In the District Court of Appeal
Fourth District of Florida

CASE NO. 4D10-1372
(Circuit Court Case No. 50 2008 CA 028930XXXX MB AW)

GARY GLARUM and ANITA GLARUM,
Appellants,

v.

LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR MERRILL LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2006-FFI, et al.,

Appellee.

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

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

ICE LEGAL, P.A.
Counsel for Appellants
1015 N. State Road 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

KEY

Record references:

R. ___= Record on Appeal

Supp. R. ___= Supplement to Record on Appeal

STATEMENT OF THE CASE AND FACTS

I. Introduction

This is a foreclosure action that Plaintiff/Appellee, LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR MERRILL LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2006-FFI (the "BANK"), filed against Defendants/Appellants, GARY GLARUM and ANITA GLARUM (the "OWNERS"), in which they sought to take the OWNERS' home in satisfaction of an unpaid loan.

II. Statement of the Facts

A. The BANK filed a complaint claiming it was the owner, holder and assignee of the note and mortgage.

The BANK filed its Complaint against the OWNERS on September 24, 2008.[1] The Complaint alleged that "a Promissory Note was executed and delivered in favor of Plaintiff, or Plaintiff's Assignor." The BANK attached an alleged copy of the note, which indicated that the payee (the original lender) was "FIRST FRANKLIN A DIVISION OF NAT. CITY BANK OF IN" and that the payor was Gary Glarum.[2] The Complaint further alleged that the note was secured

[1] Complaint to Foreclose Mortgage, filed September 24, 2008 (the "Complaint"). (R. 1-30).

[2] Complaint, ¶ 2 (emphasis added) (R. 2).

by a mortgage, which was also attached.[3] Like the note, the appended mortgage showed that the lender was FIRST FRANKLIN A DIVISION OF NAT. CITY BANK OF IN. The mortgagor under the instrument was defined as the "Borrower." On the face of the document, the "Borrower" was stated to be "GARY GLARUM JOINED BY HIS WIFE GLARUM ANITA." On the signature page, however, Anita Glarum signed as a "Non-Borrower."[4]

The Complaint further averred that "[t]he Plaintiff is the present owner and constructive holder of the Promissory Note and Mortgage"[5] and that the "Note and Mortgage were assigned to Plaintiff."[6]

The OWNERS answered the Complaint, stating that, because they were without knowledge of these allegations, they denied them and demanded strict proof.[7] After two amendments, the OWNERS raised five affirmative defenses. The Second Affirmative Defense denied the authenticity of any document presented as the original promissory note, including any endorsements. It also

---

[3] *Id*.

[4] Mortgage attached to Complaint (R. 14).

[5] *Id*.

[6] *Id*. at ¶ 3 (R. 2).

[7] Answer to Complaint to Foreclose Mortgage filed October 27, 2008, ¶¶ 2, 3, 5 (R. 38-41A).

denied the authenticity of any signatures, and the authority of anyone making them, on the promissory note, mortgage and assignment of mortgage.[8]

The Third Affirmative Defense challenged the BANK's standing on the grounds that it is not the owner and holder of the promissory note or the mortgagee.[9]

The Fifth Affirmative Defense alleged that the mortgage could not be enforced against Anita Glarum because she signed the instrument as a non-borrower, which by the instrument's own definition, meant that she was not a mortgagor.[10]

B. The BANK filed what it alleged to be the original note, mortgage and assignment.

Approximately a month later, the BANK filed a Notice of Filing which its counsel represented to contain the "Original Note" and the "Original Mortgage" at issue. This Notice of Filing was not accompanied by any affidavit or other testimony to otherwise support the representation that these were in fact the original loan documents.[11]

---

[8] Second Amended Answer and Affirmative Defenses, p. 5 (Supp. R. 554).

[9] *Id*.

[10] *Id*.

[11] Notice of Filing, dated December 3, 2008 (R. 48-73).

Weeks later, the BANK filed another Notice of Filing which its counsel represented to contain the "Original Assignment." Again, the Notice of Filing was not accompanied by any affidavit or other testimony to otherwise substantiate its authenticity.[12]

C. Discovery revealed that the BANK did not possess required documentation of its ownership of the mortgage loan.

1. The Requests for Release.

The Plaintiff's trust was formed by, and continues to be governed by, the Pooling and Servicing Agreement ("PSA") pertaining to that trust.[13] It specifies that the trustee maintain a Mortgage File consisting of mortgage documents delivered to the trustee.[14] Section 3.13 of the PSA requires the Servicer bank to provide the trustee with a Request for Release when it needs the original documents to file in a foreclosure action:

> From time to time and as shall be appropriate for the servicing or foreclosure of any Mortgage Loan, … the Trustee or its custodian shall, upon delivery to the Trustee or its custodian of a Request for Release in the form of Exhibit I signed by a Servicing Officer, release the Mortgage File to the Servicer…[15]

---

[12] Notice of Filing, dated December 29, 2008 (R. 100-03).

[13] Pooling And Servicing Agreement Dated as of December 1, 2006 ("PSA") (Supp. R. 1).

[14] PSA, p. 43, 63-65 (Supp. R. 49, 69-71).

[15] PSA, p. 95 (Supp. R. 101).

When the OWNERS sought production of any Request for Releases under §3.13 of the PSA, the BANK responded that it did not possess such a document:

> 5. Plaintiff affirmatively asserts that said requested and ordered document in not in the Plaintiffs care custody or control.[16]

Similarly, when the OWNERS propounded a request for the entire Mortgage File as defined in the PSA, the BANK responded that "it has previously provided all documents dealing with the loan file within Plaintiff's custody, care or control."[17] But according to the PSA, the Mortgage File would have contained an assignment of mortgage delivered (and thus presumably dated) prior to the closing date of December 27, 2006.[18] No such document had ever been "previously provided."

2. The Trustee's Certification.

One trust document that would have corroborated whether the note and mortgage were transferred by delivery to Plaintiff's trust was the trustee's certification that all documents required under Section 2.01 were executed and received:

---

[16] Plaintiff's Response to Defendant's Request for Production Regarding Trust Documentation and Mortgage Loan Ownership Per Court Order, served June 24, 2009, p. 3 (Supp. R. 310).

[17] Plaintiff's Response to Defendant's Request for Production Regarding Trust Documentation and Mortgage Loan Ownership Per Court Order, served November 2, 2009, p. 3 p. 3 (Supp. R. 541).

[18] PSA, p. 34, 63 (Supp. R. 40, 69).

> Within seventy (70) days of the Closing Date, the Trustee shall deliver to the Depositor and the Servicer the Trustee's Certification, substantially in the form of Exhibit D attached hereto, evidencing the completeness of the Mortgage Files, with any exceptions noted thereto.[19]

The OWNERS requested production of that certification, but the BANK objected, arguing that the request was irrelevant because "[t]he original Note and Mortgage, and Assignment of Mortgage have been filed with the Clerk."[20] The OWNERS moved to compel production of the document pointing out that "what Plaintiff or its counsel asserts about the documents they have placed in the Court file is not evidence."[21] The motion also pointed to the red flags already in the record concerning the BANK's claim of ownership: 1) the Assignment postdated the closing date of the trust and was executed "not to perfect the Trust, but to create evidence upon which Plaintiff seeks to take Defendant's home;" and 2) the Assignment was prepared by the Servicer, Home Loan Services, Inc., and signed by one of its employees holding herself out as an Assistant Vice-President of a different company, First Franklin Financial Corporation.[22]

The Court denied the motion to compel this document.[23]

---

[19] PSA, § 2.02, p. 67 (Supp. R. 73).

[20] Plaintiff's, Response to Defendant's Request for Production, dated December 16, 2008, ¶ 3 (Supp. R. 358).

[21] Defendants' Motion to Compel, dated November 10, 2008, p. 4 (R. 91).

[22] *Id*. at 4-5 (R. 91-92).

[23] *Id*.

