

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

PATRICIA E. SMITH-JOHNSON, et al.,
Appellants,

v.

**WEST SHORE VILLAGE MASTER
CORPORATION, INC.,**
Appellee.

Ref.No. 14000051AP-88B
UCN: 522014AP000051XXXXCV

ORDER AND OPINION

THIS CAUSE is before the Court on consolidated appeals from two county court orders of final summary judgment of foreclosure entered in favor of Appellee, West Shore Village Master Corporation. Appellants argue that summary judgment was improper because (1) Appellee failed to present sufficient admissible evidence to overcome Appellants' answer, affirmative defenses, and affidavit in opposition to summary judgment; (2) the affidavits were not made on personal knowledge, failed to support the exact amount of damages in the final judgment, and should have been stricken as untimely filed; and (3) there were contested factual issues as to the amount of damages were improper to resolve via summary judgment.

PROCEDURAL HISTORY

While the specific dates vary, the procedural history of the consolidated cases is similar. Appellee filed a complaint to foreclose a lien for unpaid condominium assessments owed by Appellants and due to the condominium association. Appellants were properly served, and after not filing an answer within the time provided by the court, an order of default was entered against them. After default, Appellee filed a motion for summary judgment, which was set for hearing. Appellants subsequently moved for a motion to vacate the default, and filed their answer and affirmative defenses. At the hearing on Appellee's motions for summary judgment, the trial court granted Appellants' motion to vacate judicial default, and granted Appellee's motions for summary judgment in both cases.

The procedural history differs in that in case 13-8966-CO, Appellee filed revised affidavits in support of its motion for summary judgment on June 11, 2014—19 days prior to

June 30th summary judgment hearing. The revised affidavits updated the amounts due because of Appellants' extra missed payments and the extra costs and attorney fees incurred from the time the original affidavit of money due was filed in March.

In case 13-9157-CO, Appellee never filed any revised affidavits at all, but since the cases were so similar, and the summary judgment hearings held at the same time, it appears from the record that both Appellee and the court mistakenly thought that the revised affidavits had also been filed in case 13-9157-CO. Despite Appellants' contention at the hearing that they never received the revised affidavits, as well as the lack of revised affidavits on the docket or in the record, the court relied on the revised affidavits in entering a final judgment amount that was substantially more than the amount alleged to be due in the affidavits originally filed in March. Even assuming that the revised affidavits were filed on June 11th in both cases, despite the complete lack of record evidence of such, they were not filed at least 20 days prior to the summary judgment hearing.

Appellants objected to the entry of the summary judgments at both the summary judgment hearings, and then again in their motions for rehearing. Appellants objected based on disputed issues of fact concerning the amounts due and how the payments were applied, and a failure to timely file the summary judgment affidavits in accordance with to FRCP 1.510(c). After the trial court denied Appellants' motions for rehearing, Appellants filed the instant appeal.

STANDARD OF REVIEW

Appellate courts review a ruling on summary judgment de novo. *Gonzalez v. Deutsche Bank Nat'l Trust Co.*, 95 So. 3d 251 (Fla. 2d DCA 2012). A motion for summary judgment shall be rendered forthwith if the pleadings and summary judgment evidence on file 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).

DISCUSSION

Appellants focused most of their argument at the summary judgment hearing and on appeal on how the condominium association applied their payments. Appellants generally contested the accuracy of the damages sought by Appellee, asserting that the late penalties, interest calculations, and the attorney's fees sought were inaccurate, unreasonable, and not

adequately proven. More specifically, Appellant's argued that Appellee applied the monthly assessment payments to the late fees and interest before applying it as a payment of that month's assessment. As a result, after deducting the late fees and taxes from the assessment payment, the payment was not in full, considered late, and again more late fees were accumulated. Appellants asserted that this method of applying assessment payments to late fees first was an unfair collection practice known as "pyramiding of late fees," and was a violation of TILA. Relying on §718.116(3)¹, the court found that Appellee's method of applying Appellants' payments was proper.

