

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

HSBC BANK, N.A., AS TRUSTEE FOR THE
HOLDERS OF DEUTSCHE ATL-A SECURITIES
MORTGAGE LOAN TRUST, SERIES 2007-AR2
MORTGAGE PASS-THROUGH CERTIFICATES,

PLAINTIFF,

CASE NO. 09-009463-19

UCN: 522009CA009463XXCICI

v.

CALVIN D. JOHNSON; JACQUELEINE JOHNSON;
FIRST HOME BANK; UNKNOWN TENANT NO. 1;
UNKNOWN TENANT NO. 2; and ALL UNKNOWN
PARTIES CLAIMING INTERESTS BY, THROUGH,
UNDER OR AGAINST A NAMED DEFENDANT TO
THIS ACTION, OR HAVING OR CLAIMING TO HAVE
ANY RIGHT, TITLE OR INTEREST IN THE
PROPERTY HEREIN DESCRIBED,

DEFENDANTS.

**DEFENDANTS' OBJECTION TO PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT**

COMES NOW, the Defendants Calvin D. Johnson and Jacqueline Johnson (hereinafter
"Defendants") by and through undersigned counsel MATTHEW D. WEIDNER, and hereby files
this DEFENDANTS' OBJECTION TO PLAINTIFF'S MOTION FOR SUMMARY
JUDGEMENT, and as support thereof states:

FACTS

1. This is an action for foreclosure of residential real property owned by the Defendants.
2. The named Plaintiff in this case is HSBC BANK, N.A., AS TRUSTEE FOR THE
HOLDERS OF DEUTSCHE ATL-A SECURITIES MORTGAGE LOAN TRUST, SERIES

2007-AR2 MORTGAGE PASS-THROUGH CERTIFICATES (hereinafter "Plaintiff"). The Plaintiff initiated the instant litigation when it filed its complaint on or about May 27, 2009.

3. On or about July 29, 2009, Defendants filed Request for Admissions and Request for Production.

4. On or about August 10, 2009, the Plaintiff filed a Response to Request for Admission.

5. On or about August 26, 2009 the Plaintiff filed a Response to Request for Production and a Privilege Log. However, this response objected to nearly every one of the Defendants' production requests.

6. Defendants filed an Answer and Affirmative Defenses on or about March 26, 2010.

7. The Plaintiff failed to respond to Defendants' Answer or Affirmative Defenses. The Defendants duly filed their Motion to Compel Production of Documents on or about June 18, 2010 in a formal attempt to set these objections for hearing. .

8. Notwithstanding the Defendants' motions, the Plaintiff elected to set a hearing for its Motion for Summary Judgment. In support of this motion, the Plaintiff filed its "Affidavit of Indebtedness"(hereinafter "Affidavit").

9. The Affidavit offered by the Plaintiff avers that the "[Affiant has] personal knowledge of the loan" and is "familiar with these records [loan payment records]."¹ Further, the Affidavit for this action by **HSBC Bank** is signed by Kathy Repka, Assistant Secretary of **BAC Home Loan Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P.**

10. While the Affiant averred that her statements were based upon his personal knowledge, she never stated in detail **how** her statements were based upon personal knowledge other than she is familiar with the loan payment records.

¹ See Affidavit of Indebtedness, ¶2 and 3.

11. The Affiant failed to attach any of these “loan payment records” to the Affidavit, instead Ms. Repka attached a document captioned, “amounts due under the note and mortgage”. It is unclear where this information comes from, and it is equally unclear if the information attached to this hearsay affidavit bears any relationship to the named Plaintiff in this case. It is further unclear if the records are the loan payment records and how those relate to the amounts due under the note and mortgage.

13. Moreover, the Affiant does not explain how she, who is an Assistant Secretary of BAC Home Loan Servicing, has knowledge of Bank of America’s “amounts due under the note,” or explain why she is swearing knowledge to have knowledge of the notes of another company, HSBC Bank, is suing over.

STANDARD OF REVIEW

14. Under Florida law, summary judgment is proper if, and only if, based on an examination of evidence, no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. *See The Florida Bar v. Green*, 926 So. 2d 1195, 1200 (Fla. 2006); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

15. Furthermore, pursuant to Rule 1.510 of the Florida Rules of Civil Procedure, a Court may grant summary judgment if, and only if, “the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fla. R. Civ. P. 1.510(c).

16. Finally, the Court must take all the facts that the non-movant states as true and must draw all reasonable inferences in favor of the non-moving party. *See Bradford v. Bernstein*, 510 So.2d

1204 (Fla. 2d DCA 1987); Petruska v. Smartparks-Silver Springs, Inc., 914 So.2d 502 (Fla. 5th DCA 2005).

