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

THE BANK OF NEW YORK AS TRUSTEE FOR, THE CERTIFICATEHOLDERS CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-21,

CASE NO. 08-008162-CI-11

PLAINTIFF,

v.

J. THOMAS WOOD,

DEFENDANT.
_____________________________________/

DEFENDANT'S MOTION FOR RECONSIDERDATION AND MOTION TO VACATE ORDER OF SUMMARY JUDGMENT

COMES NOW, the Defendant J. THOMAS WOOD (hereinafter "Defendant"), by and through the undersigned counsel MATTHEW D. WEIDNER, and respectfully files this MOTION FOR RECONSIDERATION AND MOTION TO VACATE SUMMARY JUDGMENT, pursuant to precedent case law, and in support thereof states as follows:

FACTS

1. On August 5, 2010 a hearing was held in regards to the Plaintiff's Motion for Summary Judgment. In opposition to this hearing, the Defendant timely filed an Objection to the Plaintiff's Motion for Summary Judgment/Motion to Strike Plaintiff's Affidavit As to Amounts Due and Owing on or about June 14, 2010 and a Supplemental Objection to Plaintiff's Motion for Summary Judgment on or about August 4, 2010.

2. The Defendant's initial twelve (12) page Objection to Plaintiff's Motion for Summary Judgment/Motion to Strike Plaintiff's Affidavit as to Amounts Due and Owing asserted four (4) very specific and detailed objections to Summary Judgment. The Defendant's entire June 16,

2010 Objection to Plaintiff's Motion for Summary Judgment/Motion to Strike Plaintiff's Affidavit as to Amounts Due and Owing is hereby incorporated by reference thereto.

3. While preparing for the August 5, 2010 hearing on Summary Judgment, counsel for Defendant determined that there were additional grounds to object to Summary Judgment so counsel for Defendant incorporated those additional grounds into a Supplemental Objection to Plaintiff's Motion for Summary Judgment. To summarize, these objections were that: (1) the Defendant timely filed a Motion to Dismiss the Plaintiff's Complaint on or about August 7, 2008 and there was no Order filed denying this Motion and that accordingly no Answer had yet been filed; (2) the purported original note filed by the Plaintiff materially conflicted with the copy of the original note attached to the Plaintiff's complaint thereby creating issues of material fact; and (3) the Plaintiff had failed to plead its capacity to maintain the instant litigation. The Defendant's entire August 4, 2010 Supplemental Objection to Plaintiff's Motion for Summary Judgment is hereby incorporated by reference thereto.

4. In addition, at the August 5, 2010 hearing, the Defendant's counsel formally objected, on record to service of process, representing that the Plaintiff had improperly resorted to service of process through constructive service rather than personal service on this Defendant. A close inspection of the Affidavit in Support of Constructive Service revealed that there are significant technical deficiencies with the service and with the Affidavit of Diligent search and Inquiry upon which the constructive service is based.

5. Also at the August 5, 2010 hearing, the Defendant's counsel objected, on record, to the introduction of the Affidavit of Amounts Due and Owing, the introduction of the purported Original Note, and all other evidence offered by the Plaintiff in support of its Motion. Specifically, counsel noted that none of the evidence had been formally introduced and objected

to the procedure by which the Court received and considered the evidence which had not been considered, or even seen, by the Defendant. Counsel repeatedly asserted that it was improper for the Court to consider such evidence not properly introduced or made part of the proceeding through a formal introduction by the proponent of that evidence.

6. Finally, while Plaintiff's counsel represented to the Court at the August 5, 2010 hearing that Defendant's Motion to Dismiss had been heard by the Court and denied Defendant asserted that no such Order was part of the court file. Immediately after the court entered its Order granting Summary Judgment counsel for Plaintiff and Defendant personally inspected the Court file and found that no Court Order denying the Defendant's Motion had ever been filed. Nevertheless, Plaintiff's counsel was unwilling to concede that the Defendant's Motion to Dismiss was still pending before this Court.

STANDARD OF REVIEW

7. Rather than constituting a motion for rehearing under Fla. R. Civ. Pro. 1.530, a motion directed to a nonfinal order is termed a "Motion for Reconsideration" based upon the trial court's inherent authority to reconsider and alter or retract orders prior to the entry of final judgment. *See* Bettez v. City of Miami, 510 So. 2d 1242, 1242-43 (So. 3d DCA 1987).