After finding that the method of payment calculation was proper, the court relied on Appellee's revised affidavits of amounts due to enter final judgments in the actions. The affidavits relied on consisted of (1) "Revised Affidavit of Attorney's Time and Paralegals' Time;" (2) Revised Affidavit of Costs;" and (3) "Calculation Worksheet," which showed a breakdown of assessment payments made and late fees and interest on those payments updated through March. It is clear from the record that the court relied on the updated affidavits, as well as an updated calculation worksheet to arrive at a final judgment amount that took into account all payments due through the time of the hearing on June 30, 2014.

Fla. Rule of Civ. P. 1.510(c) states that: "The movant shall serve the motion at least 20 days before the time fixed for the hearing, and shall also serve at that time a copy of any summary judgment evidence on which the movant relies that has not already been filed with the court." Because the revised affidavits were not filed at least 20 days before the time fixed for the hearing, they should have been stricken, and summary judgment should not have been entered thereon. Appellee filed its revised affidavit on June 11, 2014—only 19 days prior to the June 30, 2014 summary judgment hearing. Because the affidavits were not filed at least 20 days prior to

¹ §718.116 (3) reads:

Assessments and installments on assessments which are not paid when due bear interest at the rate provided in the declaration, from the due date until paid. The rate may not exceed the rate allowed by law, and, if no rate is provided in the declaration, interest accrues at the rate of 18 percent per year. If provided by the declaration or bylaws, the association may, in addition to such interest, charge an administrative late fee of up to the greater of \$25 or 5 percent of each delinquent installment for which the payment is late. Any payment received by an association must be applied first to any interest accrued by the association, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessment. The foregoing is applicable notwithstanding any restrictive endorsement, designation, or instruction placed on or accompanying a payment.

the hearing in case 13-8966-CO, and not at all in case 13-9157, it was error to rely upon them in entering final summary judgment.²

Because the supporting affidavits upon which Appellee and the court relied in entering final summary judgments were not timely filed under Rule 1.510, it is,

ORDERED AND ADJUDGED that:

1. The order of the trial court is reversed and remanded for proceedings consistent herewith.
2. Pursuant to Fla. R. App. P. rule 9.400, the assessment of appellate attorneys' fees, if any, is remanded to the lower tribunal.
3. Appellee's motion to strike reply brief is DENIED.

DONE AND ORDERED in Chambers, at St. Petersburg, Pinellas County, Florida, on this 18 day of MAY 2015.

Original Order entered on May 18, 2015, by Circuit Judges Jack Day, Amy M. Williams, and Peter Ramsberger.

² See *Hotel 71 Mezz Lender, LLC v. Tutt*, 66 So. 3d 1051 (Fla. 3d DCA 2011) (Rule 1.510(c) prevents ambush by allowing the nonmoving party to be prepared for issues that will be argued at the summary judgment hearing. Failure to comply with the rule deprives the opposing party of the ability to both adequately respond and prepare for the summary judgment hearing.); *Marlar v. Quincy State Bank* 463 So. 2d 1233 (Fla. 1st DCA 1985) (Party seeking summary judgment may file supplemental affidavits less than 20 days prior to summary judgment hearing only upon written stipulation and agreement by adverse party or upon leave of court granted by written order after written application, notice to adverse party and opportunity for hearing); *Verizzo v. Bank of New York*, 28 So. 3d 97 (Fla. 2d DCA 2010) (Failure by purported assignee of promissory note to file with court, as summary judgment evidence, the promissory note and assignment of mortgage at least 20 days before hearing on its motion for summary judgment precluded summary judgment on assignee's foreclosure claim); *Viola v. U.S. Bank Nat. Ass'n*, 133 So. 3d 1018 (Fla. 4th DCA 2014) (Trial court could not award final summary judgment of foreclosure to bank based on unauthenticated copies of the original promissory note and mortgage that bank filed 12 days before the summary judgment hearing.)

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