In the District Court of Appeal
Fourth District of Florida

CASE NO.
(Circuit Court Case No.

Appellants,

v.

Ocean Bank,

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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ISSUES 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. On their face, the Bank's affidavits refer to records which were not attached or served with the affidavits, much less sworn or certified. Do the Bank's affidavits comply with Rule 1.510(e)?

* * *

The trial court relied on affidavits filed by the Bank and ruled on the issue of attorneys' fees in the course of the hearing on the Bank's motion for summary judgment. As such, the trial court's decision precluded the evidentiary hearing which counsel for the Owners had requested and had anticipated for determining such reasonable fees. The court's decision prevented Defendant from presenting evidence on the issue. Should the judgment be vacated and returned to the trial court for determination of reasonable attorneys' fees at an evidentiary hearing?

STATEMENT OF THE CASE AND FACTS

OCEAN BANK (the "Bank"), filed a Verified Complaint to foreclose on the property of Defendants: [redacted] ("Farmers"), [redacted] ("Mr. Vickery"), and [redacted] ("Ms. Vickery"), (collectively, the "Owners"); and various other Defendants.[1] The verification on the complaint was executed by a "Work-Out Specialist," David W. Long.[2] While he asserts under penalty of perjury that the facts are true, he does not claim to have personal knowledge of those facts.

The Owners' answer denied the Bank's allegations and raised several affirmative defenses.[3] The first affirmative defense placed the Bank on notice that the Owners were contesting the reasonableness of any fees they might request at the end of the case.[4]

The Bank subsequently filed a summary judgment motion.[5] The motion referred to an affidavit of Mr. Long, which was Exhibit A to the motion. That

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[1] Verified Complaint, filed July 23, 2010. (R. 1-53).

[2] *Id.* at 11 (R. 11).

[3] Notice of Filing Verified Amended Answer and Affirmative Defenses (R. 271-283); Verified Amended Answer and Affirmative Defenses (R. 273); Order on Show Cause Hearing and Ore Tenus Motion for Leave to Amend Answer and Affirmative Defenses, Issued December 9, 2010 (R. 267-268).

[4] Verified Amended Answer and Affirmative Defenses at 9 (R. 281).

[5] Plaintiff Ocean Bank's Motion for Summary Judgment, served June 16, 2011 (R. 343-364).

affidavit was neither dated nor notarized.[6] Mr. Long's affidavit purports to authenticate a Notice of Default and Acceleration.[7] On its face, the document is a demand letter stating that the loan has been accelerated.[8] It does not provide the ten days' notice prior to acceleration as required under the mortgage.[9]

When the Owners' pointed out the notarization deficiency of Mr. Long's affidavit,[10] the Bank filed a new, but nearly identical affidavit, this time executed by a "Collections Specialist," George Kadoch.[11] The motion for summary judgment was not amended to specifically reference Mr. Kadoch's affidavit.

Mr. Kadoch's affidavit states that his testimony was based in part on the "review of documents."[12] The affidavit then specifies—to the penny—the amounts allegedly owed in principal and interest (at two different rates), the amount held in escrow and the amount collected in rental income.[13] However, the only documents attached to Mr. Kadoch's affidavit were the same as those that had been attached to Mr. Long's affidavit—the demand letter and certified mail receipts.

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[6] *Id.*, Exhibit "A" at p.2 (R. 357).

[7] *Id.*, Exhibit "a" (R. 359-360).

[8] *Id.*

[9] *Id.* (R. 359).

[10] Motion to Strike Affidavit in Support of Summary Judgment (R. 368-370)

[11] Affidavit of George Kadoch in Support of Plaintiff's Motion for Summary Judgment ("Kadoch Aff.") (R 419-429).

[12] Kadoch Aff., ¶1 (R. 419).

[13] Kadoch Aff., ¶¶ 7-9 (R. 420-421).