8. An order merely granting summary judgment is not a final judgment; rather, it is a nonfinal order. *See e.g.* White Palms of Palm Beach, Inc. v. Fox, 525 So. 2d 518, 519 (Fla. 4th DCA 1988).

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION

I. The Court incorrectly granted Summary Judgment in favor of the Plaintiff where genuine issues of material fact exist which were timely raised and objected to by the Defendant

A. Legal Standards

9. 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).

10. 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).

11. In summary judgment proceedings, 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).

12. With respect to affidavits, the admissibility of same 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). **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).

13. Furthermore, 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." *See also* CSX Transp., Inc. v. Pasco County, 660 So. 2d 757 (Fla. 2d DCA 1995) (reversing summary judgment granted below, in part, because the affiant based his statements on reports but failed to attach same to the affidavit).

14. Florida case law is exceedingly clear that where a motion to dismiss which raises viable defenses is pending in a foreclosure action, summary judgment is not proper. *See* Douglas v. Deutsche Bank Trust Co., 995 So.2d 1144 (Fla. 5th 2008). Moreover, where no answer has been filed, the burden on the movant of summary judgment increases; in such cases the movant must demonstrate conclusively that no answer the defendant could file would not raise any genuine issues of material fact. *See* Burch v. Kibler, 643 So.2d 1120 (Fla. 4th DCA 1994); Olin', Inc. v. Avis Rental Car System, 105 So. 2d 497 (Fla. 3d DCA 1958); Balzebre v. 2600 Douglas, Inc., 273 So. 2d 445 (Fla. 3d DCA 1973); White v. Harmon Glass Service, Inc., 316 So. 2d 599 (Fla. 3d 1973), *cert. denied*, 330 So. 2d 22.

15. Fla. R. Civ. Pro. 1.130(a) provides, in pertinent part, that "[a]ll...contracts... upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, **shall be incorporated in** or attached to the pleading." *Bold emphasis added.* Moreover, "when a party brings an action based upon a contract and fails to attach a necessary exhibit under Rule 1.130(a), the opposing party may attack the failure to attach a necessary exhibit through a motion to dismiss. Where a complaint is based on a written

instrument, the complaint does not state a cause of action until the instrument or an adequate portion thereof is attached to or incorporated in the complaint." Samuels v. King Motor Co. of Fort Lauderdale, 782 So.2d 489, 500 (Fla. 4th DCA 2001).

16. With respect to capacity, Fla. R. Civ. Pro. 1.120(a) provides that

> [i]t is not necessary to aver the capacity of a party to sue or be sued, the authority of a party to sue or be sued in a representative capacity, or the legal existence of an organized association of persons that is made a party, **except to the extent required to show the jurisdiction of the court.** (emphasis added)The initial pleading served on behalf of a minor party shall specifically aver the age of the minor party. **When a party desires to raise an issue as to the legal existence of any party, the capacity of any party to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, that party shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge.** *Bold emphasis added.*

17. Strict compliance with the statutory provisions governing service of process is required in order to obtain jurisdiction over a party. *See* Schupak v. Sutton Hill Assocs., 710 So.2d 707 (Fla. 4th DCA 1998); Sierra Holding, Inc. Inn Keepers Supply Co., 464 So.2d 652 (Fla. 4th DCA 1985); Baraban v. Sussman, 439 So.2d 1046 (Fla. 4th DCA 1983). The strict observance is required in order to assure that a defendant receives notice of the proceedings filed. *See* Electro Eng'g Products Co., Inc. v. Lewis, 352 So.2d 862 (Fla. 1977). *See also* Haney v. Olin Corp., 245 So.2d 671 (Fla. 4th DCA 1971) (holding that "the major purpose of the constitutional provision which guarantees 'due process' is to make certain that when a person is sued he has notice of the suit and an opportunity to defend").

18. When interpreting the portion of Fla. R. Civ. P. 1.140(b) which provides that "[a] motion making any of these defenses shall be made before pleading if a further pleading is permitted," only requires that a motion for the enumerated defenses be made before pleading (and not before a motion). The rule of statutory construction, *expressio unius est exclusio alterius* (roughly translated to mean, "whatever is omitted is understood to be excluded"), applies to the case at

issue. Where the Supreme Court, in drafting the Fla. R. Civ. P., clearly intended that these enumerated defenses be made before pleadings, the enumerated defenses shall not be waived unless a responsive pleading has been filed.

