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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,835

JOSE V. SILVA and ALMA E. SILVA,

Appellants,

vs.

SERAFIN HERNANDEZ,

Appellee.

RESPONDENT'S BRIEF ON THE MERITS
On Discretionary Review From the
Third District Court of Appeal

RESPONDENT'S BRIEF ON THE MERITS

MICHELLE B. ALVAREZ, P.A.
MICHELLE B. ALVAREZ, ESQ.
Florida Bar No. 615617
Attorney for Respondent
800 Douglas Road
Suite 170, Building B
Coral Gables, Florida 33134
(305) 446-1331

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INTRODUCTION

This is an appeal from a per curiam opinion of **the** Third District Court of Appeal affirming an Order which granted **Mortgagee** Final Summary Judgment of Mortgage Foreclosure, re-established a lost note and mortgage, foreclosed the mortgage, and awarded pre-judgment interest, costs and attorney's fees all pursuant to the note and mortgage (R. 40-45). The Petitioners, JOSE V. SILVA **and** ALMA E. SILVA, were the Defendants in the trial court, the Appellants at the Third District Court of Appeal, and will be referred to in this Brief as "**MORTGAGORS**". The Respondent, SERAFIN HERNANDEZ, was the Plaintiff in the trial court, the Appellee at the Third District Court of Appeal, and will be referred to in this Brief as "**MORTGAGEE**". 1.

1. All references to the record on appeal are designated with the symbol "R" followed by a page number. All references to the appendix are designated with the symbol "A" followed by a page number. All emphasis in the original unless otherwise stated.

SUMMARY OF THE ARGUMENT

I

Mortgagors contend that the trial court erred in not considering the affidavit they filed in opposition to the Mortgagee's Motion for Summary Judgment (R. 15-26). **However**, Mortgagors' argument is without merit because there was no court reporter present at the hearing on Mortgagee's Motion for Summary Judgment, and a transcript of the hearing does not exist. The only record there is is the Order appealed and it does not indicate that the trial court refused to consider Mortgagor's untimely affidavit (R. 40-45). On the contrary, the Summary Final Judgment states in part that the "...Court has considered the motion, affidavits, and the record, has heard argument of counsel for the parties **and** is otherwise fully advised." (R. 40) (Emphasis supplied). There is **no record** to support Mortgagors' contentions that the trial court did not consider the affidavit in opposition to Mortgagee's Motion for Summary Judgment.

II

Second, there is also no record support for Mortgagors' proposition that there was a "tender" of the monies owed by Mortgagors to Mortgagee or anyone else. Again, there was no court reporter present at the hearing on Mortgagee's Motion for Summary Judgment and a transcript of the hearing does not exist. Nor does the Order appealed make any reference to Mortgagors alleged tender of payment (R. 40-45). The record is completely devoid of any evidence to support Mortgagors' contentions. The trial court's Order must be affirmed.

III

The third issue raised by Mortgagors, that the trial court erred in its award of attorney's fees, is also without merit. This Court does not have jurisdiction to consider this issue because the Third District Court of Appeal reversed and remanded the award of attorney's fees to the trial court and it has not been reviewed by the trial court de novo (R. 46). Accordingly, this Court must dismiss the appeal on the issue of attorney's fees.

STATEMENT OF THE CASE AND FACTS

The Mortgagee respectfully rejects the Statement of the Case and Facts as presented by the Mortgagors as misrepresenting the proceedings below and submits the following as a more accurate account of the proceedings below.

Mortgagee sold real property located in Dade County, Florida to Mortgagors in 1987. As part of the transaction, Mortgagors executed a \$10,000.00 note and a purchase money mortgage in favor of Mortgagee (R. 7-9). The note matured on October 18, 1988 (R. 8). The principal balance due was not paid or tendered. The original Note and Mortgage were lost by Mortgagee sometime between September 18, 1987 and April 8, 1988. The Note states in part as follows:

Each maker and endorser severally waives demand, protest and notice of maturity, non-payment or protest and all requirements necessary to hold each of them liable as makers and endorsers.