D. The BANK moved for summary judgment.

The BANK filed a two page summary judgment motion which included no attachments and which did not specifically identify the affidavits—or any other summary judgment evidence—upon which it intended to rely.[24] The BANK had filed an Affidavit of Indebtedness executed by Christopher Spradling, a Foreclosure Manager with the "Servicer" (the bank which receives loan payments and conducts the foreclosure litigation as an agent of the owner), Litton Loan Servicing.[25] This affidavit, however, was withdrawn approximately a month after the BANK served its motion for summary judgment.[26] In its place, the BANK filed another Affidavit of Indebtedness, this time executed by Ralph Orsini as a Litigation Specialist of a different company claiming to be the Servicer, Home Loan Services, Inc.[27]

Despite references in the affidavit to a note and mortgage and "original books and records maintained in the office of the Plaintiff," no copies of these documents were attached to the affidavit, much less, copies that were sworn or

---

[24] Plaintiff's Motion for Summary Judgment, served August 11, 2009 (R. 144-46).

[25] Plaintiff's Notice of Filing Original Affidavit of Indebtedness, dated December 17, 2009 ("Spradling Affidavit") (R. 83-87).

[26] Notice of Withdrawal of Affidavit of Indebtedness (by Christopher Spradling of Litton Loan Servicing) (R. 147-52).

[27] Plaintiff's Notice of Filing Original Affidavit of Indebtedness, filed on September 8, 2009 ("Orsini Affidavit") (R. 153-57).

certified as true and correct.[28] The affidavit made no representations that any documents in the court file were true and correct, and unlike the original affiant, Mr. Orsini did not aver that "[e]ach and every allegation contained in the Complaint to Foreclose Mortgage are true."[29] Additionally, the word "assignment" is never mentioned in the affidavit.[30]

E. The OWNERS objected to the Orsini Affidavit.

After overcoming the BANK's objections, the OWNERS deposed the BANK's affiant, Mr. Orsini.[31] Based upon Mr. Orsini's deposition testimony, the OWNERS filed a Motion to Strike his affidavit on the basis that, among other things: 1) it was not based upon personal knowledge; and 2) necessary documents were not attached to the affidavit.[32]

---

[28] *Id*.

[29] *Compare*, Spradling Affidavit, ¶4, *with* Orsini Affidavit (R. 151, 155-157).

[30] Orsini Affidavit (R. 153-57).

[31] Plaintiff's Motion for Protective Order, served on September 21, 2009 (R. 158-59); Order on Plaintiff's Motion for Protective Order, entered on October 29, 2009. (R. 163-64); Transcript of Deposition of Ralph Orsini, filed on December 4, 2009. (Supp. R. 234-296).

[32] Defendants' Motion to Strike, filed on December 15, 2009 (R. 165-73).

The Plaintiff filed a response[33] and the trial court initially denied the motion at a hearing held *ex parte*.[34] At the summary judgment hearing, the trial court vacated the previous *ex parte* order denying the motion to strike, only to deny the motion again minutes later.[35]

F. The OWNERS' moved to disqualify the judge.

The OWNERS filed two motions for disqualification alleging an adversarial relationship had developed between their counsel and the judge, both of which were denied as legally insufficient.[36] This Court denied a writ of prohibition to review the judge's refusal to recuse herself.[37]

G. The trial court entered sanctions against the OWNERS' counsel without a finding of bad faith or specific findings of fact.

The OWNERS filed the affidavit of a forensic document examiner, Rita M. Lord, to counter an argument often made by banks in foreclosure cases that the

---

[33] Plaintiff's Response to Defendants' Motion to Strike Affidavit, served on January 5, 2010. (R. 188-97.)

[34] Order on Defendants' Motion for Continuance and Defendants' Motion to Strike Affidavit, entered on January 13, 2010 stating that "Defendant's counsel failed to appear for a properly noticed hearing despite counsel from Defendant's law firm being present in the court room." (R. 200).

[35] Order Denying Defendants' Motion to Strike Affidavit, entered March 11, 2010. (R. 668.)

[36] Order Denying Defendants' Second Motion for Disqualification, entered February 5, 2010 (R. 621).

[37] Order in *Glarum v. LaSalle Bank*, Case No. 4D10-603 (Fla. 4th DCA March 19, 2010).

judge may determine authenticity of the note at summary judgment simply by looking to see if it is signed in blue ink.[38] Ms. Lord's affidavit states the generic opinion that (as she has stated in identical affidavits in other cases) blue-ink signatures are not determinative—only an expert can distinguish an original, and even then, it is difficult without special equipment or testing:

> Based upon my experience and expertise, it is my expert opinion that it is extremely difficult to determine if the document is an original or a high-quality digital color reproduction without the aid of a microscope or other tools or processes, which may include destructive testing. A high-quality digital color reproduction of a document, even a document with signatures in blue ink, can mimic the appearance of the original document to the extent that they are virtually indistinguishable to the naked eye. The potential that a layperson can mistake a reproduction for an original has increased dramatically with the continuing improvement of technology for the electronic storage and reproduction of documents.[39]

The above quote is the totality of her opinion. Ms. Lord did not attest that she examined the subject note and mortgage in question and stated no opinion specific to the documents in this case.[40] Nevertheless, the BANK's counsel moved to strike the affidavit and to sanction the OWNERS' attorneys representing to the trial court that: "Said Affidavit states that it is impossible for the Affiant to determine whether <u>the Note and Mortgage filed with this court</u> are originals or high

---

[38] *See*, Transcript of March 11, 2010 hearing ("Hrg."), pp. 21-22 (Supp. R. 579-80).

[39] Affidavit of M. Rita Lord, dated November 17, 2008. (R. 357-58.)

[40] *Id*.

quality copies."[41] The sanction motion cited §57.105 Florida Statutes, but it was not served twenty-one days prior to filing.

This motion was also heard at the summary judgment hearing, but no evidence or testimony was presented or received.[42] The trial court nevertheless entered sanctions against the OWNERS' counsel for having filed Ms. Lord's affidavit.[43] The trial court's order makes no express findings of bad faith conduct and includes no detailed factual findings describing any specific acts of bad faith conduct on the part of the OWNERS' counsel.[44]

H. The trial court granted summary judgment.

The OWNERS filed a memorandum in opposition to the BANK's summary judgment motion entitled Notice of Reliance Pursuant to Rule 1.510(c), Fla. R. Civ. P. (the "Notice of Reliance").[45] In addition to the deficiencies in the motion

[41]Plaintiff's Motion for Determination of Fraud Upon the Court or in the Alternative to Strike Affidavit of Rita M. Lord and Motion for Sanctions, served on January 20, 2010, ¶ 2 (emphasis added) (R. 335).

[42] Hrg., pp. 18-30 (Supp. R. 576-96).

[43] Hrg., pp. 29-30 (Supp. R. 595-96); Order on Plaintiff's Motion for Determination of Fraud or in the Alternative to Strike Affidavit of Rita M. Lord and Motion for Sanctions, entered on March 11, 2010 (R. 671).

[44] *Id*. (R. 671).

[45] Notice of Reliance Pursuant to Rule 1.510(c), Fla. R. Civ. P., filed January 19, 2010 (Supp. R. 297-344).

and supporting affidavit detailed above, the OWNERS raised a plethora of reasons that summary judgment should be denied:

- There was a genuine issue of material fact regarding whether the Note was in the corpus of the trust and therefore, regarding the BANK's ownership of the note and mortgage;
- There was a genuine issue of material fact regarding whether the assignment established the BANK's ownership of the note and mortgage;
- Whether the document proffered as the original note was in fact the original;
- The BANK's failure to disprove the OWNERS' affirmative defenses.[46]

The OWNERS argued these same points at the summary judgment hearing.[47] At the conclusion of the hearing, the trial court granted summary judgment.[48]

The OWNERS filed a timely notice of appeal.[49]

---

[46] *Id.*

[47] Hrg. (R. 559-635).

[48] *Id.* at p. 74 (Supp. R. 632).

[49] Notice of Appeal (R. 673-680).

SUMMARY OF THE ARGUMENT

The trial court erred in granting summary judgment for at least seven different reasons. Not a single supporting document proffered by the BANK was authenticated, including the very instruments upon which the BANK's case was grounded—the note, mortgage and assignment. Because they were inadmissible, they did not qualify as summary judgment evidence. Fla. R. Civ. P. 1.510(c). The only evidence on the substantive issues identified by the BANK was a single affidavit signed by a third party who had no personal knowledge of the matters to which he attested and whose authority to act on behalf of the BANK was unproven and unclear. The affidavit itself was devoid of any sworn or certified copies of the documents referred to, and relied upon, by the affiant.

