

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION**

CASE NO. 2008-013676-CI-11

**DEUTSCHE BANK NATIONAL TRUST COMPANY,
as Trustee for IXIS REAL ESTATE CAPITAL TRUST
2006-HE3,**

PLAINTIFF,

v.

AIDA HAYES AND HOWARD HAYES

DEFENDANTS.

NOTICE OF PRODUCTION

YOU ARE NOTIFIED that after 10 days from the date of service of this notice, if service is by delivery, or 15 days from the date of service, if service is by mail, and if no objection is received from any party, the undersigned will issue or apply to the clerk of this court for issuance of the attached subpoena directed to JOHN COTTRELL, who is not a party and whose address is 10004 N. DALE MABRY HIGHWAY, SUITE 112, TAMPA, FL 33618, to produce the items listed at the time and place specified in the subpoena.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this ____ day of March, 2010 to MEGHAN A. KENEFIC, Shapiro & Fishman, LLP, 10004 N. Dale Mabry Highway, Suite 112, Tampa, FL 33618.

By: 

MATTHEW D. WEIDNER
Attorney for Defendant
1229 Central Avenue
St. Petersburg, FL 33705
(727) 894-3159
FBN: 0185957

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION**

CASE NO. 2008-013676-CI-11

**DEUTSCHE BANK NATIONAL TRUST COMPANY,
as Trustee for IXIS REAL ESTATE CAPITAL TRUST
2006-HE3,**

PLAINTIFF,

v.

AIDA HAYES AND HOWARD HAYES

DEFENDANTS.

SUBPOENA DUCES TECUM FOR RECORDS

STATE OF FLORIDA:

TO: JOHN COTTRELL
ASSISTANT VICE PRESIDENT – SAXON MORTGAGE SERVICES, INC.
SHAPIRO & FISHMAN, LLP
10004 N. DALE MABRY HIGHWAY
SUITE 112
TAMPA, FL 33618

YOU ARE HEREBY COMMANDED to appear at the law offices of MATTHEW D. WEIDNER, P.A., 1229 Central Avenue, St. Petersburg, Florida, 33705, on APRIL 15, 2010, at 12:00 PM, and to have with you at the above time and place the following:

1. All books, papers, records, documents and other tangible things kept by SAXON MORTGAGE SERVICES, INC. concerning the transactions alleged in the complaint against AIDA HAYES AND HOWARD HAYES.
2. Any and all other books, papers, records, documents or tangible things that relate to DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR IXIS REAL ESTATE CAPITAL TRUST 2006-HE3 claim against AIDA HAYES AND HOWARD HAYES.
3. All employment records, including but not limited to timesheets, which exist between JOHN COTTRELL and any employer who has employed JOHN COTTRELL two weeks preceding and two weeks subsequent to the execution of this document.

4. All records that purport to give JOHN COTTRELL the authority to sign or execute any documents on behalf of any person or entity.
5. If you are a notary public, your notary public's logs.
6. All documents, records, books, evidence or instructions that you reviewed or relied upon in order to prepare the affidavit or assignment executed in this case.

These items will be inspected and may be copied at that time. You will not be required to surrender the original items. You may comply with this subpoena by providing legible copies of the items to be produced to the attorney whose name appears on this subpoena on or before the scheduled date of production. You may condition the preparation of the copies upon the payment in advance of the reasonable cost of preparation. You may mail or deliver the copies to the attorney whose name appears on this subpoena and thereby eliminate your appearance at the time and place specified above. You have the right to object to the production pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on this subpoena. THIS WILL NOT BE A DEPOSITION. NO TESTIMONY WILL BE TAKEN.

If you fail to: (a) appear as specified, or (b) furnish the records instead of appearing as provided above; or (c) object to this subpoena **you may be in contempt of Court.** You are subpoenaed by the attorneys whose names appear on this subpoena, and unless excused from this subpoena by the attorney or the Court, you shall respond to this subpoena as directed.

