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

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

JEREMY LOY,
and KARYN LOY
Appellants,

v.

NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3,
Appellee.
_____/

UCN: 512019AP000046APAXWS
Appeal No.: 19-AP-46
L.T. Case No.: 17-CC-760

On appeal from Pasco County Court,
Honorable Frank Grey

Brendan R. Riley, Esq.,
for Appellants.

Jocelyn C. Smith, Esq., and
Kenneth Louis Salomone, Esq.,
for Appellee.

ORDER AND OPINION

Because the affidavit and exhibits filed with the Motion for Summary Judgment failed to provide evidence of any transfers of Appellants' educational loan, there was a disputed issue of material fact regarding Appellee's standing to bring suit against Appellants. Accordingly, the final summary judgment must be reversed.

STATEMENT OF THE CASE AND FACTS

Appellee National Collegiate Student Loan Trust 2007-3 filed a Complaint against Appellants Jeremy Loy and Karyn Loy claiming breach of a loan agreement. Appellee asserted that Appellants entered into an educational loan agreement with Appellee's predecessor-in-interest and that Appellee now owned the Note under a Pool Supplement and Deposit and Sale Agreement. Attached to the Complaint was a copy of the promissory note signed by Appellants and titled "Cosigned Loan Request/Credit

Agreement."[1] It refers to an agreement between Appellants and Bank of America, National Association (BOA).

Also attached to the Complaint was a "Pool Supplement." Based upon its language, the Pool Supplement was a supplemental agreement to a "Note Purchase Agreement" between BOA and the "Depositor" under the supplement: The National Collegiate Funding, LLC (NCF). The Pool Supplement transferred certain loans from BOA to NCF. The Pool Supplement stated that NCF would sell the transferred loans to a "Purchaser Trust." The Pool Supplement did not identify the Purchaser Trust.

The body of the Pool Supplement stated that its agreement date was September 20, 2007. It stated that BOA was transferring "each student loan set forth on the attached "Schedule 1." Schedule 1 was also attached to the Complaint. Critically, however, that document was blank except for the heading "Schedule 1."

The Pool Supplement stated that the amounts paid pursuant to the Pool Supplement from NCF to BOA "are those amounts set forth on 'Schedule 2.'" Schedule 2 was also attached to the Complaint but did not contain any information about specific loans.

Also attached to the Complaint was a spreadsheet with the heading "National Collegiate Student Loan Trust 2007-3." It contained information from the original loan agreement between BOA and Appellants. However, it made no reference to any other documents such as the Pool Supplement, or Schedule 1 or Schedule 2 of the Pool Supplement. In fact, the spreadsheet made no reference to any transfers to NCF or Appellee.

Finally, attached to the Complaint was a "Deposit and Sale Agreement. The agreement was for the sale and transfer of student loans from NCF to Appellee. Per the agreement, it "sets forth the terms under which the Seller is selling and the Purchaser is purchasing the student loans listed on *Schedule 1 or Schedule 2 to each of the Pool Supplements* set forth on Schedule A attached hereto. (Emphasis added.) The list of

[1] During the trial court proceedings, Appellee alternately referred to the document as an agreement and as a promissory note. In the Answer Brief before this Court, Appellee refers to it as the promissory note. Appellants did not challenge Appellee's assertion that the document is a promissory note before this Court. Thus, it is treated as such for the purpose of this appeal.

pool supplements in Schedule A of the Deposit and Sale Agreement included the September 20, 2007 Pool Supplement between BOA and NCF.

Appellants filed an Answer and Affirmative Defenses. The Answer denied that Appellee was the owner of the Note under to the Pool Supplement and Deposit and Sale Agreement. The Affirmative Defenses raised the defense of standing, asserting that Appellee did not have standing because the Complaint and attachments "do not show that any loan connected with [Appellants] was assigned or otherwise legally conveyed or transferred to [Appellee] before" the Complaint was filed.

