IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

WILLIAM O. MCNAIR,

Appellant,

v.

CORRECTED
Case No. 5D14-4140

NATIONSTAR MORTGAGE, LLC, ET AL.,

Appellees.

_____/

Opinion filed February 19, 2016

Appeal from the Circuit Court
for Osceola County,
Jeffords D. Miller, Judge.

Thomas Erskine Ice, and Amanda L. Lundergan, of Ice Appellate, Royal Palm Beach, for Appellant.

Nancy M. Wallace, and Diane G. DeWolf, of Akerman LLP, Tallahassee, and William P. Heller, of Akerman LLP, Fort Lauderdale, for Nationstar Mortgage, LLC, Appellee.

No appearance for other Appellees.

EDWARDS, J.

William O. McNair ("Appellant") appeals the trial court's entry of a summary final judgment of foreclosure in favor of Nationstar Mortgage, LLC ("Nationstar"). Nationstar's proof was lacking in the following regards: (1) it failed to authenticate the

loan payment history; (2) it failed to lay the foundation for admission of its business records and those of its predecessor; and (3) there was no competent, substantial evidence regarding the amount of interest that Appellant owed on the loan. Accordingly, we reverse the summary final judgment and remand for further proceedings.

In December 2006, Appellant and his wife executed a note in the amount of $257,600 payable to Aegis Wholesale Corporation, secured by a mortgage. The note reflected an annual interest rate of 2.45%, and indicated that the interest rate could change monthly based upon an index. In September 2009, Aurora Loan Services ("Aurora"), an alleged assignee of the mortgage, filed a foreclosure complaint against Appellant, asserting in Count I that the May 1, 2009, payment and all later payments had not been made. In Count II of its complaint, Aurora sought to establish and enforce a lost, destroyed or stolen note and mortgage. Aurora attached a copy of the note and mortgage to the original complaint.

In March 2011, Aurora filed an amended complaint that omitted the claim to reestablish the lost note and mortgage. The amended complaint included a copy of the note, mortgage, and an allonge to the note. The allonge contained three undated endorsements. The first endorsement was from Aegis Wholesale Corporation to Aegis Mortgage Corporation. The second was from Aegis Mortgage Corporation to Residential Funding Company, LLC. The final endorsement was from Residential Funding Company to Deutsche Bank Trust Company Americas ("Deutsche Bank").

In April 2013, Nationstar was substituted as the plaintiff based on Aurora's motion. Nationstar asserted that it was authorized to maintain the foreclosure action on

behalf of Deutsche Bank as the new servicer of the loan. Nationstar filed its motion for summary judgment in July 2014, attaching the supporting affidavit of A.J. Loll, a Vice President of Nationstar. It also filed a copy of the note and mortgage, the pooling and servicing agreement, the assumption agreement, the asset purchase agreement between Aurora and Nationstar, a default letter, a loan payment history purporting to be Appellant's, and the notice of assignment of servicers from Aurora to Nationstar.

"The standard of review of a summary judgment order is de novo and requires viewing the evidence in the light most favorable to the non-moving party." *Sierra v. Shevin*, 767 So. 2d 524, 525 (Fla. 3d DCA 2000) (citing *Walsingham v. Dockery*, 671 So. 2d 166 (Fla. 1st DCA 1996)). "Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law." *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) (citing *Menendez v. Palms W. Condo. Ass'n*, 736 So. 2d 58 (Fla. 1st DCA 1999)). "If the 'slightest doubt' exists, then summary judgment must be reversed." *Sierra*, 767 So. 2d at 525 (citing *Hancock v. Dep't of Corr.*, 585 So. 2d 1068 (Fla. 1st DCA 1991)).