FOR THE COURT

Matthew D. Weidner, P.A.
1229 Central Avenue
St. Petersburg, FL 33705

By: _____
Matthew D. Weidner
FBN: 0185957

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION**

CASE NO. 2008-013676-CI-11

**DEUTSCHE BANK NATIONAL TRUST COMPANY,
as Trustee for IXIS REAL ESTATE CAPITAL TRUST
2006-HE3,**

PLAINTIFF,

v.

AIDA HAYES AND HOWARD HAYES

DEFENDANTS.

**DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S AFFIDAVIT IN SUPPORT OF
ITS MOTION FOR FINAL SUMMARY JUDGMENT AND FOR ATTORNEY'S FEES**

COMES NOW, the Defendants AIDA HAYES AND HOWARD HAYES (hereinafter "Defendant"), by and through the undersigned counsel MATTHEW D. WEIDNER, and respectfully MOTIONS THIS COURT TO STRIKE PLAINTIFF'S AFFIDAVIT IN SUPPORT OF ITS MOTION FOR FINAL SUMMARY JUDGMENT AND FOR ATTORNEY'S FEES, pursuant to Fla. R. Civ. Pro. 1.510, and in support thereof states as follows:

FACTS

1. This is an action for foreclosure of real property owned by the Defendant.
2. The named plaintiff in this case is DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR IXIS REAL ESTATE CAPITAL TRUST 2006-HE3 (hereinafter "Plaintiff").

3. On March 2, 2010 Plaintiff, by and through its undersigned counsel, gave Notice of Filing of Affidavit in Support of Its Motion for Final Summary Judgment and the accompanying Affidavit (hereinafter “Affidavit”).

4. The Affiant of the above-mention Affidavit was identified as JOHN COTTRELL (hereinafter “Affiant”). The Affiant identified himself as an “Assistant Vice President” for SAXON MORTGAGE SERVICES, INC. (hereinafter “Saxon”) in the opening paragraph of the Affidavit which appears to be a paragraph reserved for the Affiant’s title. Saxon and its relationship to the Plaintiff, however, was not identified anywhere in the Affidavit.

5. The Affiant, based upon his personal knowledge, averred in the Affidavit that the total amount owed on the Note and Mortgage allegedly executed between the Plaintiff and the Defendant was \$159,661.70¹ and that “[the Plaintiff] is the owner and holder of that certain mortgage originally given by [the Defendant].”²

6. The Affiant also averred that he “has access, custody and control of the records maintained by the Plaintiff with respect to the mortgage loan account which is the subject of the instant action.”³ These records, however, were not attached to the Affidavit. Further, upon information and belief, these records are what form the basis for the Affiant’s statements.

7. Upon information and belief, Saxon is a “middleman” of sorts who is responsible for the transfer of funds between the various assignees of the underlying Mortgage and Note and has no knowledge of the underlying transactions between the Plaintiff and Defendant.

8. Upon information and belief, the Affiant, as employee of Saxon and not the Plaintiff, has no knowledge of the underlying transactions between the Plaintiff and Defendant.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT’S MOTION

¹ See Plaintiff’s Affidavit in Support of its Motion for Summary Judgment, ¶9.

² Id., ¶6.

³ Id., ¶2.

I. The Affidavit Should be Struck because the Plaintiff Failed to Attach Documents Referred to in the Affidavit

a. Legal Standards

Fla. R. Civ. Pro. 1.510(e) provides, in part, that “[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.” Failure to attach such papers is grounds for reversal of summary judgment decisions. *See CSX Transp., Inc. v. Pasco County*, 660 So. 2d 757 (Fla. 2d DCA 1995) (reversing summary judgment granted below where the affiant based statements on reports but failed to attach same to the affidavit.)

b. Argument

9. Here, the Affiant states in the Affidavit that he “has access, custody and control of the records maintained by the Plaintiff with respect to the mortgage loan account which is the subject of the instant action.”⁴ These records, however, were not attached to the Affidavit. Furthermore, upon information and belief, these records are what form the basis for the Affiant’s statements, particularly his statement that amount owed on the Note and Mortgage allegedly executed between the Plaintiff and the Defendant was \$159,661.70⁵ and that “[the Plaintiff] is the owner and holder of that certain mortgage originally given by [the Defendant].”⁶ In essence, the Affiant has averred to records which she did not submit.

