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IN THE SUPREME COURT

CLERK, SUPREME COURT

STATE OF FLORIDA

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CASE NO: **79,835**

THIRD DISTRICT COURT OF APPEAL CASE NO: **91-2240**

JOSE V. SILVA and ALMA E. SILVA

Appellants

vs.

SERAFIN HERNANDEZ

Appellee

INITIAL BRIEF OF THE APPELLANT

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STATEMENT OF CASE

The Appellants, JOSE V. SILVA and ALMA E. SILVA, the Defendants below, perfected this appeal in due course from a Summary Final Judgment of Mortgage Foreclosure, granting re-establishment of a lost note, money damages, court costs, attorney's fees and sale of real property in Dade County, Florida.

In this brief, the parties will be referred to as Appellants and Appelle. The following symbols are adopted for reference:

"R" for "Original Record on Appeal"

The Appellee filed its Complaint in this cause on **March** 26, 1991, to re-establish a lost note and to foreclose on the **securing** mortgage. (R 2-9) The Appellants filed their Answer and Affirmative Defenses of waiver for failure to produce the Note on April **23**, 1991. (R 11-12)

Appelle filed a general denial to the Affirmative Defenses (R-13) and Motion for Summary Final Judgment, (R 15-26) Appellant filed its Affidavit in Opposition to Summary Judgment. (R 27-29, 30-31) The Honorable Rosemary Usher Jones, one of the Judges of the lower tribunal, presided over the Motion for **Summary** Final Judgment.

The Third District **Court of** appeals affirmed the trial court's Summary Judgment, holding that Appellants affidavit in opposition to Summary Judgment was untimely filed and made no ruling as to the other points on appeal. (R-46)

On August 19, 1992, this Court entered its Order Accepting Jurisdiction and Dispensing with Oral Argument.

STATEMENT OF FACTS

Appellant, on September 18, 1987, executed a Note and Mortgage for \$10,000.00 encumbering real property in Dade County, Florida to Appellee. (R 8-9) Pursuant to said note, Appellants were to make monthly payments of interest **only** to the Appellee. (R 8)

Once monthly payments were started, Appellants **were** instructed to **make** interest payment to Appellee's Mother. (R 30) On or before October 17, 1988, Appellant tendered payment but the note was not produced. (R 30, 31) Appellee had in fact lost the note. (R 3-4,22) Subsequent to Appellants' offer to pay the note, two persons made claim upon the funds represented by the note. (R 30)

Appellee proceeded to file the complaint to reestablish the note, **and** at the same time, foreclose on the mortgage. Subsequently, Appellee filed his motion for summary judgment.

On August 20, 1991, Appellant, ALMA E. SILVA, executed her Affidavit in Opposition to Summary Judgment. On the same day, the day prior to the hearing, Appellant delivered a copy of the Affidavit upon Appellee's attorney. The following day, prior to the commencement of the hearing upon the Motion for Summary Judgment, the original affidavit **was** filed with the presiding Judge.

ISSUES PRESENTED FOR REVIEW

ISSUE I

Whether the trial court erred in disregarding as untimely an affidavit in opposition to summary judgment which had been delivered to movant's attorney the day **prior** to the hearing and was filed with the Court on the day of the hearing prior to commencement **of** same.

ISSUE II

Whether the trial **court** erred in granting Summary Judgment **of** Foreclosure when the record before the **court** showed that Appellant had timely tendered payment but Appellee was unable to produce the negotiable instrument **for** surrender and cancellation.

ISSUE III

Whether the trial court erred in granting Appellee interest, costs and attorneys fees in derogation of §673.604 (1) Florida Statutes 1989.

ARGUMENT

I

The trial court erred in disregarding as untimely an Affidavit in opposition to Summary judgment which, although filed with the **Court** immediately prior to commencing the hearing, had been served by delivered to the movant's counsel on the day prior to the hearing, in compliance with Florida Rules Of Civil Procedure 1.510(c).

In upholding the trial count, the Third District Court of Appeals relied on Hartford Accident & Indem. Co. v. Gillette, 519 So. 2d 1059 (Fla. 1st DCA 1988); Auerbach v. Alto, 281 So. 2d 567 (Fla. 3d DCA 1973); and Hardcastle v. Mobley, 143 So. 2d 715 (Fla. 3d DCA 1962).