19. A pleading is a technical legal term defined by the Florida Rules of Civil Procedure. Fla. R. Civ. P. 1.100, entitled Pleadings and Motions, lists a limited number of pleadings. They are as follows: (1) a complaint, (2) an answer, (3) an answer to a counterclaim, (4) an answer to a crossclaim, (5) a third-party complaint, (6) a third-party answer, and a reply. This is an exclusive list and all filings that are not mentioned in this list are by definition, not a pleading.

B. Argument

20. Here, a multitude of conflicts in material facts exist that should have precluded a ruling of summary judgment in favor of the Plaintiff.

21. To begin, the Defendant objected to the affidavit submitted by the Plaintiff in support of its Motion for Summary Judgment was based wholly on hearsay and therefore Summary Judgment granted on this basis would be improper. While the Defendant's June 16, 2010 Objection to Plaintiff's Motion for Summary Judgment/Motion to Strike Affidavit as to Amounts Due and Owing provides in-depth analysis of the reasoning behind the Defendant's argument, the purported evidence is objectionable on its face because the affidavit is based entirely on hearsay and because the Plaintiff failed to attach documents referenced in the affidavit and because the affiant lacked personal knowledge of the facts stated therein. In further support of this argument, the Defendant respectfully suggests that this court would refer to its June 16, 2010 Objection to Plaintiff's Motion for Summary Judgment/Motion to Strike Affidavit as to Amounts Due and Owing for a fuller explanation of same.

22. In addition, the Defendant properly argued that summary judgment at this stage was improper because the Defendant's Motion to Dismiss was still pending before the Court and that no Answer had yet been filed. While the Plaintiff's counsel asserted at the August 5, 2010 hearing that the Defendant's motion had already been denied, both the Defendant's counsel and the Plaintiff's counsel physically inspected the Court file and no Order denying the Defendant's motion had ever been entered. As such, the Defendant's Motion to Dismiss is still pending before this Court.

23. Because the Defendant's Motion to Dismiss is still pending, no Answer has yet been filed. As such, the Plaintiff, as movant, had the heightened burden at the summary judgment hearing to prove that no defense the Defendant could have plead would create a genuine issue of material fact. Based upon the facts asserted in both this motion and the Defendant's two objections to the Plaintiff's Motion for Summary Judgment, the Plaintiff has not met this burden.

24. There also is a material difference between the purported original note filed by the Plaintiff and the copy of the original note attached the Plaintiff's Complaint. Specifically, the alleged original note filed by the Plaintiff contains a blank endorsement which is not found on the copy of the original note attached to its complaint. This creates genuine issues of material fact regarding: (1) when the purported endorsement on the note was effectuated; (2) the endorsement's authenticity and veracity and; (3) the ability of the endorser to even execute such an endorsement. In addition, the failure of the Plaintiff to amend its Complaint and incorporate the purported original note into it distorts the Defendant's ability to litigate this case because it unclear as to what contractual basis the Plaintiff is suing upon.

25. Genuine issues of material fact also permeate with respect to the Plaintiff's capacity to proceed with the instant litigation because while the Plaintiff's name is identified in the caption

of its complaint and accompanying motions, nowhere else in any of the Plaintiff's pleadings is the Plaintiff's entity status or capacity even pled. As a threshold matter, then, it is unclear exactly who the Plaintiff even is.

26. As if this was not enough, the Defendant's counsel formally objected at the August 5, 2010, on record, to the service of process. Specifically, counsel represented that the Plaintiff had improperly asserted service of process through constructive service; this representation is highlighted upon closer inspection of the Affidavit in Support of Constructive Service, which reveals that there are significant technical deficiencies with the service. It should be noted by this Court that since the Defendant's Motion to Dismiss is not a responsive pleading and no Answer has yet been filed, this defense has not been waived.

27. Finally, the Defendant's counsel formally objected at the August 5, 2010, and again on record, to the introduction to the introduction of the Plaintiff's affidavit in support of its Motion for Summary Judgment, the introduction of the purported original note, and all other evidence offered by the Plaintiff in support of its motion. Specifically, counsel noted that none of the evidence had been formally introduced and objected to the procedure by which the Court received and considered the evidence which had not been considered, or even seen, by the Defendant.

