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

REPLY BRIEF OF APPELLANTS

Respectfully submitted,

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I. The Bank's statement of facts is wrong.

BankUnited, FSB (the "Bank") claims the Owners filed an answer without seeking leave of court.[1] Actually, the Owners did move for leave to amend their answer and affirmative defenses,[2] to which the Bank agreed.[3] Also, the agreed order on the Owners' motion for leave to amend the answer and on the Bank's motion to substitute party plaintiff did not stipulate to the request for judicial notice.[4] In fact, the order specifically reserved the Owners' right to challenge the standing of the Bank.[5] Accordingly, the Bank's misstatements should be disregarded by the Court.

II. The Bank admits its affidavit is wrong.

The affidavit of indebtedness claims interest at a per diem rate of $53.22.[6] The Bank admits this number is probably wrong: "the per diem amount . . . may

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[1] Answer Brief, p. 1.

[2] Second Am. Answer and Affirmative Defenses, Ex. A to Defendants [redacted] and [redacted] Mot. for Leave to File Second Am. Answer served March 16, 2010 (R. 304).

[3] Agreed Order on Mot. for Leave to File Second Am. Answer and Mot. to Substitute Party Plaintiff, filed April 15, 2010 (R. 646)

[4] Agreed Order on Mot. for Leave to file Second Am. Answer and Mot. to Substitute Party Pl., April 12, 2010. (R. 646-47).

[5] *Id.*

[6] Affidavit of Plaintiff's Claim, attached to Mot. for Summary Judgment (R. 90-96).

not have been $53.22."[7] Actually, the number has to be wrong because for the three hundred seventy six (376) day period from March 1, 2008 to March 11, 2009, the affidavit's $25,601.07 is the result of a per diem rate of $68.08. A properly calculated per diem rate of $53.22 equals $20,010.72 for the period. This is a five thousand dollar difference.

The final judgment has the same mistake. A $53.22 per diem rate of interest for the seven hundred and seventy seven (777) day period in the judgment equals $41,351.94. The judgment, however, lists $46,943.07 as the amount of interest.[8] The Bank does not deny the calculation from March 1, 2008 to March 11, 2009 is suspect. It merely argues that the issue of the affidavit being wrong was waived.[9] The Bank relies on *Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981). In *Dober*, the District Court remanded a summary judgment to allow for re-pleading of a statute of limitations affirmative defense that was not previously raised until appeal. *Id.* at 1323. The Florida Supreme Court reversed because the affirmative defense was never raised in the trial court. *Id.*

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[7] Answer Brief, p. 10, n. 3.

[8] *See* Final Judgment of Mortgage Foreclosure (R. 652).

[9] The Bank also argues that the affidavit may be accurate from March 12, 2009 to the judgment date. The Owners are not addressing this argument because the final interest amount is necessarily wrong because it includes the incorrect amount from the period before March 12, 2009.

The sufficiency of the affidavit cannot be waived. The Owners objected to the affidavit on the grounds that it did not comply with the Rule 1.510(e) by attaching sworn or certified copies of documents referred to therein. The rules of procedure require attachment of sworn or certified copies to preclude hearsay and to ensure the reliability of affidavits. *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 fact that the affidavit is wrong and unreliable on its face merely illustrates the purpose of Rule 1.510(e) and why it should be complied with.

Accordingly, since the affidavit is procedurally and substantively wrong, it was insufficient to be relied on as summary judgment evidence.

III. The affiant's position did not "assume" she had personal knowledge.

The Bank admits nothing was attached to the affidavit but argues that it was made on personal knowledge. Ms. Bado, however, admits she reviewed the Bank's "books, records and documents."[10] Reliance on these documents shows that Ms. Bado did not rely on personal knowledge. *See Coleman v. Grandma's Place, Inc.*, 63 So. 3d 929, 933 (Fla. 4th DCA 2011) (finding that notwithstanding

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[10] Affidavit of Plaintiff's Claim attached to Mot. for Summary Judgment (R. 90-96) (emphasis added).

an affiant's claim of personal knowledge, she had no personal knowledge because she admitted in her affidavit that she reviewed a personnel file).

Moreover, for Ms. Bado to have personal knowledge she would need to have memorized the specific amounts of principal balance, accrued interest for certain months, late charges, taxes, inspection fees, insurance premiums, and transmittal fees.[11] Since the numbers are presented to the second decimal place, Ms. Bado could not possibly have all this information memorized down to the penny. A statement in an affidavit which is physically impossible in the light of common knowledge or scientific principles may be disregarded. *Watley v. Florida Power & Light Co.*, 192 So. 2d 27, 29-30 (Fla. 1st DCA 1966). Accordingly, any assertion that Ms. Bado had personal knowledge should be disregarded.