Each maker and endorser further agrees, jointly and severally, to pay all costs of collection, including a reasonable attorney's fees in case the principal of this note or any payment on the principal or any interest thereon is not paid at the respective maturity thereof, or in case it becomes necessary to protect the security hereof, whether suit be brought or not.

This note and deferred interest payments shall bear interest at the rate of 12 percent per annum from maturity until paid.

This note is secured by a 2nd mortgage of even date

(R. 8).

Sometime during January 1991 Mortgagee began proceedings to collect on the note. On January 31, 1991, Mortgagee demanded payment of the Note (A. 1). The Mortgagors informed the Mortgagee that tender would not be made until they could be satisfied that no one else had an interest in the note. Promptly, Mortgagee prepared an Affidavit of Lost, Misplaced, Canceled Promissory Note and Satisfaction of Mortgage. (A. 2-3). Mortgagee forwarded a draft copy of the originals, with a cover letter, to Mortgagors for **review** on February 28, 1991 (A. 4). The cover letter states that "[p]romptly upon receipt of the executed documents I will contact you to arrange a mutually convenient date and time to exchange the documents and check." (A. 4). The Mortgagors did not respond to the letter nor did they object to the form of the documents submitted. Subsequently, the Mortgagee contacted Mortgagors to

exchange the Affidavit of the Lost, Misplaced, Canceled Promissory Note and Satisfaction of Mortgage for the check (A. 2). It was at this point, approximately two months later, that Mortgagors informed Mortgagee that they would not accept the Affidavit of Lost, Misplaced, Canceled Promissory Note and Satisfaction of Mortgage submitted by Mortgagee and that they would require that the Lost Note and Mortgage be re-established. The Mortgagee demanded that Mortgagors place the monies in escrow pending the re-establishment of the lost note and mortgage but Mortgagors refused stating that the monies were in a Certificate of Deposit at Florida National Bank.

On March 8, 1991, Mortgagee formally demanded payment from Mortgagors by letter (A. 5). Mortgagors did not pay nor did they respond to the demand and on March 26, 1991, Mortgagee filed his Complaint to Re-Establish Lost Note and Mortgage and to Foreclose Mortgage, (R. 2-9), and served the Complaint and Preliminary Request for Admissions, (A. 6), on Mortgagor on April 8, 1991. Mortgagors filed an Answer and Affirmative Defenses, (R. 11-12), and responded to the Request for Admissions on April 23, 1991 (A.

7). Mortgagee filed a Denial and Avoidance of Affirmative Defenses on April 23, 1991, (R. 13), and on July 19, 1991, filed the Motion for Summary Judgment with supporting Affidavits. The Motion for Summary Judgment was scheduled for hearing on August 21, 1991. No other pleadings or Affidavits were filed. On August 21, 1991, the day of the scheduled hearing on Mortgagee's Motion for Summary Judgment, Alma E. Silva, one of the Mortgagors, filed an untimely Affidavit in Opposition to Summary Judgment (R. 30-31). There was no court reporter present at the hearing, and a transcript of the hearing does not exist.

The trial court entered Summary Final Judgment in favor of Mortgagee wherein it re-established the lost note and mortgage; found that Mortgagors had defaulted in the payment of the principal balance due, awarded Mortgagee pre-judgment interest in the amount of \$3,413.16, attorney's fees in the amount of \$1,775.00, and costs in the amount of \$339.50 and ordered the sale of the property to satisfy the amount of the Judgment (R. 40-45). The following is a copy of the Summary Final Judgment of Mortgage Foreclosure:

THIS CAUSE came on to be heard on August 21, 1991, upon the duly noticed motion of Plaintiff, SERAFIN HERNANDEZ ("Hernandez"), for a Summary Final Judgment of mortgage foreclosure against all Defendants. **This Court has considered the motion, affidavits, and the record, has heard argument of counsel for the parties and is otherwise fully advised.** Upon consideration of the record and the evidence and argument of counsel herein, the Court finds there is no genuine issue of material facts and Hernandez is entitled to a judgment foreclosure as a matter of law. Accordingly, it is hereby:

ORDERED AND ADJUDGED:

1. That this Court has jurisdiction over the subject matter and over the above-named parties and that service has been properly perfected on all parties.