The case of Hartford v. Gillette, supra, can be distinguished in that the affidavit and deposition that the party attempted to use in opposition to the motion for summary judgment, were filed several days after the motion was heard.

In both Hardcastle v. Mobley, supra, and Auerbach v. Alto, supra, the affidavits were apparently first brought in at the hearing on the motions for summary judgment, no mention is made as to when service was achieved. Both courts in reaching their decisions relied on Cleveland Trust Co. v. Foster, 93 So. 2d 112 (Fla. 1957), and on Siciliano v. Hunerberg, 135 So. 2d 750 (Fla. 2d DCA 1961).

In Cleveland Trust Co. v. Foster, supra, the Supreme Court held that an

affidavit in opposition to Motions for Summary Judgment which was filed **and** served at the hearing on the motion was not timely served. The Court emphasized that service was to be made prior to the day of the hearing, as **was** achieved in the instant case.

The Second District Court of Appeals specifically stated in Burton v. GOV Contracting Corporation, **552** So. 2d 293 (Fla. 2d DCA 1989), that its Siciliano decision, did not hold that the affidavit must be filed the day before the hearing, merely that it must be filed prior to the hearing. In its opinion, the Burton Court made a careful study of the requirements of Florida Rules of Civil Procedure 1.510 (c), and the differences between service, as required in the rule, and filing. In reaching its decision, the Burton Court examined Miami Transit Company v. Ford, **155** So. 2d **360** (Fla. 1963), which, although interpreting rule 2.8 (b) Florida Rules of Civil Procedure, the Supreme Court determined in that case that the rule, which specifically required service of a motion within a prescribed time, would only require its filing with reasonable promptness. The Burton Court determined therefrom that Florida Rule of Civil Procedure 1.510(c) requires service of the affidavit the day prior to the hearing and filing promptly thereafter. See also Henry Stiles Inc. v. Evans, 206 So. 2d **65** (Fla. **4th DCA** 1968), which held that physical delivery of the affidavit on the day **prior** to the hearing is what is required by Florida Rules of Civil Procedure 1.510(c).

In the instant case, the affidavit was hand delivered to movant's attorney on the day prior to the hearing (R.27-29, 30-31), and should not have been disregarded by the trial Court,

II

The trial court erred, in granting Summary Judgment of Foreclosure when the uncontroverted facts before the Court showed that Appellant had tendered payment but Appelle was unable to surrender the Note until after the Order Re-establishing same.

It is well established that on Motion for Summary Judgment, it is the burden of the moving party to show conclusively the absence of any genuine issue of material fact. Harvey Building., Inc. v. Haley, 175 So. 2d 780 (Fla. 1965); Prudential-L.M.I. Commercial V. Sears, 572 So. 2d 15 (Fla. 3d DCA 1990). If the record reflects the existence of any genuine issue of material fact, or the possibility of **any** issue, or even the slightest doubt that an issue might exist, then Summary Judgment is improper. Grissett v. Circle K. Corporation of Texas, 593 So. 2d 291 (Fla. 2d DCA 1992). Further, when a Defendant has asserted affirmative defenses, Summary Judgment for Plaintiff can be granted only **when** each such affirmative defense has been conclusively refuted on the record, Pandol Bros., Inc. v. N.C.N.B. National Bank of Florida, 450 So. 2d (Fla. 4 DCA 1984).

Appellant affirmatively asserted Waiver as a result of tender and failure to produce the negotiable instrument for cancellation. (R 11-12) The Affidavit, filed in opposition to the Summary Judgment, again sets out the tender of payment, demand for cancellation of note, and appellee's inability to produce the note. (R 27-29, 30-31) Appellees Motion for **Summary** Judgment fails to allege demand **and** refusal to **pay** (R 15-18), and his affidavit fails to refute the allegations of the affirmative defenses (R 22,231, indeed, the "Affidavit of Lost, Misplaced or Destroyed Promissory Note and

Mortgage" in essence admits that **he** had lost the note at some point in time after receiving same. (R 22)

Having failed to controvert or disprove the affirmative defenses, to obtain Summary Judgment Appellee must establish their legal insufficiency. Proprietors Ins. Co. v. Siegel, 410 So. 2d 993 (Fla 3d DCA 1982), The Race v. Lake & River Rec. Props., 573 So. 2d 409 (Fla. 1st DCA 1991).