Appellee filed a Motion for Summary Judgment arguing that no genuine issues of material fact existed. Appellee's motion referenced an Affidavit and Verification of Account (the affidavit) that was filed contemporaneously with the motion.

In paragraph 2 of the affidavit, the affiant stated that she is employed by Transworld Systems, Inc. (TSI), the "subservicer" for Appellee. Paragraph 3 stated that TSI has been contracted to perform the duties of the subservicer for Appellee by U.S. Bank, National Association who is itself the "special servicer" of Appellee.

Paragraph 11 of the affidavit stated that Appellants' educational loan was "transferred, sold and assigned to [NCF], who in turn transferred, sold and assigned [Appellants'] educational loan to [Appellee]." Paragraph 7 of the affidavit asserted that the basis of the affiant's knowledge of the loan and its transfers was "personal knowledge of the business records maintained by TSI as custodian of records, including electronic data provided to TSI related to [Appellants'] educational loan, and the business records attached to this affidavit." Exhibits attached to support the assertions in paragraph 11 included the same Promissory Note, Pool Supplement, blank Schedule 1 of the Pool Supplement, Schedule 2 of the Pool Supplement, Deposit and Sale Agreement, and spreadsheet previously attached to the Complaint.

Appellants filed an "Opposition to Plaintiff's Motion for Summary Judgment and Motion to Strike Plaintiff's Affidavit in Support of Summary Judgment." In the filing, Appellants argued that Appellee's motion and affidavit failed to respond to Appellants' standing defense, arguing that "[Appellee] has not shown that they have standing to enforce this debt" and "has provided no evidence that they had standing to enforce this debt on or before the date the debt became due." The opposition further argued that

there was no evidence of transfer of the loan from BOA to Appellee and that without evidence of such transfer, Appellee does not have standing to sue.

The hearing on the Motion for Summary Judgment was held on April 2, 2019. Neither party had the hearing transcribed for the record on appeal. Later that same day, the trial court issued a Final Summary Judgment that granted Appellee's motion. Appellants timely-appealed.

STANDARD OF REVIEW

"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." *Skelton v. Real Estate Sols. Home Sellers, LLC*, 202 So. 3d 960, 961 (Fla. 5th DCA 2016) (quoting *Sierra v. Shevin*, 767 So.2d 524, 525 (Fla. 3d DCA 2000).

The standard of review for a trial court's ruling on the admissibility of evidence is abuse of discretion. *Jackson v. State*, 107 So. 3d 328, 339 (Fla. 2012). However, that discretion is limited by the rules of evidence. *Id*. If the reviewing court finds that the trial court abused its discretion, the error is subject to harmless error analysis. *Id*. at 342-43.

LAW AND ANALYSIS

"Summary judgment is proper only where the moving party shows conclusively that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law." *Coral Wood Page, Inc. v. GRE Coral Wood, LP*, 71 So. 3d 251, 253 (Fla. 2d DCA 2011) (citing *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966)). Where a plaintiff moves for summary judgment after a defendant has asserted an affirmative defense, the plaintiff must provide summary judgment evidence that conclusively refutes the factual bases for the affirmative defense or establishes that the defense is legally insufficient. *Coral Wood Page, Inc.*, 71 So. 3d at 253 (citing *Morroni v. Household Fin. Corp. III*, 903 So. 2d 311, 312 (Fla. 2d DCA 2005)). Summary judgment evidence includes "affidavits, answers to interrogatories, admissions, depositions, and other materials that would be admissible in evidence." Fla.R.Civ.P. 1.510(c). "The burden of proving the existence of genuine issues of material fact does not shift to the opposing party until the moving party has met its burden of proof." *Coral Wood Page, Inc.*, 71 So. 3d at 253 (quoting *Deutsch v. Global Fin. Servs., LLC*, 976 So. 2d 680, 682 (Fla. 2d DCA 2008)) (internal quotation marks omitted).