2. That Hernandez's motion for a summary final judgment of mortgage foreclosure against Jose V. Silva and

Alma E. Silva, and all other parties to this action, and all parties having or claiming to have any right, title or interest in the property which is the subject of this action, be and is hereby granted.

3. That the Note and mortgage are hereby re-established and given full force and effect as if they weren't lost. The certified copies of the Note and Mortgage attached to Hernandez's Complaint as Exhibit "A" and Exhibit "B" respectively, are now deemed to be the original note and mortgage.

4. That the mortgage sued upon by Hernandez in its complaint constitutes a valid lien upon the property hereinafter described and the subject mortgage is in default by virtue of Silva's failure to pay the principal balance due in the amount of 510,000.00, together with accrued interest thereon.

5. That this Court finds that the interests of Hernandez, by virtue of the execution, delivery and recordation of the subject note and mortgage herein foreclosed, are prior and superior to those of all of the Defendants to this cause and that the claims or interest of said Defendants, if any, have accrued since and are subject, subordinate and inferior to the lien of Hernandez's mortgage herein sought to be foreclosed; that the liens or claims of said Defendants, if any, be and are hereby foreclosed and obviated from any interest or lien upon the real property which forms the subject matter of this cause.

6. That under the note and mortgage, Defendants Silva are obligated to pay Hernandez's attorney's fees and court cost. The Court hereby finds that Hernandez is entitled to payment of reasonable attorneys fees in the amount of \$1,775.00. The Court further finds that Hernandez is entitled to payment of \$339.50 representing costs incurred.

7. That as of August 21, 1991, Silva owes Hernandez under the note and mortgage the following sums:

a. Principal Balance due on note:	\$ 10,000.00
b. Interest through 5/18/91 :	\$ 3,100.00
c. After 5/18/91, interest accrues at a per diem rate of \$ 3.29	
d. Interest from 5/18/91 through August 21, 1991:	\$ 313.16
Subtotal :	\$ 13,413.16
e. Recoverable Court Costs	\$ 339.50
f. Court awarded attorneys' fees	\$ <u>1,775.00</u>
TOTAL*	\$ <u>15,527.66</u>

* Interest shall accrue from August 21, 1991 to the date of issuance of a certificate of title at the legal rate.

8. That Hernandez has a lien to secure payment of the above itemized sums against the following described property situated in Dade County, Florida:

Lot 1, Block 3, of BIRD
VILLAS SUBDIVISION,

according to the plat thereof, as recorded in Plat Book 119, Page 99 of the Public Records of Dade County Florida.

9. The Clerk of the Court, after publication of notice as required by § 45 of the Florida Statutes, as amended, is directed to sell the mortgaged property as described above to the highest bidder, for cash, except as set forth below, on September 16, 1991 at 11:00 a.m., on the north steps of the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, free and clear and discharged of any and all rights, claims, liens, interests, encumbrances, leasehold interests and equities of the defendants to this action, all as provided by § 45 of the Florida Statutes, except that the clerk shall not hold the sale if Hernandez, or its representative, is not present to bid.

10. That out of the proceeds arising out of the sale of the property, the Clerk shall retain his costs and fees, and shall pay in this order, documentary stamps affixed to the certificate, the amount due and owing Hernandez as itemized in Paragraph 6 above, and, if the property shall sell for more than enough to pay Hernandez the above-mentioned sum with interest, the Clerk shall report the surplus to this Court for the Court's further order, and in the event the amount realized at the sale shall be insufficient to pay the total of the above-mentioned sums, the Clerk shall report the deficiency to this Court for such further orders as the Court shall deem proper.

11. Hernandez may bid at the sale and if Hernandez is the successful bidder, Hernandez shall be entitled on his bid to a credit up to the full amount due under this final judgment, including a credit in the sum of the attorney's fees provided for above.

12. That upon the sale being had in accordance with Chapter 45 of the Florida Statutes, and upon the Clerk filing the certificate of sale and certificate of title, the sale shall stand confirmed and the Defendants to this cause, and all persons claiming by, through or under them, shall be forever barred and foreclosed of any equity or right of redemption in and to the above-described property with the exception of the United States which shall have the right of redemption provided by 28 U.S.C. 2410(c) for 120 days from the date of sale but the right shall thereafter expire and the purchaser at sale shall be let into possession of the property; further, any and all persons whosoever claiming against the subject property by virtue of any liens unrecorded as of the date of the filing of Hernandez's lis pendens with the Clerk of this Court shall be forever barred from asserting any such liens, and any such liens shall be discharged forever, in accordance with the Florida Statutes.