Section 673.505 Florida Statutes (1989), states that the debtor may, without dishonor, require that the instrument be produced **for** payment and its surrender upon full payment. The surrender of the instrument, the note herein, is made necessary by Section 673.605 (2) Florida Statutes (1989), which states:

"Neither cancellation nor renunciation without surrender of the instrument affects the title thereto."

Appellee does not attempt to represent appellants' tender and demand for surrender as legally insufficient to bar to Summary Judgment, rather he apparently concedes same as in his affidavit he agrees to indemnify and hold harmless the Appellant and states:

"4. That the affiant is making this Affidavit to induce JOSE V. SILVA and ALMA E. SILVA, to tender payment.."
(R 22)

There is no factual issue that the Appellee Could not produce the note when Appellants tendered payment and were ready, willing and able to do so. Section 673.505(2) Florida Statutes (1989), states that when the creditor can not produce the note the time **for** payment does not run until the time **of** compliance. All doubts and inferences must **be resolved** against entry of Summary Judgment. Lambert v. Allstate Insurance Company, 593 So. 2d 1172 (Fla. 1st DCA 1992). Appellee was therefore not

entitled to payment until the Court entered its Order Re-establishing the lost note.

Summary Judgment foreclosing the mortgage for default was therefore improper.

III

The trial court **erred**, upon a Summary Motion for Re-establishment of Lost Note and Foreclosure, in granting interest, costs and attorney's fees where the only facts before the court **were** that payment thereon had been tendered but the instrument had been lost.

In his complaint, the Appellee had two counts: Count I seeking re-establishing of the note and mortgage (R 2-3); and Count II seeking to foreclose the mortgage, sale of the real property and use of the proceeds to be applied to satisfy indebtedness due Appellee. (R 4-5) Although they are contained in the body of Count II (R-5); neither Count sought in its prayer for relief the default of the note, damages, interest, costs OF attorney's fees. (R 4, 5-6)

In his motion for Summary Final Judgment, Appellee merely prays for entry of Final Summary Judgment and that the lost note and mortgage be re-established. (R 18)

Section **673.604**, Florida Statutes (1989), subsection **1** and **3** state:

"(1) Any party making tender of full payment to a holder when or after it is due is discharged to the extent of all subsequent liability **for** interest, costs and attorney's fees."

"(3) Where the maker or acceptor of an instrument payable otherwise than on demand is able and ready to pay at every place of payment specified in the instrument when it is due, it is equivalent to tender."

The only facts before the **Trial** Court were that the Note had been lost (R 22); that Appellant **had** tendered payment (R 30); that the note had not been presented **for** surrender (R 30); that Appellant had been **ready**, willing and able to pay off the

mortgage but for Appellee's inability to produce the original Note. (R 31)

Given the uncontroverted facts, Appellee was as a matter of law not entitled to Summary Judgment granting interest from the date of tender of payment, costs or attorney's fees.

CONCLUSION

Based upon the facts and documents before this court, it is submitted that the Lower Tribunal committed reversible error and abuse of discretion as follows:

A, The court erred in disregarding the Affidavit in Opposition To **Summary** Judgment.

B. **The** court erred in granting Summary Foreclosure and Sale of the mortgaged property.

C. The court erred in granting pre-judgement interest, costs and attorneys fees.

Under the circumstances, a reversal of the part of the Summary Final Judgment of Mortgage Foreclosure **which** grants foreclosure and sale, interest, costs and attorney's fees is appropriate and requested.

Respectfully submitted,

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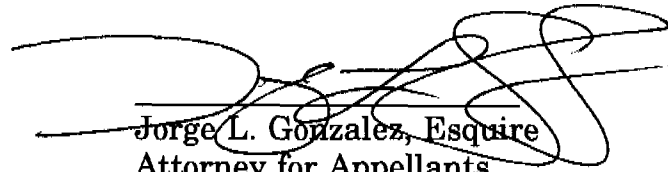
By: 

Jorge L. Gonzalez, Esquire

FLA. BAR NO. 23771 1

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to Michelle B. Alvarez,
800 Douglas Road, Suite 170, Building B, Coral Gables, Florida 33134, on September
14th, 1992.


Jorge L. Gonzalez, Esquire
Attorney for Appellants