Appellee asserted in their Motion for Summary Judgment before the trial court and their Answer Brief before this Court that the educational loan between Appellants and BOA was transferred to NCF and then Appellee. Appellee's summary judgment evidence was the sworn affidavit of the TSI employee and exhibits attached thereto. Paragraph 11 of the affidavit stated that "[Appellants'] educational loan was transferred, sold and assigned to [NCF], who in turn transferred, sold and assigned [Appellants'] educational loan to [Appellee] for valuable consideration, in the course of the securitization process."

Per paragraph 7 of the affidavit, the TSI employee stated that the basis of this knowledge is "personal knowledge of the business records maintained by TSI as custodian of records, including electronic data provided to TSI related to [Appellants'] educational loan, *and the business records attached to this affidavit*." (Emphasis added.) Thus, the basis of the affiant's knowledge of the asserted transfer of the loan from BOA to NCF and then NCF to Appellee are the business records attached to the affidavit filed contemporaneously with the Motion for Summary Judgment.

However, those business records fail to provide conclusive evidence of a transfer of Appellants' loan to either NCF or Appellee. Included in the affidavit exhibits were some of the same documents attached to the Complaint: the Promissory Note, the Pool Supplement, Schedule 1 and Schedule 2 of the Pool Supplement, the spreadsheet, and the Deposit Loan Agreement. The Pool Supplement, which was executed on September 20, 2007, stated that certain loans were transferred from BOA to NCF. The Deposit Loan Agreement transferred loans listed in multiple pool supplements from NCF to Appellee. This included the loans referenced in the September 20, 2007 Pool Supplement.

The problem is that the Pool Supplement itself does not contain any mention of Appellants' loan. The Pool Supplement stated that the specific loans being transferred were listed in Schedule 1. The Deposit Loan Agreement stated that depending on the pool supplement, the specific loans could be listed in either Schedule 1 or Schedule 2 of any particular pool supplement. However, Schedule 1 of the September 20, 2007 Pool Supplement was blank and Schedule 2 does not contain any specific loan information, let alone information about Appellants' loans. While the spreadsheet that was also attached to the affidavit contained specific information about Appellants' original loan agreement with BOA, the spreadsheet makes no reference to the Pool Supplement, Schedule 1,

Schedule 2, or any transfer whatsoever. And neither the Pool Supplement, Schedule 1, nor Schedule 2 refers to the spreadsheet. Thus, there is absolutely no evidence of a transfer of Appellants' loan from BOA to NCF or NCF to Appellee in the business records from which the affiant asserts she derived her personal knowledge of said transfers.

Appellee appears to argue in the Answer Brief that the spreadsheet is, in fact, an excerpt from Schedule 1. However, there are two problems with this argument. First, the Answer Brief to this Court is the first time Appellee has made that assertion in any filing before either the trial court or this Court. Thus, the trial court record does not support that assertion.

Second, even if Appellee had argued before the trial court that the spreadsheet was an excerpt from Schedule 1, the spreadsheet itself conclusively refutes the assertion. The top of the spreadsheet is titled with Appellee's name: "National Collegiate Student Loan Trust 2007-3." Thus, it could not have been an excerpt from Schedule 1 because Schedule 1 was originally part of the Pool Supplement showing the transfer of loans from BOA to NCF. Appellee was not a party to the supplement. Appellee was not involved until the loans referenced in the Pool Supplement were transferred from NCF to Appellee in the Deposit Loan Agreement.

Schedule 1 of the Pool Supplement is the basis of Appellee's evidence of the loan's transfer from BOA to NCF and NCF to Appellee. It is from this that the TSI affiant derives her personal knowledge of the transfers. However Schedule 1 itself was blank and the spreadsheet could not have been an excerpt from Schedule 1. Therefore, Appellee's summary judgment evidence did not conclusively refute the factual assertions supporting Appellants' standing affirmative defense.

As for the spreadsheet itself, without any connection to the Pool Supplement, Schedule 1 of the Pool Supplement, or the Deposit Sale Agreement, it is at most weak circumstantial evidence of the transfer from NCF to Appellee and only that because Appellee's name is at the top of the spreadsheet. The spreadsheet does not reference NCF, the Deposit Sale Agreement, or any transfer whatsoever. And the spreadsheet does not provide even circumstantial evidence of a transfer from BOA to NCF.

