-why-the-foreclosure-crisis-has-arisen/1128224; *More foreclosure affidavits withdrawn as another document signer identified*, Palm Beach Post, September 27, 2010, *available at*, http://blogs.palmbeachpost.com/realtime/2010/09/27/more-foreclosure-affidavits-withdrawn-as-another-document-signer-identified/; *GMAC Mortgage paperwork problems stall foreclosures*, South Florida Business Journal, September 27, 2010, available at, http://www.bizjournals.com/southflorida/stories/2010/09/27/story4.html?page=all.

[51] Supplemental Memo at 6 (A. 327).

[52] Although the interest rate applied in the Stephan Affidavits and Swaim Affidavit is ostensibly in favor, its application to the larger principal amount is not. Moreover, the unexplained difference is indicative of the larger problems underlying this judgment. If the principal and interest are wrong, entry of summary judgment violated due process because none of the numbers meet the "beyond the slightest doubt" standard the law requires. *Bifulco v. State Farm Mut. Auto. Ins. Co.*, 693 So. 2d 707, 709 (Fla. 4th DCA 1997).

date of the judgment, but also adding additional fees and costs.[53] The Swaim Affidavit, therefore, serves to furthermore undermine the judgment, not "ratify" it.

For these reasons, the trial court's reliance on *Vilvar v. Deutsche Bank*, 83 So. 2d 853 (Fla. 4th DCA 2011) was misplaced. In *Vilvar*, the court held that vague allegations of possible fraud were insufficient to warrant relief pursuant to Rule 1.540 because the appellant proffered no evidence contesting the amounts due and owing set forth in the allegation. Here, by contrast, [redacted] directed the Court to specific evidence in the record of this case showing that the Note directly contradicts both the principal amount and the interest rate alleged in the fraudulently executed affidavit, which was adopted by the judgment. Because the Note was integrated into the Complaint—and superseded the written allegations—the Bank was bound by its own pleading and [redacted] needed no independent evidence of this fact. *City of Deland v. Miller*, 608 So. 2d 121 (Fla. 5th DCA 1992) ("Admissions in the pleadings are accepted as facts without the necessity of further proof.").

Moreover, the Bank and its counsel had already impeached the reliability of the Stephan affidavits suggesting, as the public already knew, that he had no

[53] Swaim Aff. (A. 138).

personal knowledge of the facts. And even if this admission were not enough, proffered the affiant's own sworn testimony in which he confessed that, in the very same time period that he executed the affidavits in this case, it was his regular practice to sign them claiming personal knowledge when there was none. This was sufficient to show "colorable entitlement" to a hearing (and the concomitant right of discovery) that would enable to present even more specific evidence that Stephan's affidavits were defective in this case.

The fact that Stephan had no personal knowledge of the facts to which he swore in his affidavit is exacerbated by the Bank's failure to attach sworn and certified copies of the business records he claimed to have reviewed as required by Rule 1.510 (e) Fla. R. Civ. P. This requirement is an important safeguard against the exact sort of perjury and hearsay foisted by Stephan upon the court in this case. *See Bifulco v. State Farm. Mut. Auto Inc. Co.,* 693 So. 2d at 709. Because the Bank flouted this rule three times, was at a disadvantage in proving that the affidavit was false using only the evidence within her control.

also proffered evidence that the affidavit signed by Lisa Cullaro and notarized by Erin Cullaro reflected irregularities in their execution based upon the diverse variation of each of those women's "signatures" in cases filed throughout Florida, and noted that the Cullaro affidavit, on its face, reflects no knowledge or

review of the records in this case in forming an opinion on the reasonableness of attorneys' fees. [redacted] therefore submitted ample evidence of the Bank's transgressions, as well as its effect on the underlying judgment to meet the relatively low threshold of "colorable entitlement" to an evidentiary hearing.

Similarly, the result in this Court's recent decision in *Pacheo v. IndyMac Federal Bank, F.S.B.*, ___ So. 2d ___, No. 4D11-999, 2012 WL 2579596 (Fla. 4th DCA 2012) does not apply here, although the underlying requirement of a hearing should. In *Pacheo*, the court noted that a party alleging fraud in a 1.540(b)(3) motion is entitled to a hearing where that motion "sufficiently specifies the fraud and explains why the fraud would allow the court to set aside the judgment." *Id.* at *1. The *Pacheo* court found that the fraud alleged in that case—lack of standing at the time of filing of the complaint—was not sufficiently proven based solely on the evidence already in the record and the defendant's unsworn motion for relief from judgment.