The record was also teeming with issues of fact on critical elements of the BANK's case, such as: whether the BANK held the note and mortgage, whether those proffered documents were the originals of the instruments, and whether Anita Glarum was even a mortgagor. Although these issues were also raised by affirmative defense, the BANK adduced no evidence to disprove them. Instead, the trial court wrongly required the OWNERS, the non-movants, to prove them.

And while the evidence and inferences from the evidence favored the OWNERS (which should alone have precluded summary judgment), they could have provided even more evidence had the court not, in an earlier ruling, erroneously denied discovery of an essential, highly-relevant document.

And finally, the trial court erred in imposing an unmerited sanction of attorneys' fees against counsel on a motion that violated §57.105 Fla. Stat. (2009). The court entered the sanction order without taking evidence, without making a finding that counsel acted in bad faith and without detailing specific factual findings to support such a conclusion.

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). In order to determine the propriety of a summary judgment, the Court must resolve whether there are any "genuine issue as to any material fact" and whether "the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). The "burden of proving the absence of a genuine issue of material fact is upon the moving party." *Palm Beach Pain Management, Inc. v. Carroll*, 7 So. 3d 1144, 1145 (Fla. 4th DCA 2009) (citing *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966). The Court must consider the evidence contained in the record, including any supporting affidavits, in the light most favorable to the non-moving party, the OWNERS, and if the slightest doubt or conflict in the evidence, then summary judgment must be reversed. *See id*.

The standard of review for the imposition of sanctions is abuse of discretion. *Kirkland's Stores, Inc. v. Felicetty*, 931 So. 2d 1013, 1015 (Fla. 4th DCA 2006).

ARGUMENT

I. The Trial Court Erred In Granting Summary Judgment.

The OWNERS raised at least seven reasons why summary judgment should be denied, any one of which would support reversal of the order granting summary judgment.

A. The assignment was not authenticated.

In its Complaint, and throughout the case, the BANK's claim of ownership of the subject mortgage loan was specifically predicated upon an assignment from the original lender.[50] The assignment attached to the Complaint was signed on behalf of a company called First Franklin Financial Corporation, although the payee of the promissory note was "First Franklin a Division of Nat. City Bank of IN."[51] The document was executed July 2, 2008, twelve weeks before this case was filed.[52]

Later, the BANK filed a document with a notice which claimed that it was the "Original Assignment."[53] This Notice of Filing was not accompanied by any affidavit or other evidence to authenticate the attachment. The unsworn statement

---

[50] Complaint, ¶ 3 (R. 2).

[51] Assignment and Adjustable Rate Note, attached to Complaint (R. 6, 31).

[52] Assignment attached to Complaint (R. 32).

[53] Notice of Filing, dated December 29, 2008 (R. 100-03).

by the BANK's attorney that the document was an "Original" is insufficient to establish its authenticty. *Hewitt, Coleman & Associates v. Lymas*, 460 So. 2d 467 (Fla. 4th DCA 1984) (unsworn statements of attorneys do no not establish facts).

In their pleadings, the OWNERS had specifically denied the authenticity of the assignment and the authenticity and authority of any signatures on the assignment.[54] The OWNERS continued to contest authenticity and authority in its filing in opposition to the motion for summary judgment (their "Notice of Reliance")[55] and argued the issue at the hearing.[56]

The BANK's summary judgment motion does not mention an assignment. Nor does it "specifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials" (Rule 1.510 (c) Fla. R. Civ. P) for its factual assertion in the motion that it "is the owner and holder of the promissory note and mortgage…"[57] The only affidavit filed by the BANK (which was not withdrawn by the time of the hearing) was that of Ralph Orsini entitled Affidavit

---

[54] Defendants, Gary Glarum And Anita Glarum's, Second Amended Answer To Complaint To Foreclose Mortgage And Affirmative Defenses, ¶3 (asserting the Defendants are without knowledge and therefore deny the allegations of Paragraph 3 of the Complaint) (Supp. R. 551), and Second Affirmative Defense (specifically denying the authenticity and authority of any signatures on, among other things, any assignment of mortgage) (Supp. R. 554).

[55] Notice of Reliance, pp. 7-8 (Supp. R. 303-04).

[56] Hrg., pp. 67-73 (Supp. R. 625-31).

[57] Plaintiff's Motion for Summary Judgment, ¶2A (R. 145).

of Indebtedness. As with the summary judgment motion itself, the word "assignment" does not appear anywhere in Mr. Orsini's affidavit. That affidavit, therefore, could not have authenticated the assignment.

Mr Orsini had been deposed, but again, the BANK did not state in its summary judgment motion that it was relying on that deposition as required by Rule 1.510 (c) Fla. R. Civ. P. Even if the BANK had done so, Mr. Orsini's deposition testimony would not have authenticated the assignment.[58] Indeed, the BANK's attorney objected to questioning about the assignment on the grounds that "[Mr. Orsini] didn't have anything to do with drafting or assigning or doing anything with the assignment."[59]

Yet, Mr. Orsini testified that the assignment was the only document upon which he relied to say in his affidavit that he had "personal knowledge that the Plaintiff is the owner and holder of the Note and Mortgage…"[60]

> Q. How did you verify that plaintiff, as you allege, or as you stated in No. 2, plaintiff is the owner and the holder of the note and mortgage, how did you verify that?
>
> A. [Mr. Orsini] Again, that was by the assignment, seeing the ownership transferred.[61]

---

[58] Transcript of Deposition of Ralph Orsini ("Orsini Deposition"), pp. 15-17 (Supp. R. 251-53).

[59] Orsini Deposition, p. 16 (Supp. R. 252).

[60] Affidavit of Indebtedness ¶2 (R. 155).

[61] Orsini Deposition, p. 10 (Supp. R. 246).

At the hearing, the BANK's only response was that authentication was unnecessary because the assignment was notarized.[62] The notarization, however, is only an acknowledgment. The person who executed the assignment did not swear to its contents. *See McGibney v. Smith*, 511 So. 2d 1083 (Fla. 5th DCA 1987).

Accordingly, the one document essential to the BANK's claim of ownership was never authenticated, and therefore, not part of the "summary judgment evidence" upon which the trial court could base its judgment. Rule 1.510 (c) Fla. R. Civ. P. (summary judgment evidence must be admissible); *BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So.3d 936, 939 (Fla. 2d DCA 2010) (Summary judgment reversed where unauthenticated assignment did not constitute admissible evidence establishing bank's standing to foreclose, and the bank submitted no other evidence to establish that it was the proper holder of the note and mortgage). Moreover, despite his statements under oath, Mr. Orsini had no personal knowledge of the assignment pled in the Complaint, or any other means by which the BANK became the owner of the note.

The trial court here, however, ruled that an authenticated assignment was unnecessary for the BANK to take the OWNERS' home:

> THE COURT: Okay. I'm going to determine that it would not preclude entry of summary judgment.[63]

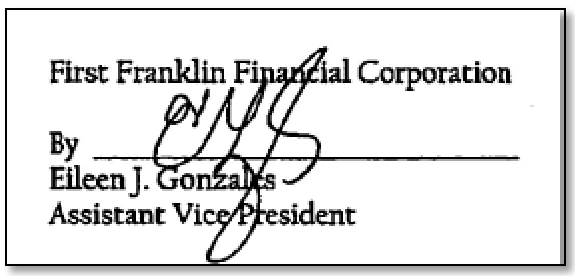
---

[62] Hrg., p. 72 (Supp. R. 630).

[63] Hrg., p. 73 (Supp. R. 631).

B. The signature on the assignment was not authenticated nor shown to have been authorized by the payee.

Even if the assignment were properly before the trial court as summary judgment evidence, an issue of fact remained as to the authority of, and authenticity of the signature of, the person purporting to execute the assignment. The alleged assignment bears the signature of Eileen Gonzales, who claims to be the Assistant Vice President of a company called First Franklin Financial Corporation:[64]


First Franklin Financial Corporation
By
Eileen J. Gonzales
Assistant Vice President

A document produced by the BANK, however, indicates that the official signature of Eileen Gonzales is vastly different:


Eileen Gonzales
Assistant Vice President, Documentation Services Manager

More importantly, this same document, and the letter that accompanied it, shows that Ms. Gonzalez is an employee—not of First Franklin Financial Corporation (or even of the original lender and payee on the note, First Franklin a

[64] Assignment attached to Complaint (R. 31).