The Bank also filed an Affidavit of Attorneys' Fees and Costs in which the affiant states that his testimony was based, in part, on his "review of documents."[14] No sworn or certified copies of such documents were attached. Additionally, the Bank filed an affidavit of a fee expert which declares that he reviewed the files of the law firm representing the Bank, the court docket, and the substantive filings therein.[15] He also testified concerning hourly rates "reflected in the [attorneys'] billing statements."[16] The expert affidavit has but a single attachment—the expert's curriculum vitae.[17] None of the affidavits, including Mr. Kadoch's affidavit, contains a jurat affirming that they were executed before the notary.

At the summary judgment hearing, the Owners argued, among other things, that summary judgment was precluded because the Bank's affidavits did not attach sworn or certified copies of the payment records and documents referred to in the affidavits.[18] The Bank indicated that payment records had been produced in response to discovery in January of that year.[19] Although these documents were

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[14] Affidavit of Attorneys' Fees and Costs [by Gregory S. Grossman of Astigarraga Davis Mullins & Grossman] (R. 411).

[15] Affidavit of Robert W. Pittman, Esquire in Support of Plaintiff's Application for Attorneys' Fees and Costs (R. 414-415).

[16] *Id*. at ¶¶ 8, 12 (R. 414, 415).

[17] *Id.* at 9 (R. 417-418).

[18] Tr. of Proceedings held before the Honorable Lucy Chernow Brown, dated December 6, 2011, p. 7-9 ("Summary Judgment Hrg.") (R. 484-498).

[19] *Id.* at 9 (R. 492).

not identified in the motion for summary judgment and were neither sworn nor certified, the lower court granted summary judgment for the Bank.[20]

After granting summary judgment, the court awarded attorneys' fees based on the Bank's fee affidavits, despite the Owner's affirmative defense contesting the reasonableness of any fees to be levied,[21] and despite defense counsel's request at the summary judgment hearing that the fees be determined by evidentiary hearing.[22] The trial court expressly rejected this request on the grounds that the Owners had not submitted an affidavit in opposition to the fees.[23] The final judgment included attorneys' fees in the amount of $37,978.50.[24]

The Owners filed a timely notice of appeal.[25]

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[20] Final Judgment of Commercial Foreclosure, filed on December 6, 2011 (R. 462-466) and Order Granting Motion for Summary Judgment, filed on December 6, 2011 (R. 470-471).

[21] Amended Answer and Affirmative Defenses, filed on September 28, 2010 (R. 179-189).

[22] Summary Judgment Hrg., p. 10. (R. 493)

[23] *Id.*

[24] Final Judgment of Commercial Foreclosure, filed on December 6, 2011 (R. 462-466) and Order Granting Motion for Summary Judgment, filed on December 6, 2011 (R. 470-471).

[25] Notice of Appeal, filed January 4, 2012 (R. 499-505).

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) is unambiguous in its requirement that sworn or certified copies of all papers or parts thereof referred to in a summary judgment affidavit be attached or served with the affidavit. The Bank's affidavits on their face refer to records which were not attached or served with the affidavits and were neither sworn or certified. The affidavits, therefore, do not comply with Rule 1.510(e).

The trial court also erred in determining reasonable attorneys' fees based on affidavits because the Owners had requested an evidentiary hearing on fees, and because the affidavits in support of the fees, like that in support of the amounts due and owing on the note, failed to comply with Rule 1.510(e).

Based on the inadequacies of the Bank's affidavits, this Court should reverse the final summary judgment and remand to the trial court for further proceedings. The Court should also instruct the lower court that, if summary judgment is ultimately entered against the Owners, an evidentiary hearing must be held to determine the amount of attorneys' fees that are reasonable.

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). Here, the issue is whether the summary judgment affidavit met the requirements of Rule 1.510(e) Fla. R. Civ. P. The construction and application of procedural rules are reviewed *de novo*. *Barco v. Sch. Bd. of Pinellas County*, 975 So. 2d 1116, 1121-22 (Fla. 2008). The Florida Rules of Civil Procedure are construed in accordance with the principles of statutory construction. *Id.* When the language of the rule is unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory construction; the rule must be given its plain and obvious meaning. *See id*.