Pacheo, however, does not mean that every motion to set aside the judgment must be accompanied by evidence beyond what already exists in the record. Just as a party opposing summary judgment need not submit additional evidence where the plaintiff has failed to meet its burden, *see, e.g, Stop & Shoppe Mart, Inc. v. Mehdi*, 854 So. 2d 784, 787 (Fla. 5th DCA 2003) ("When a movant for summary

judgment fails to meet its burden, it is unnecessary for the opposing party to file an affidavit in opposition."), a party alleging fraud can make a colorable claim without submitting a verified motion where admissible evidence and admissions already on file otherwise support it.

Here, the probability of the misconduct alleged was already condeded in the Bank's own post-judgment "Notice" and Motion to Ratify, and is readily apparent from a simple comparison of the pleadings to the purported "evidence." And in any event, [redacted] did submit additional evidence to support her claims in the form of sworn testimony of the Bank's affiant and judicially noticeable public records concerning the federal review programs for loans serviced by GMAC and other banks.

Because [redacted] Motion, in essence, joined the Bank's timely, and still unresolved, motion to reconsider the judgment pursuant to Rule 1.540(b), it was timely. The trial court was required to hold an evidentiary hearing to consider the fraud and misconduct extensively set out in [redacted] Motion to Vacate and Supplemental Memorandum. *See e.g.*, *Risch v. Bank of Am., Nat. Ass'n*, 72 So. 3d 161 (Fla. 2d DCA 2011) (hearing required on 1.540(b)(3) motion where movant presented colorable evidence of fraud). Alternatively, this Court could consider [redacted] Motion and Supplemental Memorandum to be a valid response to the timely

Motion to Ratify. *See, e.g.*, *Estate of Willis v. Gaffney*, 677 So. 2d 949, 951 (Fla. 2d DCA 1996) (noting that trial court applied wrong legal standard in refusing to hear post-trial motion because it is "well-settled law of Florida that '[a] pleading will be considered what it is in substance, even though mislabeled.'") (citation omitted). It would be inequitable to prevent [redacted] from questioning the veracity of affidavits that the Bank's attorneys themselves questioned.

II. The Announcement of the Federal Foreclosure Review Program's Investigation into GMAC's Wide-Ranging False Testimony Made it Inequitable for the Judgment to Have Prospective Effect.

In her Supplemental Memorandum, [redacted] further argued that the Federal Government's finding that foreclosures obtained against individuals like [redacted] should be subject to independent review and possible compensation justified relief pursuant to Rule 1.540(b)(5).[54] That rule is "designed to provide 'extraordinary relief' in narrow circumstances, and is to be narrowly construed." *Pure H2O Biotechnologies, Inc. v. Mazziotti*, 937 So. 3d 242, 245 (Fla. 4th DCA 2006). Still, this case presents the precise narrow circumstance envisioned by *Pure H2O*.

[redacted] is one of countless victims of GMAC's dishonest foreclosure practices. [redacted] provided the Court with detailed evidence of the robo-signing scandal, noting

[54] There is no time limit for seeking relief pursuant to Rule 1.540(b)(5), but [redacted] did so within days of the Federal Government's announcement Independent Foreclosure Review Program. Supplemental Memorandum at 3-4 (A. 356-57).

that the attorneys general from all 50 states were investigating GMAC's foreclosure methods, and that Stephan himself was the epicenter of the investigations.[55] This significant new evidence included the Federal Government's conclusion that foreclosures by GMAC (and others) on primary residences between January 1, 2009 and December 31, 2010 (which brackets the judgment here) likely caused financial injury, and likely entitled the customer to "compensation or other remedy."[56] These circumstances clearly arose after the judgment, but when coupled with the inherent flaws in the underlying judgment, compel a court of equity to investigate further. The trial court should therefore have used its discretion to overturn the judgment pursuant to Rule 1.540(b)(5).

III. The Judgment is Void Because the Underlying Complaint Failed to State a Claim.

Finally, the same pleading discrepancies that supported [redacted] claim of fraud require reversal in this case for the additional reason that they render the judgment void. Specifically, to the extent that the Bank meant to sue on another loan, or a modified version of the loan mentioned in the Complaint (as was suggested by the Bank's counsel during argument on the Motion to Vacate), then it failed to attach

[55] Supplemental Memorandum at 2-4 and Exhibits thereto (A. 357-60).

[56] Supplemental Memorandum Exhibit D (A. 368).

the operative documents to the Complaint. And because the operative documents were not attached, the Complaint failed to state a cause of action, and was thus, void.

As an initial matter, the Florida Rules of Civil Procedure require that any contract upon which a claim is based must be attached to the pleading. *See* Rule 1.130(a) Fla. R. Civ. P. ("All bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, ***shall*** be incorporated in or attached to the pleading.") (emphasis added). The purpose of this rule "is to apprise the defendant of the nature and extent of the cause of action so that he may plead with greater certainty." *Diaz v. Bell MicroProducts-Future Tech, Inc.*, 43 So. 3d 138, 140 (Fla. 3d DCA 2010).