WHEREFORE, based upon the foregoing, the Defendant respectfully request this Court grant its Motion for Reconsideration, vacate its Motion for Summary Judgment in favor of the Plaintiff, enter an Order denying 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 12 day of August, 2010 to KRISTIN L.POLK, Florida Default Law Group, P.L., P.O. Box 25018, Tampa, FL 33622-5018.

By: ______________________

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

THE BANK OF NEW YORK AS TRUSTEE FOR, THE CERTIFICATEHOLDERS CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-21,

CASE NO. 08-008162-CI-11

PLAINTIFF,

v.

J. THOMAS WOOD,

DEFENDANT.
_______________________________________/

DEFENDANT'S OBJECTION PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT/MOTION TO STRIKE PLAINTIFF'S AFFIDAVIT AS TO AMOUNTS DUE AND OWING

COMES NOW, the Defendant J. THOMAS WOOD (hereinafter "Defendant"), by and through the undersigned counsel MATTHEW D. WEIDNER, and respectfully OBJECTS TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT and MOTIONS THIS COURT TO STRIKE PLAINTIFF'S AFFIDAVIT AS TO AMOUNTS DUE AND OWING, pursuant to Fla. R. Civ. Pro. 1.510, and in support thereof states as follows:

FACTS

1. This is an action for foreclosure of residential real property owned by the Defendant.
2. The named Plaintiff in this action is THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-21 (hereinafter "Plaintiff"). The Plaintiff initiated this lawsuit when it filed its complaint.
3. On or about June 2, 2010 the Plaintiff, by and through its undersigned counsel, motioned this Court for Summary Judgment and in support thereof filed its Affidavit as to Amounts Due and Owing (hereinafter "Affidavit").

4. The Affiant of the Affidavit is identified as ASHLEY BARRAZA (hereinafter "Affiant"). The Affiant identified herself as the Vice President for BAC HOME LOANS SERVICING, L.P. F/K/A COUNTRYWIDE HOME LOANS SERVICING, L.P. (hereinafter "BAC Home Loans") and not the Plaintiff. Moreover, the relationship between BAC Home Loans and the Plaintiff is not even defined in the Affidavit.

5. Additionally, the Affidavit, save for one cryptic line which reads that "[BAC Home Loans] is responsible for the collection of this loan transaction and pursuit of any delinquency in payments,"[1] fails to set forth with any degree of specificity what duties BAC HOME LOANS performs for the Plaintiff.

6. Upon information and belief, BAC Home Loans 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.

7. Upon information and belief, the Affiant, as an employee of BAC Home Loans and not the Plaintiff, has no knowledge of the underlying transactions between the Plaintiff and Defendant.

8. Notwithstanding this, the Affiant averred, **based on her personal knowledge**, that "the Plaintiff is owed the following sums of money as of 07/07/2010...$225,586.23."[2]

9. Moreover, the Affiant also averred in paragraph two (2) of the Affidavit that "I am familiar with the books of account and have examined all books, records, systems, and documents kept by [BAC Home Loans] concerning the transactions alleged in the Complaint."

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[1] *See* Affidavit as to Amounts Due and Owing, ¶2.
[2] *See* Id at ¶4.

10. However, these books, records, systems, and documents, which form the basis of the Affiant's statements, were not attached to the Affidavit.

11. Furthermore, the Affiant did not aver that she is the custodian of these books, records, systems, and documents, only that she was merely "familiar" with them.

12. Finally, the Affiant averred to a conclusion of law, namely that "[t]his Affidavit is submitted...**for the purpose of showing that there is in this action no genuine issue as to material fact, and that Plaintiff is entitled to a judgment as a matter of law**."[3] *Bold emphasis added.* However, this statement of law was not supported by facts stated therein.

13. Specifically, the Affiant failed to aver exactly against who the Plaintiff was entitled to judgment as a matter of law against. Nowhere in the Affidavit does the Affiant aver that the Plaintiff is entitled to a judgment of law against the Defendant. In fact, the Defendant is not even mentioned in the Affidavit.

14. At best, then, the Affiant averred that the Plaintiff was owed $267,252.61 by someone, and that therefore the Plaintiff was entitled to final judgment against this unidentified party.

