

County Civil Court: CIVIL PROCEDURE—Summary Judgment—Upon de novo review Court concludes that trial court erred when it entered Final Summary Judgment for Respondent based on affidavit that is insufficient as a matter of law. Affiant did not swear or affirm that she had personal knowledge of specific facts and that statements made therein are true and correct. Summary Final Judgment reversed and case remanded for further proceedings. Tom Brown v. Neighborhood F Homeowners' Association, Inc., No. 13-000016AP-88A (Fla. 6th Cir. App. Ct. August 19, 2013).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

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

TOM BROWN
Appellant,

Case No.: 13-000016AP-88A
UCN: 522013AP000016XXXXCI

v.

**NEIGHBORHOOD F. HOMEOWNERS'
ASSOCIATION, INC.**
Appellee.

Opinion Filed _____

Appeal from Final Judgment
Pinellas County Court
Judge Walt Fullerton

Timothy W. Weber, Esq.
Amanda M. Adams, Esq.
Attorneys for Appellant

James N. Casesa, Esq.
Jessie E. Bowden, Esq.
Attorneys for Appellee

PER CURIAM.

Tom Brown appeals the Final Summary Judgment entered in favor of Neighborhood F Homeowners Association, Inc. (the "Association") on December 21, 2012. We reverse and remand the matter for further proceedings.

Statement of Facts

On January 9, 2012, the Association filed a complaint seeking damages for Mr. Brown's alleged failure to pay in full assessments and monthly homeowner association maintenance fees for the months of October 2007 through December 2011. In his first affirmative defense to the complaint Mr. Brown alleged that the Association failed to

properly levy the assessments in accordance with the Declarations of Covenants, Conditions, and Restrictions of the Association.¹

The Association filed a Motion for Summary Judgment and supported the motion with the "Affidavit of Proof of Claim" executed by Tabetha Cetrangola, Director of Management Services for the Association. (R. 25-27) In the affidavit, Ms. Cetrangola states that the Association complied with all notice requirements for bringing this action to recover the unpaid assessments and fees from Mr. Brown.

In opposition to the Association's motion for summary judgment, Mr. Brown timely served the Association with an affidavit prepared by Mr. Brown's counsel and the "Notice of Summary Judgment Evidence."² Attached to the Notice were documents provided by the Association in response to Mr. Brown's Request for Production. On December 14, 2012, a hearing was conducted and the trial court considered the Association's "Affidavit of Proof of Claim" and the documentation supplied by Mr. Brown in opposition to the motion for summary judgment. No court reporter was present.

On December 21, 2012, the trial court entered "Summary Judgment for Plaintiff" finding that the undisputed evidence proved the Association's entitlement to the principal, interest, costs, and attorney's fees as demanded. The order found that Mr. Brown failed to raise "a relevant, legitimate issue of fact." On the same date in a separate judgment the trial court entered Final Summary Judgment for the Association.

On March 18, 2013, pursuant to Florida Rule of Appellate Procedure 9.200(b)(4) the parties filed a "Joint Stipulation Regarding Hearing." The trial court approved the stipulation and a motion to supplement the record on April 5, 2013.

Arguments on Appeal

Mr. Brown presents one issue on appeal: "Whether the trial court overlooked genuine issues of material fact as to whether the Association met its burden to prove that it properly levied the assessments in accordance with its Bylaws."

It is asserted that the Association failed to meet its burden of proof because the Bylaws require it to retain the post office certificate of mailing as proof it mailed a notice of the annual budget meeting to each homeowner. Mr. Brown claims disputed issues of

¹ In a second affirmative defense, Mr. Brown claimed the Association imposed an interest rate in excess of the legal maximum under Florida law. A "Joint Stipulation Regarding Hearing" in accordance with Florida Rule of Appellate Procedure 9.200(b)(4) has been filed of record. The stipulation states that the Association argued below that this affirmative defense is without merit because section 720.3085(3), Florida Statutes governs. (R. 218, par. 10). Mr. Brown has not briefed this issue on appeal and it has been abandoned.

² See England v. Seminole Walls & Ceilings Corp., 842 So. 2d 261, 264 (Fla. 5th DCA 2003)("In our view, reference to "delivery" in rule 1.510(c) includes and incorporates delivery by fax in rule 1.080(c) [now Florida Rule of Judicial Administration 2.516(b)(2)(E)].").

fact exist as to whether the Association met its burden. It is asserted that the trial court improperly placed the burden of proof on Mr. Brown to prove his defense in order to avoid the summary judgment. See Berg v. Bridle Path Homeowners Ass'n, Inc., 809 So. 2d 32 (Fla. 4th DCA 2002).

The "Notice of Summary Judgment Evidence" filed by Mr. Brown contains the following "Affidavits of Mailing" with attachments: September 14, 2007, "Budget" (R 58); July 24, 2009 "Notice of Annual and BOD Meeting" (R 63); August 24, 2009 "Reminder of Annual and BOD Meeting" (R 70). The record does not contain any post office certificates of mailing.

The Association argues on appeal that Ms. Cetrangola's affidavit was sufficient to meet the burden to demonstrate that notices of the annual meetings were properly given to the homeowners in 2007 through 2011; and the burden shifted at that time to Mr. Brown to prove he had not been supplied with notice. In reviewing the affidavit of Ms. Cetrangola the Court notes that she hand-printed her name and job title on blank lines provided in the preprinted affidavit. She states she "is authorized by the Plaintiff to make this affidavit and serves as the Plaintiff's Director of Management Services. As such he/she is personally aware of the facts and circumstances surrounding this case."

Standard of Review

The appellate court reviews a final summary judgment de novo. Makryllos v. Citizens Property Ins. Corp., 103 So. 3d 1032, 1033 (Fla. 2d DCA 2012). The trial court may enter summary judgment only when the record shows that no genuine issues of material fact remain and that the movant is entitled to judgment as a matter of law. Id.

Analysis

Upon conducting a de novo review of the evidence of record, this Court notes that the "Affidavit of Proof of Claim" executed by Ms. Cetrangola does state that Notice of the Annual Meeting was given to each parcel owner in accordance with the Bylaws for the years 2007, 2008, 2009, 2010, and 2011. (R. 26, par. 13, 17). However, Ms. Cetrangola's statement in paragraph one of her affidavit that "he/she is personally aware of the facts and circumstances surrounding this case" is ambiguous. She does not state under penalty of perjury that she has personal knowledge that the 2007, 2008, 2009, 2010, and 2011 Notices of Annual Meeting were mailed to all homeowners. Ms. Cetrangola does not state under penalty of perjury that all the statements in the "Affidavit of Proof of Claim" are true and correct to support the entry of summary judgment. Further, the Court notes that Ms. Cetrangola did not sign the 2007 or 2009 "Affidavits of Mailing" filed by Mr. Brown in opposition to summary judgment. These

defects in the affidavit provide an insufficient basis upon which to grant summary judgment.

Conclusion

This Court concludes that Ms. Cetrangola's affidavit is insufficient to support summary judgment and final summary judgment for the Association was improperly entered.

While the Association's Bylaws state that the Association is to retain a certificate of mailing as proof of mailing; this Court concludes that proof of mailing the Notices of Annual Meetings may be made through other proper documentary evidence or through testimony given under penalty of perjury by individuals with personal knowledge of actual mailing of the notices.

The Final Summary Judgment is reversed and this matter is remanded for further proceedings.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 19th day of August, 2013.

Original order entered on August 19, 2013 by Circuit Judges Linda R. Allan, John A. Schaefer, and Keith Meyer.

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