The Owners' entitlement to an evidentiary hearing on reasonable attorneys' fees is a legal issue—the application of a rule established by existing case law. Such pure questions of law are reviewed *de novo*. *See State v. Glatzmayer*, 789 So. 2d 297, 301 (Fla. 2001). Even if it were appropriate to deny the Owners an evidentiary hearing, the fee award then becomes a summary judgment issue to be reviewed under that standard. In that event, the issue is whether the fee affidavits complied with Rule 1.510(e), which is reviewed *de novo*.

ARGUMENT

I. The Bank's affidavits are legally insufficient.

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.

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

This Court has held that failure to comply with Rule 1.510(e) is a 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).

That the amounts due and owing were mentioned in the Verified Complaint does not avail the Bank. Mr. Long's verification of the Complaint was not made

upon personal knowledge as required for the Verified Complaint to serve as a summary judgment affidavit. *Ballinger v. Bay Gulf Credit Union*, 51 So. 3d 528, 529 (Fla. 2d DCA 2010) (to suffice as a summary judgment affidavit, the allegations of the verified complaint must meet the requirements of Rule 1.510(e), must be based on personal knowledge, and must show affirmatively that the affiant is competent to testify to the matters stated therein). Moreover, the amounts due alleged in the Verified Complaint—even the amount alleged as the principal—do not match the amounts awarded in the final judgment.[26]

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

In the Kadoch Affidavit in Support of Motion for Summary Judgment, Mr. Kadoch himself concedes that the affidavit is based in part upon a "review of documents" which he claims to be business records.[27] He does not identify the names of those documents and does not attach any copies of financial records to this affidavit, much less sworn or certified copies.

Yet, Mr. Kadoch lists the specific amounts of principal balance, accrued interest, interest "at the default rate" due to the Bank, as well as the escrow funds and rental income for which the Owners were credited. Further, the affiant asserts

[26] Compare Verified Complaint ¶22 (R. 5) with the Final Judgment of Commercial Foreclosure, ¶ 1 (R. 462).

[27] Kadoch Aff., ¶ 1 (R. 419).

that a *per diem* rate of interest of $151.23 continues to accrue[28] All the financial numbers are presented to the second decimal place—making it evident from the face of the affidavit that Mr. Kadoch is relating the contents of records to the court. Unless he were to also lay the foundation for having the prodigious mental powers of a savant, he could not possibly have all this information memorized down to the penny.

It is evident from the face of the affidavit, then, that the essential paragraphs intended to establish the amounts due and owing are not based upon "personal knowledge," but rather, upon hearsay gleaned from reading unsworn records that were not before the court at the summary judgment hearing.

Indeed, the Bank's counsel conceded at the hearing that there are records upon which the affiant based his recitation of figures when she argued that a "payment history" had previously been produced.[29] Not only was the payment history not specifically identified in the summary judgment motion as required by Rule 1.510(c), it was not identified as one of the documents that would meet the business record exception discussed in the affidavit. Lastly, the payment history was inadmissible as summary judgment evidence because it was not sworn or

[28] *Id.* at ¶ 9 (R. 421).

[29] Summary Judgment Hrg., p. 9. (R. 492).

certified as required by Rule 1.510(e). The trial court erred in relying on this affidavit over objection.

II. The award of attorneys' fees should be remanded to the trial court for an evidentiary hearing to determine reasonable fees.