Had Schedule 1 listed Appellants' loan, the result may have been different. Without Schedule 1, there is no evidence that Appellants' loan was transferred from BOA

to anyone else and little evidence of a subsequent transfer to Appellee. Therefore, the summary judgment evidence filed by Appellee failed to conclusively refute Appellants' standing affirmative defense and there remained a disputed issue of material fact regarding whether Appellants' loan was transferred to Appellee. Accordingly, the trial court should have denied the motion for summary judgment.

Because Appellee's motion should have been denied regardless of whether the trial court properly admitted evidence under the business records hearsay exception, this Court does not address Appellants' claim that the trial court erred in admitting the records in question.

A Note on Lack of Transcript

While not raised by either party in their briefs, this Court takes a moment to address something that is common in county-to-circuit civil appeals in Pasco County. For proper appellate review, a transcript of the hearing or trial that resulted in the trial court order being appealed is usually necessary. This is because a trial court's decisions are presumed to be correct. Therefore, the appellant must demonstrate that a reversible error was made. *Hirsch v. Hirsch*, 642 So. 2d 20 (Fla. 5th DCA 1994); *Casella v. Casella*, 569 So. 2d 848 (Fla. 4th DCA 1990).

Without a transcript, an appellant cannot overcome the presumption of correctness of the trial court's actions and rulings because an appellate court cannot determine whether the trial court made an error during the hearing or trial. *Id*. In such cases, an appellate court can only reverse a trial court if there is an error apparent on the face of the trial court's written order and that error resulted in a miscarriage of justice. *Harris v. McKinney*, 20 So. 3d 400, 405-06 (Fla. 2d DCA 2009) (citations and quotations omitted).

In this particular appeal, this Court was able to conduct appellate review because Appellee did not argue for affirmance based upon the lack of a transcript. And even if it had, there is an exception applicable to this appeal where an appellant appeals a summary judgment order issued after affirmative defenses are raised. *See, e.g., Johnson v. Deutche Bank Nat'l Trust Co. Ams.*, 248 So. 3d 1205, 1210-11 (Fla. 2d DCA 2018); *Houk v. PennyMac Corp.*, 210 So. 3d 726, 731 (Fla. 2d DCA 2017); *Misha Enters. v. GAR Enters.*, 117 So. 3d 850, 853-54 (Fla. 4th DCA 2013). However, even in a summary judgment appeal, preparation of a transcript would be prudent because the exception only

applies on a case-by-case basis. *See id*. (all holding that appellate review was possible despite the lack of a transcript but only because there was sufficient evidence in the parties' pleadings, motions, exhibits, and affidavits to conduct appellate review).

Parties in county civil trial court proceedings that may end up appearing before this Court are advised to either have relevant hearings and trials transcribed or recorded for later transcription, or prepare a Statement of Evidence or Proceedings under Florida Rule of Appellate Procedure 9.200(b)(5). Otherwise, civil appellants risk affirmance based upon the presumption of correctness applicable to every trial court order.

CONCLUSION

While the sworn affidavit attached to Appellee's Motion for Summary Judgment asserted that the educational loan between Appellants and BOA had been transferred to Appellee, neither the Complaint, Motion for Summary Judgment, nor the attachments thereto, provided evidence showing the actual transfer of the loan. Thus, a genuine issue of material fact remained and Appellee failed to conclusively refute Appellants' affirmative defense that Appellee did not have standing to bring suit. Therefore, the trial court should have denied Appellee's Motion for Summary Judgment.

It is therefore ORDERED and ADJUDGED that the final summary judgment of the trial court is hereby REVERSED and the case REMANDED for proceedings consistent with this Opinion.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this ___ day of _____, 2020.

Original Order entered on June 2, 2020, by Circuit Judges Linda Babb, Kimberly Campbell, and Lauralee G. Westine.

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