13. That this Court retain jurisdiction of this cause for the purpose of making all other orders and judgments as may be necessary and proper, including, but not limited to, deficiency judgments and writs of possession and assistance.

DONE AND ORDERED in chambers, at Miami, Dade County, Florida this 21st day of August, 1991.

JUDGE ROSEMARY USHER JONES
CIRCUIT COURT JUDGE

Copies furnished to:
Michelle B. Alvarez, Esquire
Jorge L. Gonzalez, Esquire

(R. 40-45) (Emphasis supplied).

Mortgagors filed an untimely Motion for Rehearing of Summary Judgment ruling (R. 32-34) and Mortgagee filed a Response to Mortgagors' Motion for Rehearing of Summary Judgment (R. 35-38). After hearing, at which there was, once again, no reporter and no transcript, the Court entered an Order denying Mortgagors' Motion for Rehearing (A. 8).

Mortgagors then filed a timely Notice of Appeal (R. 39). At the Third District Court of Appeal, Mortgagors raised the argument that the trial court had erred because it failed to consider Mortgagor's affidavit in opposition to Mortgagee's Motion for Summary Judgment. Mortgagee argued before the Third District Court of Appeal that any refusal of the trial court to consider Mortgagor's affidavit was proper because of its untimeliness. The Third District Court of Appeal affirmed per curiam the trial court's judgment with the exception that it reversed and remanded the issue of attorney's fees. The following is a copy of the Third District Court of Appeal's Opinion:

Before NESBITT, BASKIN and FERGUSON, JJ

PER CURIAM.

We affirm the summary final judgment in favor of appellee. The trial court properly disregarded appellants' untimely affidavit. 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); cert.denied, 297 So.2d 31 (Fla. 1974); Hardcastle v. Mobley, 143 So.2d 715 (Fla.3d DCA 1962); contra Burton v. GOV Contracting Corp., 552 So.2d 293 (Fla. 2d DCA 1989).

We reverse the award of attorney's fees, however. "[I]t is well settled that the testimony of an expert witness concerning a reasonable attorney's fee is necessary to support the establishment of the fee." Crittenden Orange Blossom Fruit v. Stone, 514 So.2d 351 (Fla.1987); see Hemmerle v. First Fed. Sav. & Loan Ass'n, 338 So.2d 82 (Fla. 2d DCA 1976). Here, the record contains no testimony other than that of the attorney seeking the fees. An award of fees on that record is error. Palmetto Fed. Sav. & Loan Ass'n v. Day, 512 So. 2d 332 (Fla. 3d DCA 1987); Walker v. Kremer, 382 So.2d 338 (Fla. 4th DCA 1980); Rodin v. Auto-Train Corp., 377 So.2d 810 (Fla. 3d DCA 1979); Mullane v. Lorenz, 372 So.2d 168 (Fla. 4th DCA 1979). The cause is remanded for the trial court to conduct a hearing on the attorney's fee issue.

Affirmed in part; reversed in part.

(R.46).

Mortgagors then filed a Motion for Rehearing which the Third District Court of Appeal denied (R. 47). Mortgagors filed a Notice to Invoke Discretionary Jurisdiction and this Court accepted jurisdiction and dispensed with oral argument on August 19, 1992.

ISSUES ON APPEAL

We respectfully restate the issues on appeal as follows:

I

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REESTABLISHING THE LOST NOTE AND MORTGAGE AND FORECLOSING ON THE MORTGAGE WHERE THE RECORD FAILS TO SUPPORT THE CONTENTION THAT THE AFFIDAVIT IN OPPOSITION TO SUMMARY JUDGMENT WAS NOT CONSIDERED BY THE TRIAL COURT BECAUSE OF ITS UNTIMELINESS?

II

WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT WHERE THERE IS NO RECORD SUPPORT FOR THE PROPOSITION THAT PAYMENT WAS MADE?