Division of Nat. City Bank of IN)—but of another company called National City Home Loan Services.[65] It also shows that National City Home Loan Services, Inc. was the Servicer for the Plaintiff's trust, a fact that is corroborated by the PSA.[66] <u>If Ms. Gonzales works for the Servicer (i.e. agent) of the trust, rather than the payee, then the trust has simply assigned the mortgage to itself.</u>

In an attempt to resolve this factual inconsistency, the BANK argued that National City Loan Services and a company it refers to as "First Franklin" are "under the umbrella of Home Loan Services"[67]—the company which now claims to be the Servicer. The BANK, therefore, appears to be representing that the original lender and Eileen Gonzales' employer are the same company.

But the documents upon which the BANK relied for this argument were unauthenticated applications for fictitious name registration. To the extent that these applications would be admissible and might suggest the registrations were actually granted, they do not mention the assignor, First Franklin <u>Financial Corporation</u>, but rather, another company, First Franklin <u>Loan Services</u>. Worse, the applications show that the two entities in question are fictitious names, not for

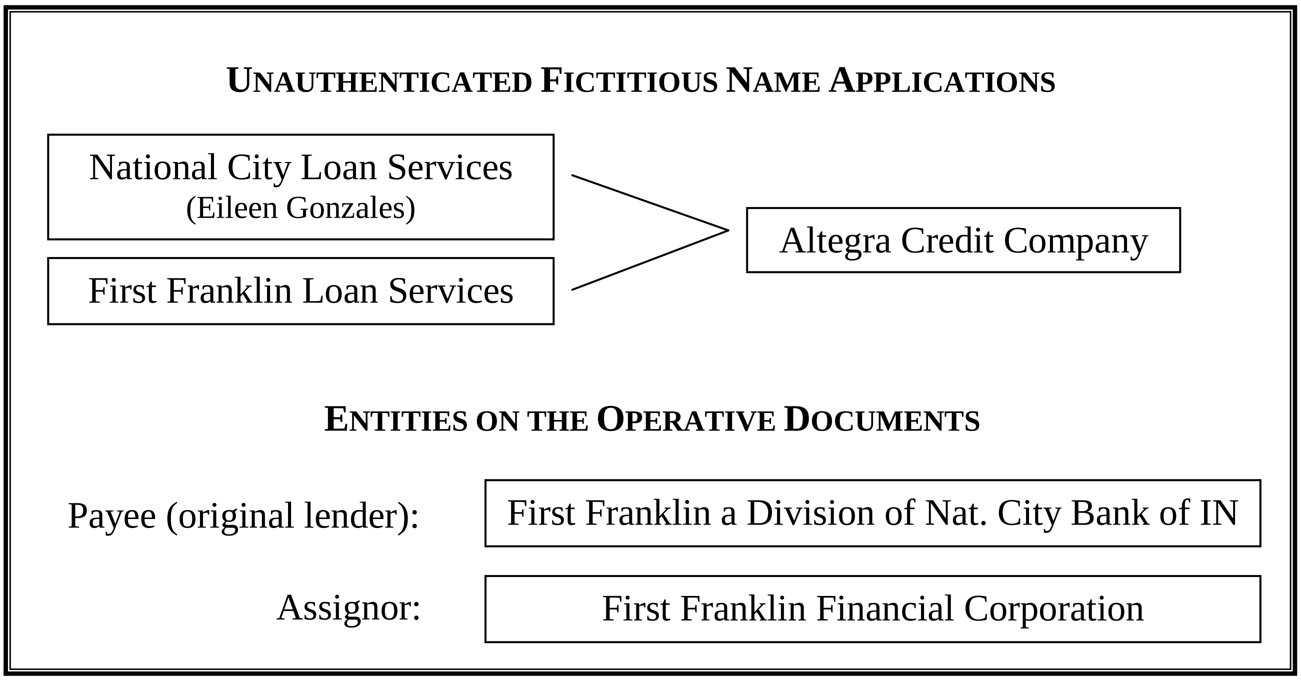
---

[65] National City Home Loan Services list of Servicing Officers, attached to Plaintiff's Response to Defendant's Second Request for Production Regarding Trust Documentation and Mortgage Loan Ownership, dated June 17, 2009 (Supp. R. 527-28).

[66] PSA (Supp. R. 1),

[67] Plaintiff's Response in Opposition to Defendant's Notice of Reliance, dated January 20, 2010, ¶ 61 (R. 370).

Home Loan Services, but for still another entity, Altegra Credit Company.[68] None of these companies (or fictitious names) is either the payee on the note or the assignor:



Setting aside these questionable documents, what makes the BANK's argument truly bizarre is that it represents that its Servicer, Home Loan Services, Inc. (the entity conducting this litigation on behalf of the BANK and which hired the BANK's attorneys[69]), is the alter ego of the assignor, First Franklin Financial Corporation. But this cannot be true because First Franklin Financial Corporation is a defendant (and appellee) in this action and one which was served with service

---

[68] Plaintiff's Response in Opposition to Defendant's Notice of Reliance, dated January 20, 2010, ¶¶ 59-63 and Exhibit G (R. 394).

[69] *See*, Orsini Deposition, p. 6 (Supp. R. 242).

of process.[70] The BANK's attorneys continue to serve First Franklin Financial Corporation with its motions and pleadings at its registered agent, CT Corporation System.[71] In short, if the assignor and Home Loan Services, Inc. are effectively the same entity, then the latter, as an agent of the BANK, is suing itself and the BANK's attorneys are conducting this litigation against their own client.

Signatures on assignments do not fall within the self-authenticating provision of the Uniform Commercial Code ('UCC") because assignments are not negotiable instruments. §673.3081(1) and §673.1041(2), Fla. Stat. (2009). Nevertheless, in an abundance of caution, the OWNERS did trigger the exception to that provision by specifically contesting the authenticity and authority of the signature on the assignment in their pleadings. *See Riggs v. Aurora*, -- So. 3d --, Case No. 4D08-4635 (Fla. 4th DCA June 16, 2010) (finding self-authentication applicable where defendant did not raise the authenticity of a signature at issue in the pleadings.) Here, in their Second Affirmative Defense, the OWNERS specifically contested the signature on the assignment:

> Defendants also specifically deny the authenticity of any signatures, and the authority of any person or persons making them, on

[70] *See*, Complaint (R. 1) and Entry 9 of official trial court docket indicating summons issued and returned for First Franklin Financial Corporation.

[71] *See*, service list on Plaintiff's Response in Opposition to Defendant's Notice of Reliance (R. 373).

documents related to the promissory note and mortgage, including, but not limited to, any assignment of mortgage.[72]

Accordingly, the entry of summary judgment was error in the face of this triable issue of fact.

C. The "original" note and mortgage were not authenticated, nor were the endorsement signatures on the note.

As with the assignment, the BANK submitted no evidence that the note and mortgage it filed as "originals" were authentic. Like the assignment, the mortgage is not a negotiable instrument subject to the UCC's self-authentication provision. §673.3081(1) and §673.1041(2) Fla. Stat. (2009). The authenticity of the note and mortgage and the authority of the person signing the endorsement had been disputed in the pleadings—a key fact that distinguishes this Court's recent opinion in *Riggs v. Aurora*, -- So. 3d -- (Fla. 4th DCA June 16, 2010).

The original note is, of course, required to foreclose. *Ferris v. Nichols*, 245 So. 2d 660, 662 (Fla. 4th DCA 1971); *Pastore-Borroto Development*, *Inc. v. Marevista Apartments, M.B., Inc.*, 596 So. 2d 526 (Fla. 3d DCA 1992). Moreover, "the original note and mortgage must be introduced into evidence or a satisfactory reason must be given for failure to do so." *Fair v. Kaufman*, 647 So. 2d 167, 168

[72] Defendants, Gary Glarum and Anita Glarum's, Second Amended Answer to Complaint to Foreclose Mortgage and Affirmative Defenses, p. 5 (Supp. R. 554).

(Fla. 2d DCA 1994) (emphasis added), *citing*, *W.H. Downing v. First National Bank of Lake City*, 81 So. 2d 486 (Fla.1955).