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S OBJECTION

I. The Plaintiff's Motion Should Be Denied Because of Outstanding Discovery and Because the Court Has Not Ruled on the Plaintiff's Objections to the Defendants' Request for Production

a. Legal Standards

17. The Florida Rules of Civil Procedure establish a broad scope of discovery so that parties have a fair opportunity to obtain information that might be relevant to the cause of action. These rules permit a party to discover any matter if it is not privileged and if it is relevant to the claim or defense of any party. *See*, Fla. R. Civ. P. 1.280(b)(1).

18. Furthermore, it is a long-standing common law rule that a decision regarding summary judgment will not be entered where there is outstanding discovery. In Henderson v. Reyes, 702 So. 2d 616 (Fla. 3d DCA 1997), the Third District held that it was an error for the trial court to enter a final summary judgment of foreclosure in favor of Reyes while there were depositions that had not been completed and an outstanding request for the production of documents. *See also Villages at Mango Key Homeowners Ass'n, Inc. v. Hunter Development, Inc.*, 699 So. 2d 337 (Fla. 5th DCA 1997) (holding that summary judgment is inappropriate and premature when discovery is ongoing and depositions or other discovery are outstanding); Collazo v. Hupert, 693 So. 2d 631, 631 (Fla. 3d DCA 1997) (holding that while "discovery was still pending, the trial court should not have entertained a motion for summary judgment until such discovery was concluded.")

19. Finally, in Salzberg v. Eisenberg, 368 So.2d 442 (Fla. 3rd DCA 1979), a trial court ruling of summary judgment was reversed by the Third District where objections to interrogatories and

a motion to produce were pending. As the Court there explicitly noted, "prior to a determination by the trial court of these objections, it was not possible to ascertain whether any genuine issues of any material facts remained in the cause." Absent such a determination, it was untimely for the trial court to render a final summary judgment in favor of appellees." *Id* at 442. *Bold emphasis added.*

b. Argument

20. Here, the Plaintiff has objected to nearly every single one of the Defendants' Requests for Production.

21. The Defendants duly filed their Motion to Compel Production of Documents on or about June 17, 2010 in a formal attempt to set these objections for hearing. The gist of the Defendants' argument is that the discovery requested sought material, relevant and admissible evidence that is germane to issues in this case as well as to the Defendants' Affirmative Defense. This timely motion is still pending before this Court.

22. The Defendants discovery request does not ask for privileged information and is relevant to its affirmative defense filed with the Court as well as any subsequent defenses which may be developed based upon proper application of the discovery process.

23. Additionally, prior to the determination by this Court of these objections, it is not possible for the Court to ascertain whether there are any genuine issues of material fact remain in this case.

WHEREFORE, because there is outstanding discovery in this case and because this Court has not ruled on the Plaintiff's objections to the Defendants' Request for Production, the Defendants' respectfully request this Court deny the Plaintiff's Motion for Summary Judgment, and any other relief the Court deems just and proper.

I. The Plaintiff's Motion Should Be Denied Because the Plaintiff has failed to Respond to Defendants' Affirmative Defenses

a. Legal Standards

24. Under Florida law, summary judgment is proper if, and only if, based on an examination of evidence, no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. See The Florida Bar v. Green, 926 So. 2d 1195, 1200 (Fla. 2006); Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000).

25. Florida Courts clearly disallow summary judgment when plaintiffs fail to refute affirmative defenses. In Lazuran v. Citimortgage, Inc., 4D09-1340 (Fla. 4th DCA 2010), the court held the trial court's grant of summary judgment improper where the plaintiff failed to refute an affirmative defense. See also, Frost v. Regions Bank, 15 So.3d 905 (Fla. 4th DCA 2009) (Because the bank did not meet its burden to refute the Frosts' lack of notice and opportunity to cure defense, the bank is not entitled to final summary judgment of foreclosure.).

b. Argument

26. Here, the Defendants' filed a number of affirmative defenses to the Plaintiff's claims.

27. The Plaintiff failed to respond to the Defendants' affirmative defenses.

28. As mentioned above, summary judgment is only proper if no genuine issue of material fact exists. The Defendants' have raised a number of genuine issues of material fact in their affirmative defenses. By failing to respond to these affirmative defenses, the Plaintiffs have failed to respond to genuine issues of material facts that the Defendant has raised.

WHEREFORE, because the Plaintiff has failed to respond to the Defendants' Affirmative Defenses in this case and because this Court has not ruled on the Defendants' Affirmative Defenses, the Defendants' respectfully request this Court deny the Plaintiff's Motion for Summary Judgment, and any other relief the Court deems just and proper.