III

WHETHER THIS COURT LACKS JURISDICTION TO REVIEW AN AWARD OF ATTORNEY'S FEES WHERE THE DISTRICT COURT REVERSED AND REMANDED THE AWARD AND THE TRIAL COURT HAS NOT RECONSIDERED THE AWARD?

ARGUMENT

I

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT REESTABLISHED THE LOST NOTE AND MORTGAGE AND FORECLOSED ON THE MORTGAGE BECAUSE THERE IS NO RECORD TO SUPPORT THE CONTENTION THAT THE AFFIDAVIT WAS NOT CONSIDERED BY THE TRIAL COURT BECAUSE OF ITS UNTIMELINESS.

Mortgagors contend trial court erred in granting Final Summary Judgment of Foreclosure because the trial court refused to consider the untimely affidavit filed in opposition to Mortgagee's Motion for Summary Judgment. The Mortgagors' argument is misplaced and **without** merit for two reasons, to wit: 1) there is **no record** to support Mortgagors' contention; and 2) assuming, **arguendo**, that the trial court did not consider the affidavit, the ruling was proper because the affidavit was untimely.

There is **no record** to support Mortgagors' contentions that the trial court did not consider the affidavit in opposition to Mortgagee's Motion for Summary Judgment (R. 30). There was no court reporter present at the hearing on Mortgagee's Motion for Summary Judgment, and a transcript of the hearing does not exist. The only

record there is is the Order appealed and it does not indicate that the trial court refused to consider Mortgagor's untimely affidavit (R. 40-45). On the contrary, the Summary Final Judgment states that the "...Court has considered the motion, affidavits, and the record, has heard argument of counsel for the parties and is otherwise fully advised." (R. 40) (Emphasis supplied). A reviewing court is limited to the face of the record presented. Coffman v. State, 292 So.2d 608 (Fla. 4th DCA 1974). A trial court's decision has the presumption of correctness and the burden is on the party who asserts error to demonstrate it. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979).

In Applegate, after a non-jury trial without a reporter, the trial court found that Applegates' lien was superior to Barnett Bank's lien. Barnett Bank appealed but did not bring forward any substitute for a trial transcript. The First District Court of Appeal reversed on the grounds that the trial court's judgment was not supported by the facts. However, this Court accepted review and held that:

Without a record of the trial proceedings, the appellate court cannot properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory. Without knowing the

factual context, neither can an appellate court reasonably conclude that the trial judge so misconceived the law as to require reversal. The trial court should have been affirmed because the record brought forward by the appellant is inadequate to demonstrate reversible error....

Id. at 1152.

In the case at bar, there was no court reporter present at the hearing on Mortgagee's Motion for Summary Judgment, there was no transcript, and Mortgagors failed to provide the Court with a substitute for a trial transcript. This Court's review is limited to the record before it.

The burden to show error is on the party who asserts it. Watson v. State, 218 So.2d 528 (Fla. 3d DCA 1969). The party asserting error can discharge this burden only by making error clearly, definitely and fully to appear; and failure to meet this burden impels conclusion that there is no error and the judgment or order appealed must be affirmed. Strate v. Strate, 328 So.2d 29 (Fla. 3d DCA 1976). In the case at bar, Mortgagors have failed to show that error clearly, definitely and fully exists.

This Court must affirm the trial court's Order which re-establishes the lost note and mortgage and forecloses the mortgage because there is no record support to Mortgagors' contention that the trial court refused to consider Mortgagor's Affidavit in

opposition to Mortgagee's Motion for Summary Judgment and Mortgagors have failed to show that error clearly, definitely and fully exists.

Notwithstanding the above argument, assuming, arguendo, that the trial court refused to consider Mortgagor's affidavit in opposition, the court properly **did so** because the affidavit was untimely filed. Mortgagor filed the affidavit in opposition to Mortgagee's Motion for Summary Judgment the same day of the hearing (R. 30). In fact, Mortgagors tendered the affidavit to the trial judge during the hearing; the Mortgagors admit that they filed the affidavit the same day as the hearing.