It is black letter law that a party is entitled to an evidentiary hearing to determine reasonable attorneys' fees upon request. *Geraci v. Kozloski*, 377 So. 2d 811, 812 (Fla. 4th DCA 1979) ("[T]he determination of an attorney[']s fee for the mortgagee based upon affidavits over objection of the mortgagor is improper."); *Morgan v. S. Atl. Prod. Credit Ass'n*, 528 So. 2d 491, 493 (Fla. 1st DCA 1988) (holding that upon specific objection to the setting of a fee without an evidentiary hearing, the party seeking the fee must present testimony concerning the necessity and reasonableness of the fee); *Lafferty v. Lafferty*, 413 So.2d 170 (Fla. 2d DCA 1982) (same); *Marchion Terrazzo, Inc. v. Altman*, 372 So.2d 512 (Fla. 3d DCA 1979) (same); *Dvorak v. First Family Bank*, 639 So. 2d 1076, 1077 (Fla. 5th DCA 1994) (same).

Additionally, because the Bank was attempting to obtain summary judgment on the issue of reasonable attorneys' fees, the affidavits it submitted in support of such fees must also meet the requirements of 1.510(e). *See Ellis v. Barnett Bank of Lakeland*, 341 So. 2d 545, 546 (Fla. 2d DCA 1977) (applying Rule 1.510 to attorney fee affidavit). Just as with the Kadoch affidavit, the attorneys' fees affidavits were insufficient. Leaving aside that all the affidavits in this case failed

to comply with §117.05(4)(c) Fla. Stat. (2011),[30] the fee affidavits—like the Kadoch affidavit—also failed to comply with Rule 1.510(e) Fla. R. Civ. P., because sworn or certified copies of the documents referred to in the affidavits were not attached.

Specifically, in the Affidavit of Attorneys' Fees and Costs, the affiant stated that his testimony was based, in part, on his "review of documents that are generated in the ordinary course of the firm's business."[31] No sworn or certified copies of any such documents were attached. The affiant sets forth the hourly rates for various members of the firm, but does not attest to even an overall number of hours worked, much less, the hours worked at the individual timekeeper rates that ranged from $115 per hour to $300 per hour. Instead, the affiant jumps to the total fee, again expressing the figures down to the cent.

Likewise, the affidavit of the fee expert states that he reviewed the files of the law firm representing the Bank, the court docket, and the substantive filings therein.[32] He also testified concerning hourly rates "reflected in the [attorneys']

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[30] By omitting the words "subscribed before me," the jurat did not attest that "the signer personally appeared before the notary public at the time of the notarization." §117.05(4)(c) Fla. Stat. (2011).

[31] Affidavit of Attorneys' Fees and Costs [by Gregory S. Grossman of Astigarraga Davis Mullins & Grossman] (R. 411).

[32] Affidavit of Robert W. Pittman, Esquire in Support of Plaintiff's Application for Attorneys' Fees and Costs (R. 414-415).

billing statements."[33] None of these documents were provided by way of sworn and certified copies.

These fee affiants, therefore, are simply parroting information into the record that is contained in documents that have not been admitted as "summary judgment evidence." In the absence of compliance with Rule 1.510(e), such testimony is objectionable as hearsay and a violation of the best evidence rule. By withholding the underlying documentation, the Bank has shielded them from scrutiny and avoided meaningful contradiction—elements essential to due process.

Accordingly, even if the Owners had not been entitled to an evidentiary hearing, the affidavits were insufficient to support an award of attorneys' fees by way of summary judgment.

[33] *Id*. at ¶¶ 8, 12 (R. 414, 415).

CONCLUSION

The Bank's affidavits do not comply with Florida Rule of Civil Procedure 1.510(e) and fail to support a summary judgment. Accordingly, this Court should reverse the final summary judgment and remand to the trial court for further proceedings. The Court should also instruct the lower court that, if summary judgment is ultimately entered against the Owners, an evidentiary hearing must be held to determine the amount of attorneys' fees that are reasonable.

Dated March 20, 2012

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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 March 20, 2012 on all parties on the attached service list. This brief also complies with Administrative Order No. 2011-1 and an electronic copy has been emailed to the court at efiling@flcourts.org.

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