WHEREFORE, because the Plaintiff has failed to attach documents referred to in its Affidavit in violation of Fla. R. Civ. Pro. 1.510(e), the Affidavit should be struck in whole.

II. The Affidavit Should be Struck because the Affidavit Was Not Based Upon the Affiant’s Personal Knowledge

a. Legal Standards

⁴ *See Plaintiff’s Affidavit in Support of its Motion for Summary Judgment*, ¶2.

⁵ *Id.*, ¶9.

⁶ *Id.*, ¶6.

As a threshold matter, the admissibility of an affidavit rests upon the affiant having personal knowledge as to the matters stated therein. *See* Fla. R. Civ. Pro. 1.510(e) (reading, in pertinent part, that “affidavits shall be made on personal knowledge”); Enterprise Leasing Co. v. Demartino, 15 So. 3d 711 (Fla. 2d DCA 2009); West Edge II v. Kunderas, 910 So. 2d 953 (Fla. 2d DCA 2005); In re Forefeiture of 1998 Ford Pickup, Identification No. 1FTZX1767WNA34547, 779 So. 2d 450 (Fla. 2d DCA 2000). Additionally, a corporate officer’s affidavit which merely states conclusions or opinion is not sufficient, even if it is based on personal knowledge. Nour v. All State Supply Co., So. 2d 1204, 1205 (Fla. 1st DCA 1986). Most importantly, an affiant should state in detail the facts showing that the affiant has personal knowledge. *See* Hoyt v. St. Lucie County, Bd. Of County Comm’rs, 705 So. 2d 119 (Fla. 4th DCA 1998) (holding an affidavit legally insufficient where it failed to reflect facts demonstrating how the affiant would possess personal knowledge of the matters at issue in the case); Carter v. Cessna Fin. Corp., 498 So. 2d 1319 (Fla. 4th DCA 1986) (holding an affidavit legally insufficient where the affiant failed to set out a factual basis to support a claim of personal knowledge of matter at issue in the case and failed to make assertions based on personal knowledge.)

The Third District, in Alvarez v. Florida Ins. Guaranty Association, 661 So. 2d 1230 (Fla. 3d DCA 1995), noted that “the purpose of the personal knowledge requirement is to prevent the trial court from relying on hearsay when ruling on a motion for summary judgment and to ensure that there is an admissible evidentiary basis for the case rather than mere supposition or belief.” *Id.* at 1232 (quoting Pawlik v. Barnett Bank of Columbia County, 528 So. 2d 965, 966 (Fla. 1st DCA 1988)). This opposition to hearsay evidence has deep roots in Florida common law. In Capello v. Flea Market U.S.A., Inc., 625 So. 2d 474 (Fla. 3d DCA 1993), the Third District

affirmed an order of summary judgment in favor of Flea Market U.S.A as Capello's affidavit in opposition was not based upon personal knowledge and therefore contained inadmissible hearsay evidence. *See also* Doss v. Steger & Steger, P.A., 613 So. 2d 136 (Fla. 4th DCA 1993); Mullan v. Bishop of Diocese of Orlando, 540 So. 2d 174 (Fla. 5th DCA 1989); Crosby v. Paxson Electric Company, 534 So. 2d 787 (Fla. 1st DCA 1988); Page v. Stanley, 226 So. 2d 129 (Fla. 4th DCA 1969). Thus, there is ample precedent for striking affidavits in full which are not based upon the affiant's personal knowledge.