In a Motion for Summary Judgment all opposing affidavits must be filed prior to the day of the hearing. Rule 1.510(c), Fla. R.Civ.P.; Auerbach v. Alto, 281 So.2d 567 (Fla. 3d DCA 1973). "Both the Florida Rules of Civil Procedure and the cases interpreting the rules have made it mandatory that affidavits in opposition to motions for summary judgment be filed prior to the day of the hearing.". Id. at 567, 568. In Auerbach, the Third District Court of Appeal held the "... trial judge to be eminently

correct in refusing to consider the affidavit proffered on the morning of the hearing on plaintiffs' motion for summary judgment.". Id. at 568.

The Third District Court of Appeal also held in Hardcastle v. Mobley, 143 So.2d 715 (Fla. 3d DCA 1962), that "[i]t is not sufficient in defense of a motion for summary judgment to rely on the paper issues created by the pleadings, but it is incumbent upon the party moved against to submit evidence to rebut the motion for summary judgment and affidavits in support thereof or the court will presume that he had gone as far as he could **and** a summary judgment could be properly entered ... affidavits in **opposition to** motions for summary judgment must be filed prior to the day of the hearing.". Id. at 717.

Mortgagors rely on Burton v. GOV Contracting Corp., 552 So.2d 293 (Fla. 2d DCA 1989) for the proposition that counteraffidavits can be filed on the day of the hearing. First, the facts in Burton are completely distinguishable from the facts of the case at bar, and therefore Burton is inapplicable. In Burton, GOV sued the defendants alleging a default on a guaranty defendants executed.

The guarantors answered the complaint, **asserting** the affirmative defenses of recoupment and payment and filed a counterclaim seeking damages for Plaintiff's failure to complete the **work** on subdivision improvements. The guarantors eventually withdrew their affirmative defense of payment **before** the hearing on the motion for summary judgment.

The guarantors returned incomplete answers to GOV's interrogatories and request for production of documents. GOV filed a motion to compel and the trial court granted the motion, ordering the defendants to respond fully to the discovery requests within ten days. Guarantors failed to comply with the order and GOV filed a motion for sanctions, which the trial court granted. Specifically, the trial court stayed the guarantors from proceeding further on their counterclaim until they complied with the order compelling discovery.

GOV filed a motion for summary judgment and alleged that guarantors **were** precluded from asserting recoupment as a defense because it **was** the same subject matter as the counterclaim, which the trial court had stayed for defendant's failure to comply with the order compelling discovery. The trial court granted GOV's motion on the grounds that the defendant was precluded from raising

recoupment as a defense to the action and because the counteraffidavit was untimely. The Second District Court of Appeal reversed the judgment and held that the trial court committed error in not allowing guarantor's to raise recoupment as a defense to the action and, because the affidavit had been served on counsel the day prior to the hearing and filed with the court on the day of the hearing, the counteraffidavit was not untimely.

In the case at bar, one of the Mortgagors filed an Affidavit in Opposition to Mortgagee's Motion for Summary Judgment on the day of the scheduled hearing (R. 30). No other pleadings or affidavits were filed by Mortgagors. The record is completely devoid of evidence that the trial court refused to consider Mortgagor's affidavit. The only record there is is the Order appealed and it does not indicate that the trial court refused to consider Mortgagor's untimely affidavit (R. 40-45). On the contrary, the Summary Final Judgment states that the "...Court has considered the motion, affidavits, and the record, has heard argument of counsel for the parties and is otherwise fully advised." (R. 40) (Emphasis supplied).

Second, the holding in Burton defies the long standing principle of stare decisis. This Court held in Cleveland Trust Company v. Foster, 93 So.2d 112 (Fla. 1957), that "[t]he motion

shall be served 10 days before the time fixed for the hearing. The adverse party **prior** to the **day of the hearing** may serve opposing affidavits. Id. at 114. Assuming, arguendo, that this Court finds that Burton is in conflict with the holding in this case, Mortgagee urges that Burton must be overruled because **its** holding is contrary to Rule 1.510(c), Fla.R.Civ.P., and the common law. See, 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); cert. denied, 297 So.2d 31 (Fla. 1974); Hardcastle v. Mobley, 143 So.2d 715 (Fla. 3d DCA 1962).