STANDARD OF REVIEW

15. 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).

16. 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

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[3] *See* Affidavit as to Amounts Due and Owing, ¶1.

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).

17. 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 MOTION

I. The Affidavit Should be Struck and the Plaintiff's Motion for Summary Judgment Should be Denied because the Affidavit Was Not Based Upon the Affiant's Personal Knowledge

a. Legal Standards

18. 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).

19. 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).

20. **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.)

21. 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)).

22. 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

23. Here, the entire Affidavit is hearsay evidence as the Affiant has absolutely no personal knowledge of the facts stated therein.

24. As an employee of BAC Home Loans, whose relationship to the Plaintiff is not even defined in the Affidavit, she has no knowledge of the underlying transaction between the Plaintiff and the Defendant. Neither the Affiant nor BAC Home Loans: (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.

25. At best, BAC Home Loans, 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.

26. Most importantly, the Affidavit, save for one cryptic line which reads that "[BAC Home Loans] is responsible for the collection of this loan transaction and pursuit of any delinquency in payments,"[4] fails to set forth with any degree of specificity what duties BAC HOME LOANS performs for the Plaintiff.

27. Thus, the Affiant has failed to state in detail the facts showing that she has personal knowledge as required by the Florida case law.

28. 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 $225,000) is, by its very nature, hearsay.

29. 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).

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[4] *See* Affidavit as to Amounts Due and Owing, ¶2.

30. 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 summary judgment.) 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.

31. 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).

32. This rule provides that notwithstanding the provision of §90.802 (which renders hearsay statements inadmissible), hearsay statements are nevertheless admissible, 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.*

33. There are, however, several problems with this argument. To begin, no memorandums, reports, records, or data compilation have been offered by the Plaintiff.

34. Furthermore, these records were not made by a "person with knowledge" because BAC Home does not have any knowledge of the underlying transaction between the Plaintiff and the Defendant and because the Affidavit fails to state in detail how BAC Home Loans could possibly have knowledge of the underlying transaction between the Plaintiff and the Defendant.

35. Additionally, the Affiant's failure to attach any of the documents she refers to shows a lack of trustworthiness.

36. 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 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 Affidavit is not based upon the Affiant's personal knowledge, the Defendant respectfully request that the Plaintiff's Affidavit be struck, the Plaintiff's Motion for Summary Judgment be denied, and other relief that the Court deems just and proper.

II. The Affidavit Should be Struck and the Plaintiff's Motion for Summary Judgment Should be Denied because the Plaintiff Failed to Authenticate Documents Referred to in the Affidavit

a. Legal Standards

37. Florida Statue §90.901 (1989) states, in pertinent part, that "[a]uthentication or identification of evidence is required as a condition precedent to its admissibility."

38. The failure to authenticate documents referred to in affidavits renders the affiant incompetent to testify as to the matters referred to in the affidavit. *See* Fla. R. Civ. Pro. 1.510(e) (which reads, in pertinent part, that "affidavits...shall show affirmatively that the affiant is competent to testify to the matters stated therein"); Zoda v. Hedden, 596 So. 2d 1225, 1226 (Fla. 2d DCA 1992) (holding, in part, that failure to attach certified copies of public records rendered affiant, who was not a custodian of said records, incompetent to testify to the matters stated in his affidavit as affiant was unable to authenticate the documents referred to therein.)

39. A "custodian" is identified "a person or institution that has charge or custody (of...papers)." *See* Black's Law Dictionary, 8th ed. 2004, *custodian.*

a. Argument

40. Here, the Affiant averred in paragraph two (2) that "I am familiar with the books of account and have examined all books, records, systems, and documents kept by [BAC Home Loans] concerning the transactions alleged in the Complaint."

41. Nevertheless, these books, records, systems, and documents which form the basis of the Affiant's statements were not attached to the Affidavit and the Affiant did not aver that she is the custodian of these books, records, systems, and documents, only that she was "familiar" with them.

42. In essence, then, the Affiant averred to matters which she was incompetent to testify to in the same matter as the affiant in Zoda, *supra.*

WHEREFORE, because the Plaintiff failed to authenticate documents referred to in its Affidavit, the Defendant respectfully request that the Plaintiff's Affidavit be struck, the Plaintiff's Motion for Summary Judgment be denied, and other relief that the Court deems just and proper.