b. Argument

Here, the entire Affidavit is hearsay evidence as the Affiant has absolutely no personal knowledge of the facts stated therein. As an employee of Saxon, whose relationship to the Plaintiff is not even identified in the Affidavit, he has no knowledge of the underlying transaction between the Plaintiff and the Defendant. Neither the Affiant nor Saxon: (1) were engaged by the Plaintiff for the purpose of executing the underlying mortgage transaction with the Defendant; or (2) had any contact with the Defendant with respect to the underlying transaction between the Plaintiff and Defendant. At best, Saxon, who is not the named Plaintiff, acted as a middleman of sorts, whose primary function was to transfer of funds between the various assignees of the underlying Mortgage and Note. Most importantly, the Affidavit fails to set forth with any degree of specificity what duties Saxon performs for the Plaintiff. Thus, the Affiant has failed to state in detail the facts showing that she has personal knowledge.

Because the Affiant has no personal knowledge of the underlying transaction between the Plaintiff and Defendant, any statement she gives which references this underlying transaction (such as the fact that the Plaintiff is allegedly owed sums of monies in excess of \$159,000) is, by its very nature, hearsay. The Florida Rules of Evidence define hearsay as "a statement, other

than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Fla. Stat. §90.801(1)(c) (2007). Here the Affiant is averring to a statement (that the Plaintiff is allegedly owed sums of money) which was made by someone other than herself (namely, the Plaintiff) and is offering this as proof of the matter asserted (that Plaintiff is entitled to enforce the Note and Mortgage and that Plaintiff is entitled to a judgment as a matter of law.) At best, the only statements which the Affiant can aver to are those which regard the transfer of funds between the various assignees of the Mortgage and Note.

The Plaintiff may argue that while the Affiant’s statements may be hearsay, because they may be based off of certain alleged “business” records, they should nevertheless be admitted under the “Records of Regularly Conducted Business Activity” exception. Fla. Stat. §90.803(6) (2007). This rule provides that notwithstanding the provision of §90.802 (which renders hearsay statements inadmissible), hearsay statements are not inadmissible, even though the declarant is available as a witness, if the statement is

[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. *Emphasis added.*

There are, however, several problems with this argument. To begin, and as previously demonstrated, no memorandums, reports, records, or data compilation have been offered by the Plaintiff. Moreover, the First District has recently held that lists of payments due and owing, such as the list found in paragraph four, are inadmissible hearsay statements and not business

records and it is therefore an error to award summary judgment based on such an affidavit. Mitchell Brothers, Inc. v. Westfield Ins. Co., 35 Fla. L. Weekly D107 (Fla. 1st DCA Dec. 31, 2009).

WHEREFORE, because the Affiant's statements in the Affidavit are not based upon personal knowledge and are therefore inadmissible hearsay evidence to which no hearsay exception applies, the Affidavit should be struck in whole.

III. Sanction of Attorney's Fees is Appropriate

Fla. R. Civ. Pro. 1.510(g) reads, in full, that

[i]f it appears to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorneys' fees, and any offending party or attorney may be adjudged guilty of contempt. *Emphasis added.*

The undersigned counsel has expended considerable time and resources preparing to defend against an affidavit which has, on its face, no basis in law. Both the Plaintiff and the Plaintiff's counsel knew that the Affiant's affidavit lacked authenticity and reliability yet still chose to file it with the Court. This may be indicia of a modus operandi on the Plaintiff's part to present misrepresentations and false affidavits to the Court which make an award of attorney's fees and costs an appropriate sanction.

WHEREFORE, Defendant asks this Court to GRANT its MOTION TO STRIKE PLAINTIFF'S AFFIDAVIT IN SUPPORT OF ITS MOTIN FOR SUMMARY JUDGMENT and enter an ORDER granting ATTORNEY'S FEES AND COSTS and any other relief the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 8th day of March, 2010 to MEGHAN A. KENEFIC, Shapiro & Fishman, LLP, 10004 N. Dale Mabry Highway, Suite 112, Tampa, FL 33618.

By: 

MATTHEW D. WEIDNER
Attorney for Defendant
1229 Central Avenue
St. Petersburg, FL 33705
(727) 894-3159
FBN: 0185957