Rule 1.510(c), Fla.R.Civ.P. and interpreting case law mandate that Affidavits in Opposition to Motions for Summary Judgment be filed prior to the day of the hearing. Mortgagors defied the Rule and interpreting case law by filing the Affidavit the day of the hearing (R. 30). Accordingly, the Summary Final Judgment appealed must be **affirmed**.

II

**THE TRIAL COURT PROPERLY GRANTED
SUMMARY JUDGMENT WHERE THERE IS NO
RECORD SUPPORT FOR THE CONTENTION
THAT PAYMENT WAS MADE.**

Mortgagors contend that Summary Judgment in favor of Mortgagee was improper because Mortgagors tendered payment. Mortgagors' point is without merit. First, the record is completely devoid of any evidence which would support the allegation that payment was tendered. The only reference to tender is in the untimely Affidavit in Opposition to Summary Judgment (R. 30). There is no record support as to whom the alleged tender was made, when the alleged tender was made and/or where the alleged tender was made. Even the Affidavit in Opposition to Summary Judgment fails to state to whom, when and/or where tender was made (R. 30). As a matter of fact, Mortgagee demanded tender from Mortgagors on January 31, 1991 (A. 1), on or about February 28, 1991 (A. 4), and on March 8, 1991 (A. 5) and Mortgagors refused. ².

2.

Mortgagee incorporates herein the argument infra, pages 13 through 16 and further asserts that the reviewing Court is limited to the record before it. Coffman v. State, 292 So.2d 608 (Fla. 4th DCA 1974).

Second, summary judgment was proper because there were no material issues of fact and Mortgagee was entitled to judgment as a matter of law.

A party is entitled to Summary Judgment where there is no genuine issue as to any material fact and where the moving party is entitled to judgment as a matter of law. Rule 1.510(c), Fla.R.Civ.P.; Colon v. Lara, 389 So.2d 1071 (Fla. 3rd DCA 1980).

The First District Court of Appeal in Harrison v. Consumers Mortgage Company, 154 So.2d 195 (Fla. 1st DCA 1963), defined the term "genuine issue" as "...a real as distinguishable from a false or colorable issue.". Id. at 195. And, in Wells v. Wilkerson, 391 So.2d 267 (Fla. 4th DCA 1980), the Fourth District Court of Appeal defined a "material fact" as follows: "[a] material fact is one essential to the result that is placed in controversy by the pleadings and affidavits. Thus, to preclude the entry of summary judgment there must be some fact essential to a resolution of the legal questions raised **by** the case which is genuinely controverted.". Id. at 267.

The material and undisputed facts in **the** case at bar are as follows: Mortgagors executed a note and purchase money mortgage in favor of Mortgagee on September 18, 1987 (R. 6-8). The note matured and became due and payable on October 18, 1988 (R. 7-9). Mortgagors failed to make the payment due on October 18, 1988.

Mortgagee demanded payment from Mortgagors on three different occasions (A. 1, 4-5). Mortgagors did not respond to the letters, did not pay, nor **did** they tender the monies due into escrow or, subsequently, into the court registry.

Mortgagee filed a Complaint to Reestablish Lost Note and Mortgage and to Foreclose Mortgage on March 26, 1991 (R. 2-9) and **served** Request for Admissions (A. 6). Mortgagors filed an Answer and Affirmative Defenses (R. 11-12) and Response to Request for Admissions (A. 7) on April 23, 1991. Mortgagee promptly filed a Denial and Avoidance of Affirmative **Defenses** (R. 13) on April 23, 1991, and on July 19, 1991, Mortgagee filed a Motion for Summary Judgment and supporting Affidavits (R. 15-26). No other pleadings or Affidavits were filed. On August 21, 1991, the day of the scheduled hearing on Mortgagee's Motion for Summary Judgment, Mortgagors handed to the trial judge an Affidavit in Opposition to Summary Judgment executed by Alma E. Silva, one of the Mortgagors (R. 30-31).

The Note, Mortgage and Affidavits filed in support of Mortgagee's Motion for Summary Judgment, upon which the trial judge relied, are in plain english, and speak for themselves (R. 6-8).