Because due process requires that the operative contract be attached to the complaint, the written provisions of such a contract prevail over any allegations made in the complaint. *Khan v. Bank of Am., N.A.*, 58 So. 3d 927, 928 (Fla. 5th DCA 2011) ("When exhibits are attached to a complaint, the contents of the exhibits control over the allegations of the complaint."). "Where there is an inconsistency between the general allegations of material fact in the complaint and the specific facts revealed by the exhibit, and they have the effect of neutralizing

each other, the pleading is rendered objectionable." *Schweitzer v. Seaman*, 383 So. 2d 1175, 1178 (Fla. 4th DCA 1980) (upholding dismissal of complaint with prejudice due to pleading inconsistency); *see also Kent Elec. Co. v. Jacksonville Elec. Auth*., 395 So. 2d 277, 277 (Fla. 1st DCA 1981) (upholding dismissal of complaint). "If an attached document to a complaint negates the pleader's cause of action, then dismissing the complaint is appropriate." *McKey v. D.R. Goldenson & Co., Inc.*, 763 So. 2d 409, 410 (Fla. 2d DCA 2000); *see also Geico Gen. Ins. Co., Inc. v. Graci*, 849 So. 2d 1196, 1199 (Fla. 4th DCA 2003).

Pursuant to Rule 1.540(b), a court may vacate a judgment that is void at anytime. Indeed, "[i]f it is determined that the judgment entered is void, the trial court has no discretion, but is obligated to vacate the judgment." *See Dep't of Transp. v. Bailey*, 603 So. 2d 1384, 1386-87 (Fla. 1st DCA 1992); *see also Southeast Land Developers Inc. v. All Florida Site and Utilities Inc*., 28 So. 3d 166 (Fla. 1st DCA 2010). A void judgment is a nullity that cannot be validated by the passage of time and may be attacked at any time. *M.L. Builders, Inc. v. Reserve Developers, LLP*, 769 So. 2d 1079, 1082 (Fla. 4th DCA 2000) (citing *Ramagli Realty Co. v. Craver*, 121 So. 2d 648, 654 (Fla.1960)).

A default judgment is void if the underlying complaint fails to state a claim. *Becerra v. Equity Imports, Inc.*, 551 So. 2d 486, 488 (Fla. 3d DCA 1989) ("Failure

to state a cause of action, unlike formal or technical deficiencies, is a fatal pleading deficiency not curable by a default judgment"); *Southeast Land Developers Inc. v. All Florida Site and Utilities Inc*., 28 So. 3d 166, 168 (Fla. 1st DCA 2010) ("A default judgment is void and should be set aside when the complaint fails to state a cause of action."). This is true because a default can only admit the well-pled allegations of the complaint. "The party seeking affirmative relief may not be granted relief that is not supported by the pleadings or by substantive law applicable to the pleadings." *Bd. of Regents v. Stinson-Head, Inc*., 504 So. 2d 1374, 1375 (Fla. 4th DCA 1987), *citing* H. Trawick, Trawick's Florida Practice and Procedure § 25-4 (1986 ed.).

In summary, because the Complaint was subject to dismissal for failure to state a claim (assuming the claim was for the breach of some unidentified, modified loan), then the judgment based on that faulty Complaint—even a default judgment—is void and must be set aside. *Becerra v. Equity Imports, Inc.*, 551 So. 2d at 488.

CONCLUSION

The judgment that took [redacted] home violated her right to due process at every turn. The Complaint failed to state a claim and the motion for summary judgment was awarded based upon affidavits the Bank later admitted were probably fraudulently executed. As shown by sworn testimony of the Bank's affiant, [redacted] was but one victim of a nationwide and systemic fraud on the legal system by the Bank's servicer, GMAC. [redacted] timely moved to set aside the judgment against her during the time that the trial court still possessed post-judgment jurisdiction to revisit the judgment, such jurisdiction having already been invoked by the Bank. [redacted] demonstrated colorable entitlement to an evidentiary hearing on the alleged fraud and misconduct and the trial court abused its discretion in ruling without such a hearing.

For all of the foregoing reasons, the trial court's ruling on [redacted] Rule 1.540(b) motion should be REVERSED and the underlying judgment vacated. At a minimum, the Court should remand for the trial court to conduct an evidentiary hearing on [redacted] motion.

Dated: July 20, 2012

Respectfully submitted,

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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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this July 20, 2012 to all parties on the attached service list.

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