And while the signatures on the note are said to be self-authenticating—unless their authenticity is specifically denied in the pleadings (§90.902(8), Fla. Stat. (2009) and §673.3081(1), Fla. Stat. (2009))—this evidentiary shortcut is not available to establish that the proffered document itself is an original. As this Court held in *Ferris*, even where a copy of the note is attached to the complaint and the signatures on the note are admitted, summary judgment may not be granted unless the movant identifies the subject note by affidavit:

> Because of the failure of the plaintiff to comply with this rule [Rule 1.510(e) Fla. R. Civ. P.], <u>neither affidavit sufficiently identifies the note referred to therein as the note on which the action is based</u>.
>
> * * *
>
> Applying this statute [now §673.3081(2)] in the context of the present case, it appears that the plaintiff would have been entitled to a summary judgment had he produced the note <u>and sufficiently identified it by affidavit as the note sued on</u>…

Ferris v. Nichols, 245 So.2d at 662 (emphasis added).

Additionally, even if the UCC's self-authentication provision were applicable, it merely eliminates the need for extrinsic evidence as a condition precedent to admissibility of the note. Mere admission under this provision does not conclusively establish that the note is the genuine original. Rather, the authenticity of the note becomes an issue for the trier of fact. *See U.S. v. Carriger*, 592 F.2d 312, 316 (6th Cir. 1979). Accordingly, even with self-authentication, there remains a genuine issue of fact regarding authenticity which precludes summary judgment.

The BANK may be tempted to argue that it was entitled to a presumption of authenticity under the same self-authentication provision:

> If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized…

§673.3081(1), Fla. Stat. (2009). As the plain language of the statute reveals, however, the presumption is applicable only as to the signatures on the note, and arguably, only as to the <u>maker's</u> signature on the note. *See*, UCC Comment to § 3-308 (explaining that the presumption rests in part on the fact that "normally any evidence [regarding forged or unauthorized signatures] is within the control of, or more accessible to, the defendant"—which would not be true in the case of an endorsement signature).

Even if such a presumption did exist in this case, it was overcome by contrary evidence that suggested the note and the endorsements were not genuine, such as: 1) the BANK's inability to produce documentation required by the PSA to release the original note from the trust; 2) an assignment that postdated the closing date of the trust; and 3) a questionable signature on the assignment that, together with other documents produced by the BANK, implies that the BANK, through its agent, had assigned the note to itself. The OWNERS could have adduced additional evidence that the note never reached the trust (and thus, that the the BANK was never in possession of the original note) had the trial court not denied the OWNERS' motion to compel relevant discovery on this subject. *See*, disscusion in Part II, below.

Of course, as this Court held in *In re Estate of Short*, 620 So. 2d 1106 (Fla. 4th DCA 1993), the trial court was not free to weigh the OWNERS' evidence to determine whether the presumption—assuming it was even applicable—had been overcome:

> We do not understand how the trial judge could have reached the conclusion he did without weighing the available evidence against the presumption. Summary judgment hearings are ordinarily not for weighing evidence. The proponent has demonstrated that genuine issues of material fact do exist. Summary judgment is therefore improper.

Id.

The trial court erred, therefore, in granting summary judgment where the BANK's failure to authenticate the note and mortgage either barred their admissibility entirely, or at best, created an genuine issue of material fact.

D. A genuine issue of fact remained regarding Home Loan Servicing's authority to act as agent of the BANK.

The BANK's affiant was Ralph Orsini who, apparently unclear about who he is employed by or even whether he is male or female, averred that his personal knowledge concerning the subject loan was gained through "his/her position with the Plaintiff or its agent."[73] At deposition, Mr. Orsini confirmed that he was employed by Home Loan Services which he confirmed was the Servicer (not Plaintiff).[74] Yet, when confronted with a notice indicating that, in May of 2009, the servicing rights had been transferred to NationPoint rather than Home Loan Services, Mr. Orsini had no explanation:

> Q. And I'll just ask you if recognize that document?
>
> A. No. Well, let me clarify. I recognize that it's a notice sent to the borrower, but specifically no.
>
> Q. And I'll ask you, if you could, to read the box in the middle where it says: Beginning May 1st, 2009, please send your payments and correspondence to NationPoint at the appropriate address below. Can you tell me what relation NationPoint has to this loan?
>
> A. Not sure, unless they were the originator.[75]
>
> * * *
>
> Q. Can you tell me about the transferring of the servicing rights, these debts? You said it was originally with Home Loans Servicing?
>
> A. Correct.
>
> Q. And then went to Litton?
>
> A. Yes.
>
> Q. Can you state, is that a common practice at your company to switch, switch the servicing company and switch back?

---

[73] Orsini Affidavit, ¶ 2 (R. 150).

[74] Orsini Deposition, pp. 5, 10 (Supp. R. 241, 246).

[75] Orsini Deposition, p. 22 (Supp. R. 258).

A. No, actually it's not. …[76]

* * *

Q. …Do you have any reason to know why it would direct payments to go to NationPoint when you have said earlier that in May it was actually Home Loan Services that took back over the servicing?

A. No.[77]

* * *

Q. … Do you know this to be incorrect? Was NationPoint ever the servicer on this loan?

A. I would have no knowledge of that.[78]

Once again, the BANK attempted to explain away the discrepancy by claiming that "NationPoint is owned and operated by Home Loan Services and is a subsidiary of the same…"[79] In support of this statement, the BANK referenced yet another unauthenticated document purporting to show that NationPoint Loan Services was a fictitious name of Home Loan Services, Inc.[80] That the BANK would submit such a document for consideration is an admission that a factual issue remained for which such proof would be needed for summary judgment.

[76] Orsini Deposition, p. 11 (Supp. R. 247).

[77] Orsini Deposition, p. 23 (Supp. R. 259).

[78] Orsini Deposition, p. 25 (Supp. R. 261).

[79] Plaintiff's Response in Opposition to Defendant's Notice of Reliance, dated January 20, 2010, ¶ 35 (R. 366).

[80] Plaintiff's Response in Opposition to Defendant's Notice of Reliance, dated January 20, 2010, ¶ 35 and Exhibit E (R. 366, 388).

That the BANK failed to submit an affidavit that would lay any evidentiary foundation for this document was fatal to its bid for summary judgment.[81]

E. A genuine issue of fact remained as to whether the promissory note was part of the trust corpus.

1. The BANK's inability to produce essential trust documents was evidence that it did not have standing.

The BANK's court-ordered response to the OWNERS' Request for Production Regarding Trust Documentation and Mortgage Loan Ownership created an issue of fact about whether or not the subject note was ever in the trust. The OWNERS requested:

> 5. Any and all requests for releases between the Trustee, Custodian, Master Servicer, or Servicer whereafter the Mortgage File changed possession under Section 3.13 of the Pooling and Servicing Agreement.

After being compelled by the trial court to answer, the BANK responded:

> Plaintiff affirmatively asserts that said requested and ordered document in not in the Plaintiff's care custody or control.[82]

[81] The BANK also claimed that a power of attorney had been produced to prove that Home Loan Servicing, Inc. was empowered to act on behalf of the Plaintiff. (Hrg., p. 15; Supp. R. 573). The Appellants are unable to locate such a power of attorney in the record and Mr. Orsini admitted that he had never signed anything as an attorney-in-fact for plaintiff in this case (Orsini Deposition, p. 28; Supp. R. 264). But even if a power of attorney exists it was not authenticated by sworn affidavit, and thus, was not summary judgment evidence.

[82] Plaintiff's Response to Defendant's Request for Production Regarding Trust Documentation and Mortgage Loan Ownership Per Court Order, served June 24, 2009, p. 3 (Supp. R. 310).

Accordingly, the BANK's admission that it has no request for release raises an issue of fact about whether or not the subject note and mortgage were ever physically in the trust. The PSA mandates that, when the Servicer requires the note, mortgage, and other documents constituting the mortgage file for use in foreclosure proceedings the trustee or custodian must first receive a Request for Release.[83] Here, the Servicer would have been required to send a Request for Release to the trustee (the BANK) to obtain the note, mortgage and assignment for filing with the court.

If the Servicer in this case did not need to send such a Request for Release, then there is a genuine issue of material fact about where the Servicer obtained the purported originals of the note and mortgage, and whether the note and mortgage were ever in Plaintiff's trust to begin with. Therefore, the BANK's ownership of the subject note and mortgage is still a factual issue to be tried.

2. That the execution date of the alleged Assignment was after the closing date of the trust is further evidence that the BANK lacks standing.

Furthermore, the closing date for the BANK's trust was December 27, 2006.[84] Yet, the alleged Assignment was dated nearly a year and a half later (July 2, 2008). The BANK's only counter argument was the date of execution was just

[83] Section 3.13 of the PSA, p. 95 (Supp. R. 101).