Recognizing that Ms. Bado did not actually have personal knowledge, the Bank next argues that she did not need personal knowledge because her position assumes she should have personal knowledge. For support it cites *Carter v. Cessna Fin. Corp.*, 498 So. 2d 1319, 1321 (Fla. 4th DCA 1986). *Carter* actually found that the affidavit in that case was legally insufficient. *Id.* In dictum, however, it stated that "[a] factual basis for the affiant's knowledge need not be set out where the affiant is shown to be in a position where he would necessarily

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[11] Affidavit of Plaintiff's Claim, attached to Mot. for Summary Judgment (R. 90-96).

possess the knowledge." *Id. citing First Mortgage Inv. v. Boulevard Nat'l Bank of Miami*, 327 So. 2d 830, 831-32 (Fla. 3d DCA 1976). In *First Mortgage*, the court found documents need not be attached because the affiant stated he had personal knowledge and the court believed him based on the fact that as senior vice-president of the business trust it would not be illogical that he could have personal knowledge of a transaction of that magnitude by the trust. 327 So. 2d at 831-32. Here, in the age of affidavit robosigning, it is illogical that a vice president of a huge, multi-billion dollar organization would have personal knowledge of what the Bank claims is one of thousands of loans purchased from the FDIC. There was no personal knowledge here nor was it a particularly large transaction for which it may be assumed the affiant would have a specific recollection.

The Bank next relies on *Beverage Canners, Inc. v. E. D. Green Corp.*, 291 So. 2d 193, 195 (Fla. 1974), to argue that an affidavit by an officer of a corporation does not need to state the sources of his knowledge because it is presumed. *Beverage Canners* cites to *United Bonding Ins. Co. v. Dura-Stress, Inc.*, 243 So. 2d 244, 246 (Fla. 2d DCA 1971), which turned on the fact that the president of a Florida corporation is required to be a director and directors of Florida corporations are chargeable with knowledge of corporate affairs.

Here, Ms. Bado does not claim to be a director. BankUnited is a federal savings bank. There is no requirement that officers of federal savings banks be

directors. 12 C.F.R. § 563.33 (2011). Nor is there any requirement that non-executive officers of federal savings banks be chargeable with knowledge of corporate affairs. *Id; see also United Bonding Ins.*, 243 So. 2d at 246.

Furthermore, at summary judgment the movant's affidavits, if any, are to be strictly read, and the affidavits of the party opposing summary judgment are to be liberally read. *See Holl v. Talcott,* 191 So. 2d 40, 46 (Fla. 1966); *Bourassa v. Busch Entm't Corp.*, 929 So. 2d 552, 562 (Fla. 2d DCA 2006). The affidavits in the cases cited by the Bank were all affidavits filed in opposition to summary judgment that were read liberally. The affidavit here, on the other hand, must be strictly read.

Strictly reading the affidavit, it failed to comply with the rule. Ms. Bado's deposition confirms this. She takes one minute to review each affidavit which is prepared by someone else.[12] She admittedly only reviews a summary in the form of a payoff statement which was not attached to the affidavit.[13] Also, she was not the records custodian of the note and mortgage which was kept by the post-closing department.[14] Therefore, any assumption of personal knowledge is rebutted by the fact that she admittedly relied on records and in fact had no personal knowledge.

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[12] Deposition of Tina Bado, April 5, 2010, p. 5, 12 (R. 396-644).

[13] Id. at 12, 22.

[14] Id. at 30-31.

Moreover, she relied on records of which she had no custody, control or supervision.

This Court holds that summary judgment affidavits must comply with Rule 1.510(e). *Coleman*, 63 So. 3d at 933; *Ferris v. Nichols*, 245 So. 2d 660, 662 (Fla. 4th DCA 1971). Failure to comply with this rule is a basis for 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). The affidavit here was not only incorrect but it did not comply with the summary judgment rule.

CONCLUSION

The language of Rule 1.510(e) is clear and the trial court erred in refusing to enforce this rule. Also, the affidavit is wrong. The Court should ignore the Bank's request to ignore the affidavits' procedural and substantive deficiencies. Accordingly, this Court should reverse the final summary judgment and remand to the trial court for further proceedings.

Dated September 1, 2011

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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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