III. The Affidavit Should be Struck and the Plaintiff's Motion for Summary Judgment Should be Denied because the Plaintiff Failed to Attach Documents Referred to in the Affidavit

a. Legal Standards

43. 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."

44. 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.

45. 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.

b. Argument

46. As previously demonstrated in Part II, *supra*, the Affiant referred to books, records, systems, and documents which formed the basis of her statements, particularly her statement that "the Plaintiff is owed the following sums of money as of 07/07/2010...$225,586.23."[5]

47. Nevertheless and as also previously demonstrated, these books, records, systems, and documents were not attached to the Affidavit.

48. Therefore, the Affiant, just as the affiant in CSX Transp., Inc., was relying on inadmissible hearsay statements. Admission of such an affidavit, then, would be grounds for summary judgment.

WHEREFORE, because the Plaintiff failed to attach documents referred to in its Affidavit, the Defendant respectfully request that the Plaintiff's Affidavit be struck, the Plaintiff's Motion for Summary Judgment be denied, and other relief that the Court deems just and proper.

IV. The Affidavit Should be Struck and the Plaintiff's Motion for Summary Judgment Should be Denied because the Affidavit Contains Impermissible Conclusions of Law Not Supported By Facts

a. Legal Standards

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[5] *See* Affidavit as to Amounts Due and Owing at ¶4.

49. An affidavit in support of a motion for summary judgment may not be based upon factual conclusions or opinions of law. Jones Constr. Co. of Cent. Fla., Inc. v. Fla. Workers' Comp. JUA, Inc., 793 So. 2d 978, 979 (Fla. 2d DCA 2001).

50. Furthermore, an affidavit which states a legal conclusion should not be relied upon unless the affidavit also recites the facts which justify the conclusion. Acquadro v. Bergeron, 851 So. 2d 665, 672 (Fla. 2003); Rever v. Lapidus, 151 So. 2d 61, 62 (Fla. 3d DCA 1963).

b. Argument

51. Here, the Affidavit contained conclusions of law which were not supported by facts stated therein.

52. Specifically, the Affiant averred to a statement of law, namely that "[t]his Affidavit is submitted...**for the purpose of showing that there is in this action no genuine issue as to material fact, and that Plaintiff is entitled to a judgment as a matter of law**."[6] *Bold emphasis added.*

53. However, nowhere in the Affidavit does Affiant state that the Plaintiff is entitled to a judgment as a matter of law because the Defendant owe the Plaintiff money.

54. At best the Affidavit accuses someone of owing the Plaintiff $225,586.23 and that the Plaintiff should be entitled to a judgment as a matter of law against that specific someone.

55. By not clearly identifying the parties in question, the Affiant has not adequately supported her legal conclusions with specific facts.

WHEREFORE, because the Affidavit contains impermissible conclusions of law not supported by facts therein, the Defendant respectfully request that the Plaintiff's Affidavit be struck, the Plaintiff's Motion for Summary Judgment be denied, and other relief that the Court deems just and proper.

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[6] *See* Id at ¶1.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 14th day of June, 2010 to KRISTIN L.POLK, Florida Default Law Group, P.L., P.O. Box 25018, Tampa, FL 33622-5018.

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

THE BANK OF NEW YORK AS TRUSTEE FOR, THE CERTIFICATEHOLDERS CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-21,

CASE NO. 08-008162-CI-11

PLAINTIFF,

v.

J. THOMAS WOOD,

DEFENDANT.

______________________________________/

DEFENDANT'S SUPPLEMENTAL OBJECTION PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Defendant J. THOMAS WOOD (hereinafter "Defendant"), by and through the undersigned counsel MATTHEW D. WEIDNER, and respectfully files this SUPPLEMENTAL OBJECTION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, pursuant to Fla. R. Civ. Pro. 1.510, and in support thereof states as follows:

FACTS

1. This is an action for foreclosure of residential real property owned by the Defendant.

2. The named Plaintiff in this action is THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-21 (hereinafter "Plaintiff"). The Plaintiff initiated this lawsuit when it filed its Complaint on or about June 3, 2008.

3. On or about August 7, 2008 the Defendant timely filed a Motion to Dismiss the instant action citing various defects in the Plaintiff's Complaint. While the Plaintiff eventually responded to this request on or about October 19, 2009, the Defendant's motion has not yet been