[84] PSA, p. 34 (Supp. R. 40).

that—the date the document was signed, and was, therefore, not evidence of when the mortgage loan was actually transferred to the trust:

> MR. VANHOOK [BANK's attorney]: … I acknowledge, though, what he's saying about the trust and the 2006 issue. But that's just the date of the execution of the assignment of mortgage. It doesn't state on there the date that it -- that that was the date that the note and mortgage were given to the trust. …[85]

This argument, however, only concedes the existence of an issue of fact. The alleged assignment uses the present tense to express that the instrument itself accomplished the transfer: "Assignor hereby assigns…"[86] Nothing in the language of the assignment (or the Complaint) indicates that it is merely memorializing an earlier transfer.

Drawing all reasonable evidentiary inferences in favor of the OWNERS, as the court must do (*Knight Energy Services, Inc. v. Amoco Oil Co*., 660 So. 2d 786, 788 (Fla. 4th DCA 1995)), the BANK lacked standing because the subject loan had not been incorporated in the BANK's trust. Yet, at the hearing, the trial court rejected the OWNERS' arguments on this point because their affirmative defense regarding standing and real-party-in-interest did not specifically mention the trust:

> THE COURT: Yes. Technically, as [the BANK's lawyer] has described, <u>this affirmative defense doesn't talk anything about the trust, it doesn't talk anything about this being a trust. It just talks about, not the real party in interest and a lack of standing. And there</u>

[85] Hrg., pp. 42-43 (Supp. R. 600-01).

[86] Assignment attached to Complaint (R. 32).

> is not sufficient facts to even raise that. And certainly I gave you leave, and would have been more than happy to give you leave to amend this affirmative defense before the hearing, which was not sought. So I'm going to determine that affirmative defense does not preclude entry of summary judgment.[87]

This reasoning was patently erroneous because the BANK bears the burden of pleading and proving its ownership of the mortgage loan. The OWNERS' denied the ownership allegations of the BANK's Complaint, making standing a contested issue even if the OWNERS had never pled a single affirmative defense.

The conclusion was also flawed because it incorrectly placed the burden on the OWNERS to prove their affirmative defense, rather than on the BANK to disprove it. *See Knight Energy Services, Inc. v. Amoco Oil Co.*, 660 So.2d at 788 ("Before a plaintiff is entitled to a summary judgment of foreclosure, the plaintiff must either factually refute the alleged affirmative defenses or establish that they are legally insufficient to defeat summary judgment.").

F. A genuine issue of fact remained as to whether Anita Glarum was a mortgagor.

Even if the BANK had properly authenticated the mortgage it claimed to be the original, that document would only create another issue of fact—whether Anita Glarum was a mortgagor. On the face of the mortgage, the "Borrower" is stated to

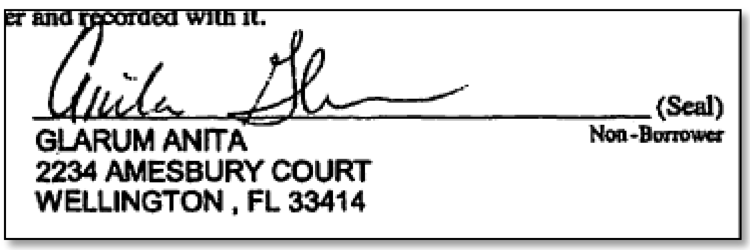
[87] Hrg., p. 43 (emphasis added) (Supp. R. 601).

be Gary Glarum "joined by his wife Glarum Anita."[sic][88] Leaving aside the misnomer in the identification of Anita Glarum as "Glarum Anita," the document itself specifies that the person bound by the instrument—the mortgagor—is the Borrower:[89]

(B) "Borrower" is GARY GLARUM JOINED BY HIS WIFE GLARUM ANITA

Borrower is the mortgagor under this Security Instrument.

Yet, on the signature page, only Gary Glarum is identified as a "Borrower." Anita Glarum (or "Glarum Anita") is clearly shown as a "Non-Borrower."



er and recorded with it.

(Seal)
GLARUM ANITA Non-Borrower
2234 AMESBURY COURT
WELLINGTON , FL 33414

The mortgage, therefore, contains a factual conflict within its four corners. Ms. Glarum is said to be "joining" her husband as a borrower, but is signing as a non-borrower. If Ms. Glarum is not a "borrower" as that term is used in the mortgage, then she is not a mortgagor.

In response, the BANK acknowledged that Ms. Glarum was a "non-borrower,"[90] but never addressed the fact that the lien instrument itself equates

[88] Mortgage attached to Complaint (R. 14).

[89] *Id*.

[90] Hrg. p. 48 (Supp. R. 606).

"borrower" and "mortgagor." Oddly, the BANK argued that, because it was only "trying to foreclose out her interest," it was irrelevant that she was not a mortgagor under the instrument. According to the BANK, Ms. Glarum was like any other junior lienholder, such as the homeowners' association, which likewise was not a mortgagor on the subject mortgage.[91] Of course, it hardly bears mentioning that, an ownership interest, such as that held by Ms. Glarum, is superior to that of the BANK (unlike the interest of a junior lienholder) unless she is shown to have voluntarily liened her property as a mortgagor.

Nevertheless, the trial court again concluded that this factual issue was insufficient to bar summary judgment:

> THE COURT: I'm going to determine that the fourth and fifth affirmative defense do not preclude entry of summary judgment.[92]

G. The Orsini Affidavit was defective.

The OWNERS asked the trial court to strike the Orsini Affidavit because, among other things: (1) necessary documents were not attached to the affidavit as required by Rule 1.510(e); and 2) it was not based upon personal knowledge.[93]

---

[91] Hrg., pp. 48-49 (Supp. R. 606-07).

[92] Hrg., p. 49 (Supp. R. 607).

[93] Defendants' Motion to Strike, filed on December 15, 2009 (R. 165-73).

1. The documents referenced in the affidavit were not attached.

In *Ferris v. Nichols*, 245 So. 2d 660, 662 (Fla. 4th DCA 1971), this Court addressed summary judgment affidavits in the context of an action to enforce a promissory note. Although the movant had supplied two affidavits, this Court 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.)

Ferris v. Nichols, 245 So.2d at 662 (emphasis added). The trial court erred, therefore, in refusing to enforce this rule.

2. The affiant had no personal knowledge of the matters to which he attested.

At deposition, Mr. Orsini conceded that his personal knowledge of the matters in his affidavit was limited to reviewing the copies of records in a computer database:

> Q. No. 1 says that you had personal knowledge of the facts. If you could, can you take me through what you did to gain personal knowledge of the facts?
>
> A. When the affidavit was given to me, I reviewed it to see what they were saying as far as it went, like defendants failed to pay the

> installment due on May 1st, 2008 and all subsequent payments after that. So I went back and reviewed the pay history and verified that nothing had been done after that point in time. Reviewed the note and the mortgage, as well as a copy of the complaint and the assignment.
>
> * * *
>
> Q. And in paragraph 2, paragraph 2 says that the information you gave in this affidavit is contained in the original books and records maintained in the office of the plaintiff. Can you describe those records for me that you wrote that, please?
>
> A. Well, I review copies that are on our computer database.[94]

Mr. Orsini admitted that he did not make any of the entries he reviewed, had "no idea" who did, and had "no idea" if that person even worked at Home Loan Servicing.[95]

Worse, some of the records upon which Mr. Orsini relied were prepared by an entirely different company, Litton Loan Services.[96] Mr. Orsini confessed he had no personal knowledge of whether Litton had been an agent or attorney-in-fact of the Plaintiff.[97] In fact, the BANK's attorney objected to questioning about Litton's role in the case on the grounds that "[Mr. Orsini] doesn't know anything about Litton."[98]

---

94 Orsini Deposition, pp. 8-9 (Supp. R. 244-45).

95 Orsini Deposition, p. 10 (Supp. R. 246); *see also*, pp. 12, 43 (Supp. R. 248, 279).

96 Orsini Deposition, p. 11, 21 (Supp. R. 247, 257).

97 Orsini Deposition, p. 26, 27 (Supp. R. 262, 263).

98 Orsini Deposition, p. 27 (Supp. R. 263).

It is well-settled that mere conclusory statements about information contained in documents reviewed for an affidavit are hearsay. *See Zoda v. Hedden*, 596 So. 2d 1225, 1226 (Fla. 2d DCA 1992). In *Zoda*, the only foundation for allegations of personal knowledge was affiant's examination of public records. The Court held that such a review was insufficient to meet the requirements of Rule 1.510(e), Fla. R. Civ. P. Here, as in *Zoda*, Mr. Orsini's only foundation for his alleged personal knowledge consisted of an examination of records.