II. The Plaintiff's Motion for Summary Judgment Should be Denied and its Affidavit of Amounts Due and Owing Should be Struck because the Plaintiff Failed to Attach Documents Referred to in the Affidavit

a. Legal Standards

29. 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.”

30. Failure to attach such papers is grounds for reversal of summary judgment decisions. In CSX Transp., Inc. v. Pasco County, 660 So. 2d 757 (Fla. 2d DCA 1995) the Second District reversed summary judgment granted below, in part, because the affiant based his statements on reports but failed to attach same to the affidavit. The Second District noted that because these statements were based upon said reports, they were consequently not based upon the affiant’s personal knowledge, and were therefore inadmissible hearsay statements. Id at 759.

31. It is also **most important** that an affiant 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),

32. 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)).

33. 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).

b. Argument

34. The Affidavit offered by the Plaintiff in support of its Motion for Summary Judgment avers that "[the Affiant has] personal knowledge of the lain that is the subject [of the complaint]."²

35. Therefore, despite the contention that the Affiant's statement that the Affidavit was based upon her personal knowledge, all of her statements could have could have only been based upon the loan payment records which she examined. This includes her statement that "Plaintiff owns and holds the note described in the Plaintiff's Complaint dated November 22, 2006, in the current principal amount of \$618,558.63."

36. Moreover, the Affiant claims the statements are based on her personal knowledge but never explains how she has knowledge of the statements in the loan service record, if she prepares the loan service records, or how she who identifies herself with **BAC Home Loan Servicing**, L.P. f/k/a Countrywide Home Loans Servicing, L.P. has any knowledge of the

² See Amounts Due and Owing, ¶2.

activities of **HSBC Bank, N.A.**, As Trustee for the Holders of Deutsche Alt-A Securities Mortgage Loan Trust, Series 2007-AR2 Mortgage Pass-Through Certificates.

37. In spite of the Affiant's general contention in the next statement of paragraph two (2) that "[Affiant has] personal knowledge of the loan", the Affiant once again failed to aver with any amount of specificity or particularity **how** she has personal knowledge of the matters contained in these books, records, and documents which form the basis of his statements.

38. Therefore, it can only be concluded based upon the information available and belief that (1) the statements contained within the "loan payment records" were prepared by someone other than the Affiant, such as an employee or agent of the Plaintiff whose duty it is to keep the books accurately and completely; and (2) the Affiant **has absolutely no** personal knowledge of the matters contained within the books, records, and documents.

39. Since the Affiant's statements were in fact not based upon his personal knowledge they are therefore hearsay. The only way to cure this fatal defect would be for the Plaintiff to have attached the books, records, and documents which formed the basis of the Affiant's statements.

40. Nevertheless, the Plaintiff has failed to attach any of these books, records, and documents were to the Affidavit. Thus, the Affiant's statements remain inadmissible hearsay.

41. The Plaintiff may argue that while the Affiant's statements may be hearsay, 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.*

42. There are, however, several problems with this argument. To begin, no memorandums, reports, records, or data compilation have been offered by the Plaintiff; thus, the statements in question cannot be a memorandum, report, record, or data compilation.

43. Moreover, the Affiant shows a “lack of trustworthiness” because he averred that his statements were based upon his “personal knowledge” when they were, in fact, not.

44. Finally, 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; it is therefore an error to award summary judgment based on such an affidavit. Mitchell Brothers, Inc. v. Westfield Ins. Co., 24 So. 3d 1269 (Fla. 1st DCA 2009).

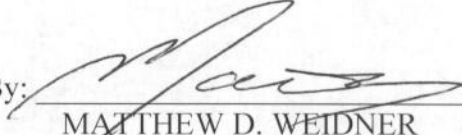
45. The failure of the Plaintiff to do attach the books, records, and documents referred to in its Affidavit is in direct violation of both the Florida Rules of Civil Procedure and multiple Florida state cases. Allowing the Affidavit would lead to the admissible of inadmissible hearsay evidence and is grounds for a reversal of a summary judgment decision.

WHEREFORE, because the Plaintiff has failed to attach documents referred to in its Affidavit, the Defendants respectfully request this Court strike the Affidavit of Amounts Due and Owing, deny the Plaintiff’s Motion for Summary Judgment, 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 18th day of June, 2010 to MICHAEL D. WILD, Smith, Hiatt & Diaz, P.A.,
PO BOX 11438, Fort Lauderdale, FL 33339-1438.

By: _____


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