Loll's affidavit flirted with laying the foundation for admission of many of Nationstar's documents under the business records hearsay exception; however, it came up short in several respects. Although Loll testified in the affidavit to having personal knowledge of the facts, he only stated that he was employed as a "Vice President" of Nationstar and did not discuss his job responsibilities. Thus, it is unknown whether his position at Nationstar necessarily required a familiarity and understanding of the business records attached to the motion as he only vaguely described his familiarity with Nationstar's recording system and did not indicate whether he personally

reviewed the business records. *See Progressive Exp. Ins. Co. v. Camillo*, 80 So. 3d 394, 399 (Fla. 4th DCA 2012) ("An affiant's personal knowledge may be based on his or her review of the underwriting file." (citing *Jackson Nat'l Life Ins. Co. v. Proper*, 760 F. Supp. 901, 907 (M.D. Fla 1991))). Thus, despite the recitation of the requirements of the business record exception, it does not appear from the affidavit that Loll had the requisite personal knowledge to lay a foundation for Nationstar's business records. *See Yang v. Sebastian Lakes Condo. Ass'n, Inc.*, 123 So. 3d 617, 621 (Fla. 4th DCA 2013) (holding that the witness failed to establish the foundation for the business records exception even though she "employed all of the magic words").

Loll's affidavit was insufficient to authenticate Aurora's records as he did not explain whether he had any familiarity with that company's documents. Loll's testimony that Nationstar retained a number of former Aurora employees who were familiar with Aurora's record keeping system, did not serve to authenticate Aurora's records. Although Loll stated that Nationstar employees "reviewed" the Aurora records, it failed to confirm that Nationstar employees reviewed the Aurora records for accuracy.

While Loll suggested that Aurora had policies and procedures in place regarding how information was entered, he completely failed to describe those policies or procedures. In *Bank of New York City v. Calloway,* 157 So. 3d 1064 (Fla. 4th DCA 2015), the Fourth District Court of Appeal determined that "[w]here a business takes custody of another's business records and integrates them within its own records, the acquired records are treated as having been made by the successor business, such that both records constitute the successor's business's singular business record." 157 So. 3d at 1071 (citing *United States v. Adefehinti*, 510 F.3d 319, 326 (D.C. Cir. 2007)).

However, since the third party's business records "lack the hallmarks of reliability inherent in a business's self-generated records, proponents must demonstrate not only that the other requirements of [the business records exception rule] are met but also that the successor business relies upon those records and the circumstances indicate that the records are trustworthy." *Id.* (alteration in original)(citations omitted). "In most instances, a proponent will clear this hurdle by providing evidence of a business relationship or contractual obligation between the parties that ensures a substantial incentive for accuracy." *Id.* at 1072. Nationstar failed to prove this through Loll's affidavit.

Furthermore, Loll's affidavit only swore that "true and correct copies" of the note and mortgage, the pooling and servicing agreement, the assumption agreement, and the purchase agreement were attached to the motion. Loll did not indicate that the loan payment history documents, also attached to the motion, were true and correct copies. Instead, he only asserted that the loan payment history was made in "accordance with the business records maintained by Nationstar." As the affidavit did not swear to the authenticity of the loan payment history, it did not comply with the requirements of Florida Rule of Civil Procedure 1.510(e) and could not properly be considered by the trial court. *See Bifulco v. State Farm Mut. Auto. Ins. Co.*, 693 So. 2d 707, 710 (Fla. 4th DCA 1997) ("In short, rule 1.510(e), by its very language, excludes any document from the record on a motion for summary judgment that is not one of the enumerated documents or is not a certified attachment to a proper affidavit."). Nationstar's efforts to prove the amount of interest owed by Appellant were likewise inadequate, being based upon various calculations and assumptions instead of actual business records.

Based on the foregoing, it is clear that there were disputed issues of material fact and that Nationstar failed to establish that it was entitled to judgment in its favor as a matter of law. Accordingly, we reverse the summary final judgment entered in favor of Nationstar and remand this matter to the trial court for further proceedings.

REVERSED AND REMANDED WITH INSTRUCTIONS.

COHEN and LAMBERT, JJ., concur.