In *Thompson v. Citizens Nat'l Bank of Leesburg*, 433 So. 2d 32 (Fla. 5th DCA 1983), the Court stated:

> An affidavit based on information and belief rather than personal knowledge is not admissible into evidence and should not be considered by the trial court on a motion for summary judgment….The affiant did not (nor could he) state that he had personal knowledge of the matters contained in Metro's business records, nor that the bank records were complete or correct and were kept under his supervision and control.

Thompson, 433 So. 2d at 33 (internal citations omitted). In *Thompson*, as in the instant action, the affiant could not have had personal knowledge of the accuracy of records kept by a separate company. The unsupported proclamations in Mr. Orsini's affidavit were therefore based upon unverified, unauthenticated records, rendering the affidavit inadmissible hearsay.

And while the BANK made no attempt during Mr. Orsini's deposition to lay the necessary foundation for the documents he reviewed, he could not have done so because he did not qualify as a records custodian. To be deemed a records custodian capable of authenticating the documents or laying the foundation for the business records exception to hearsay, Mr. Orsini must be in charge of the activity constituting the business practice or well enough acquainted with the activity to give the testimony. *Specialty Linings, Inc. v. B.F. Goodrich Company*, 532 So. 2d 1121 (Fla. 2d DCA 1988) *citing Alexander v. Allstate Insurance Company*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980). Furthermore, those records must be in Mr. Orsini's custody as a regular part of his work or he must supervise the creation of the records. *See Mastan Co. v. American Custom Homes, Inc*., 214 So. 2d 103 (Fla. 2d DCA 1968). While there remained considerable doubt that Mr. Orsini was qualified to testify to the authenticity of his own company's records, there can be no doubt that he was eminently <u>un</u>qualified to testify regarding the records of Litton Loan Services.

The trial court, nevertheless, denied the motion to strike the affidavit as hearsay.[99] Not only was this ruling erroneous, but because the affidavit constituted the sum total of the BANK's summary judgment evidence, the granting of summary judgment based upon this hearsay was reversible error.

[99] Hrg., p. 17 (Supp. R. 575).

H. The trial court shifted the burden to the OWNERS to prove their affirmative defenses.

As shown throughout the discussion above, the trial court repeatedly, and incorrectly, shifted the burden on the OWNERS to prove their own affirmative defenses at summary judgment. However, it is "[t]he party moving for summary judgment [that] must factually refute or disprove the affirmative defenses raised, or establish that the defenses are insufficient as a matter of law. *Stop & Shoppe Mart, Inc. v. Mehdi*, 854 So. 2d 784 (Fla. 5th DCA 2003); *Knight Energy Servs., Inc. v. Amoco Oil Co.,* 660 So.2d 786, 788 (Fla. 4th DCA 1995); *Cufferi v. Royal Palm Dev. Co., Inc.*, 516 So.2d 983, 984 (Fla. 4th DCA 1987) (In a foreclosure action, "[a] summary judgment should not be granted where there are issues of fact raised by affirmative defense which have not been effectively factually challenged and refuted.").

Until this burden is met, the non-moving party is under no obligation to prove any matter. *Frost v. Regions Bank*, 15 So.3d 905 (Fla. 4th DCA 2009) (summary judgment entered in error where movant's affiant failed to address all affirmative defenses). *See also Spradley v. Stick*, 622 So.2d 610 (Fla. 1st DCA 1993) (movant's proof of the nonexistence of a genuine fact must be "conclusive").

Accordingly, the granting of summary judgment was error.

II. The Trial Court Erred in Denying Discovery Regarding Ownership of the Note.

The OWNERS had contested the BANK's claim of ownership of the note and mortgage at every juncture. Yet, the BANK sought to block every discovery request regarding ownership on the grounds of relevance. It was the BANK's steadfast position that its ownership had already been conclusively established based solely on the unsworn declaration of its lawyers:

> MR. VANHOOK [BANK's lawyer]: Your Honor, all the -- with Number 3, I'm just basically confused by it. What I think that they're looking for is something to do with ownership of note and mortgage. We have the original note and mortgage. It's been filed.[100]

Based on this argument, the trial court excused the BANK from producing the one trust document that would have revealed when, if ever, the note and mortgage were delivered (and thus, transferred) to Plaintiff's trust.[101]

The record that the trial court protected from discovery, the Trustee's Certification, is required by Section 2.01 of the PSA. It is a letter that states whether all documents delivered to the Trustee pursuant to Section 2.01 (i.e. the note, mortgage, assignment, etc. for each loan being securitized) were actually received by the trustee (the BANK):

> Within seventy (70) days of the Closing Date, the Trustee shall deliver to the Depositor and the Servicer the Trustee's Certification, substantially in the form of Exhibit D attached hereto, evidencing the

[100] Transcript of Motion to Compel Hearing May 4, 2009, p. 11 (R. 140).

[101] *Id*.; Order Compelling Discovery, dated May 8, 2009 (R. 129).

> completeness of the Mortgage Files, with any exceptions noted thereto.[102]

The OWNERS requested production of that certification, but the BANK objected on the grounds of relevance:

> **<u>Request No 3:</u>**
>
> The Trustee's certification that all documents required under Section 2.01 were executed and received. 2.02(a).[103]
>
> **Response:**
>
>> Plaintiff objects to request to produce number 3 due to the fact that Plaintiff has not lost the original Note and Mortgage. Plaintiff has attached a copy of the original Note and Mortgage, and Assignment of Mortgage. The original Note and Mortgage, and Assignment of Mortgage have been filed with the Clerk.[104]

The OWNERS moved to compel production of the document pointing out that "what Plaintiff or its counsel asserts about the documents they have placed in the Court file is not evidence."[105] The motion pointed to the existing red flags concerning the BANK's claim of ownership: 1) the assignment postdated the closing date of the trust and was executed "not to perfect the Trust, but to create evidence upon which Plaintiff seeks to take Defendant's home;" and 2) the

---

[102] PSA, § 2.02, p. 67 (Supp. R. 73) and Exhibit D to PSA (Supp. R. 170).

[103] Defendants' Request for Production Regarding Trust Documentation and Mortgage Loan Ownership, dated November 21, 2008, p. 2 (Supp. R. 352).

[104] Plaintiff's, Response to Defendant's Request for Production, dated December 16, 2008, ¶ 3 (Supp. R.358).

[105] Defendants' Motion to Compel, dated November 10, 2008, p. 4 (R. 91).

assignment was prepared by the Servicer, Home Loan Services, Inc., and signed by one of its employees holding herself out as an Assistant Vice-President of First Franklin Financial Corporation.[106]

At the hearing, the BANK reiterated its argument that all discovery regarding ownership was irrelevant because its lawyers have proclaimed that the documents in the file are the originals. To determine relevancy of evidence for discovery, however, the court may not consider as fact attorney's unsworn statements. *Bassette v. Health Mgmt. Res. Corp.*, 661 So. 2d 317 (Fla. 2d DCA 1995). The trial court, nevertheless, denied the OWNERS' motion to compel.[107]

The Trustee's Certificate was not only relevant, but went to the very heart of the OWNERS' defense that the BANK lacked standing. If the named Plaintiff could not produce the Trustee's Certificate (just as it could not produce other documents held by the trust), that fact would be relevant to show that the Servicer conducting the litigation was not authorized to bring this action in the BANK's name (as suggested by NationPoint's competing claim to be the Servicer). If the Bank did produce the Certificate, the presence of the subject loan on the exception list would establish that the loan instruments were never received, and thus, never transferred to the trust.

[106] *Id*. at 4-5 (R. 91-92).
[107] *Id*.

Such a revelation would cast doubt on whether the note and mortgage in the court file were genuine originals, or conversely, whether the originals were being presented by an entity different from, but posing as, the named Plaintiff. In either event, the BANK (the named Plaintiff and trustee) would have no standing to foreclose.

Because the discovery was highly relevant to the OWNERS' defense and because withholding the discovery prejudiced the OWNERS in their presentation of issues of fact at the summary judgment hearing, it was reversible error to deny their motion to compel. Rule 1.280(b)(1) Fla. R. Civ. P.; *see Davich v. Norman Bros. Nissan, Inc.*, 739 So. 2d 138, 140 (Fla. 5th DCA 1999) (observing that "the concept of relevancy is broader in the discovery context than in the trial context," appellate court vacated summary judgment where trial court had denied relevant discovery); *In re Estate of Sauey*, 869 So. 2d 664, 665 (Fla. 4th DCA 2004) (where materials sought by a party would appear to be relevant to the subject matter of the pending action, the information is fully discoverable); *Epstein v. Epstein*, 519 So. 2d 1042, 1043 (Fla. 3d DCA 1988) ("Where materials sought by a party would appear to be relevant to the subject matter of the pending action, it is an abuse of discretion to deny discovery."), *citing, Orlowitz v. Orlowitz*, 199 So. 2d 97 (Fla.1967).

III. The Trial Court Erred In Entering a Sanction Against the OWNERS' counsel.

The OWNERS filed the affidavit of a forensic document examiner who had not examined the note in this case, but who opined generally that it is virtually impossible, even for an expert, to distinguish an original document from a quality color copy without the aid special equipment such as a microscope. Of course, the trial court may not weigh the evidence in determining a summary judgment, and thus, could not have made its own determination of whether the note in the court file was a copy or the original merely by looking at it. But to the extent it might have been tempted to do so, the undisputed evidence established that the determination requires expertise and special tools. At no point did Ms. Lord attest, or even imply, in her affidavit that she reviewed the note and mortgage in question.

The BANK responded with a motion which asked the court to determine whether the affidavit was fraudulent.[108] The BANK also sought sanctions against the OWNERS' counsel under §57.105, Fla. Stat. (2009), despite never having served the motion twenty-one days in advance as required by subsection (4) of that statute.[109] What was far more reprehensible about the motion, however, was that it misrepresented the contents of the affidavit as stating that "it is impossible for

---

[108] Motion For Determination of Fraud Upon The Court or in the Alternative Motion to Strike Affidavit of Rita M. Lord And Motion For Sanctions, dated January 20, 2010 (R. 334).

[109] *Id*.

the Affiant to determine whether the Note and Mortgage filed with the court are originals or high quality copies."[110]

Using this misrepresentation, and noting that the affidavit predated the filing of the note and mortgage, the BANK made outlandish and libelous accusations that the affidavit was fraudulent:

> Immediately upon receipt, the undersigned noticed a glaring inconsistency with the Affidavit of Rita M. Lord. Said affidavit was signed and notarized on November 12, 2008.
>
> * * *
>
> Therefore, it is impossible for Rita M. Lord to have reviewed the originals on file with this court when said affidavit was sworn and subscribed to.
>
> * * *
>
> It is unbelievable the audacity that counsel for the Defendant has, to assume that this honorable court or the undersigned would not have the intelligence to notice such a blatant attempt to commit fraud upon this court.[111]

The motion also attempted to attribute some nefarious purpose to the fact that the same affidavit had been filed in other cases in which the same opinion would be relevant.[112] These shrill protests concluded with a "demand" that the conduct be reported to the Florida Bar.[113]

---

[110] *Id*. at ¶ 2 (R. 335).

[111] *Id*. at ¶¶ 3, 5, 7 (R. 335-36.)

[112] *Id*. at ¶ 6 (R. 335).

[113] *Id*. at ¶ 8 (R. 336).

The OWNERS responded by pointing out that the supposed "glaring inconsistency" rested entirely on the BANK's false description of Ms. Lord's affidavit—a misrepresentation that could only have stemmed from "an embarrassingly elementary error in reading the Affidavit or a deliberate attempt to convince this Court there is an inconsistency when there is none."[114] In short, it was quite plain that it was the BANK, not the OWNERS, who was attempting to deceive the trial court.

In ruling upon the motion, however, the trial court called Ms. Lord a "bastard expert" and repeatedly expressed its concern that the same affidavit had been used in other cases.[115] The court then struck the affidavit and entered a sanction of attorneys' fees against the OWNERS' attorneys.[116] The order contained no findings of fact, stating only that "[t]he Affidavit of Rita M. Lord is stricken from the record and counsel for the Defendant shall pay Plaintiff's attorney's fees to bring said motion within 20 days of the date hereon."[117]

---

[114] Defendants, Gary Glarum and Anita Glarum's Cross-Motion for Determination of Fraud on the Court and Memorandum in Opposition to Plaintiff's Motion to Strike Affidavit of Rita M. Lord, dated January 25, 2010, pp. 2-3 (R. 507-08).

[115] Hrg., pp. 21, 22-23, 24, 25-26, 29 (Supp. R. 579, 580-81, 582, 583-584, 587).

[116] Hrg., p. 30 (R. 588).

[117] Order on Plaintiff's Motion for Determination of Fraud or in the Alternative to Strike Affidavit of Rita M. Lord and Motion for Sanctions, dated March 11, 2010, (R. 668).

To the extent that the trial court appears to have stricken the affidavit, not based upon an assessment of its evidentiary value in this case, but upon a concern that it had been filed in other cases, the ruling was unwarranted and erroneous. But the truly egregious aspect of the order was that it required counsel to pay sanctions without an articulation of the legal basis or factual findings.

First, the BANK's only alleged basis for such a sanction was §57.105, Fla. Stat. (2009), but there was no showing that the BANK served the motion twenty-one days before filing as required. Nor would the statute be applicable since it pertains only to claims that the attorney knew or should have known were not supported by the material facts. §57.105(1)(a), Fla. Stat. (2009). Even if the filing of an affidavit could be construed as a "claim," there was no showing by the BANK, or finding by the court, that the material facts of the affidavit were false—i.e. that a layperson can always distinguish color copies from originals with the naked eye.

Second, according to the Florida Supreme Court, the trial court's inherent authority to assess attorneys' fees against an attorney must be based upon an express finding of bad faith conduct and must be supported by detailed factual findings describing any specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees. *Moakley v. Smallwood*, 826 So. 2d 221, 227 (Fla. 2002).

The trial court neither made an express finding of bad faith conduct nor entered detailed factual findings describing the specific acts of bad faith conduct on the part of the OWNERS' counsel.[118] Therefore, the entry of sanctions against OWNERS' counsel was an abuse of discretion.

---

[118] Order on Plaintiff's Motion for Determination of Fraud or in the Alternative to Strike Affidavit of Rita M. Lord and Motion for Sanctions, entered on March 11, 2010 (R. 671). The OWNERS submit that the unjustified sanction against their attorneys is entirely consistent with their two Motions for Disqualification filed in this case that alleged a fear of judicial antipathy towards counsel. This Court denied a writ of prohibition regarding the two recusal motions on the grounds it had previously denied writs in other cases involving conflict between the same judge and the same attorneys as in this case. Order in *Glarum v. LaSalle Bank*, Case No. 4D10-603 (Fla. 4th DCA March 19, 2010).

CONCLUSION

Based upon the foregoing facts and case law, the summary judgment in this case should be reversed and the case remanded with instructions to permit the requested discovery of the Trustee's Certificate. The Order on Plaintiff's Motion for Determination of Fraud or in the Alternative to Strike Affidavit of Rita M. Lord and Motion for Sanctions, entered on March 11, 2010, should also be vacated.

Dated July 12, 2010

ICE LEGAL, P.A.
Counsel for Appellants
1015 N. State Road 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888
Email: mail@icelegal.com

By: ______________________
Thomas Ice, Esq.
Florida Bar No. 0521655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this July 12, 2010 on all parties on the attached service list.

ICE LEGAL, P.A.
Counsel for Appellants
1015 N. State Road 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888
Email: mail@icelegal.com

~~By:~~ ____________________
Thomas Ice, Esq.
Florida Bar No. 0521655

SERVICE LIST

Thomassina Moore, Esq.
BUTLER AND HOSCH, P.A.
3185 S. Conway Road, Suite E
Orlando, FL 32812-7315
Appellee's counsel

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.

ICE LEGAL, P.A.
Counsel for Appellants
1015 N. State Road 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888
Email: mail@icelegal.com

By: ________________
Thomas Ice, Esq.
Florida Bar No. 0521655