The Mortgagors' response to Mortgagee's Request for Admissions is also in plain english and speaks for itself (A.7). The Mortgagors responded in the affirmative to the following statements:

1. That the copies of the mortgage and note attached as exhibits to the complaint are true copies of the original instruments which they purport to duplicate.

2. That the originals of the mortgage and note, copies of which are attached as exhibits to the complaint, were executed by the person or persons whose signatures appear on those instruments.

3. That Plaintiff, SERAFIN HERNANDEZ, loaned monies in accordance with the mortgage and note, copies of which are attached as exhibits to the complaint.

5. That the loan made pursuant to the instruments, copies of which are attached as exhibits to the complaint, has not been fully repaid.

6. That all dates of signing, filing, or recordation shown on the exhibits to the complaint accurately reflects the dates on which such instruments were signed, filed or recorded.

7. That you are obligated to plaintiff upon the indebtedness arising from the mortgage and note, copies of which are attached as exhibits to the complaint.

(A. 6 - 7).

The Second District Court of Appeal held in Castle Construction Company vs. Huttig Sash & Door Company, 425 So.2d 575 (Fla. 2nd DCA 1982), that "where the determination of a party's liability depends on the written instruments of the **parties** and their legal effect, the question becomes one of law only and is determinable by summary judgment.". Id. at 575. In the case at bar, the liability of the parties depended on written instruments, a Note and a Mortgage (R. 7-9).

Mortgagors state in their brief that Mortgagee failed to controvert or disprove the affirmative defenses.

While it is true that it is necessary for a plaintiff to show that affirmative defenses have no basis in fact in order to be entitled to summary judgment, this does not mean that by the raising of purely paper issues the defendant can forestall the granting of relief to the plaintiff where the pleadings and evidentiary matters **before** the trial court show that the defenses are without substance in fact or in law. Reflex, N.V. vs. Umet Trust, 336 So. 2d 473, 474-475 (Fla. 3rd DCA 1976).

Mortgagors raised as an affirmative defense that "Defendants were **ready** willing and able to pay off the outstanding balance of said mortgage when said became due. Defendants offered to tender same" (R. 11-12). Mortgagee promptly filed a Denial and Avoidance of Affirmative Defenses on April 23, 1991 (R. 13). On July 19, 1991, Mortgagee filed his Motion for Summary Judgment and supporting Affidavits (R. 15-26). No other document, pleading or evidence was submitted by Mortgagors in support of the affirmative defense, or otherwise. Except for the self serving Affidavit, (R. 30), which was signed by only one of the two Mortgagors and which was untimely filed, the record is completely devoid of evidence as to whom, when and where the alleged tender was made. In fact, even the Affidavit itself fails to state to whom the alleged tender was made, when the alleged tender was made, and/or where the alleged tender was made (R. 30).

In the case at bar, the determination of Mortgagors' liability depended upon a written instrument (R. 6-8). The pleadings and affidavits filed in this case conclusively show that there was no genuine issue as to any material fact, and that Mortgagee was entitled to judgment as a matter of law. "The fundamental purpose for the summary judgment procedure is to relieve the litigant and

the court from the trial of unnecessary lawsuits." General Truck Sales vs. American Fire & Casualty Company, 100 So.2d 203 (Fla. 3rd DCA 1958). The trial court, in the case at bar, did just that. Accordingly, this Court must affirm the trial court's judgment which reestablishes the lost note and mortgage, awarded Mortgagee pre-judgment interest, cost and attorney's fees and ordered the sale of the property to satisfy the amount of the judgment.

III

THIS COURT LACKS JURISDICTION TO REVIEW AN AWARD OF ATTORNEY'S FEES WHERE THE DISTRICT COURT OF APPEAL REVERSED AND REMANDED THE AWARD AND THE TRIAL COURT HAS NOT YET RECONSIDERED THE AWARD.

Mortgagors contend that the trial court erred in awarding Mortgagee's attorney's fees. Mortgagors' argument is, once again, without merit because this Court does not have jurisdiction to consider this issue. In the case at bar, the Third District Court **of Appeal reversed** and remanded the award of attorney's fees to the trial court, (R. 46), and the attorney's fee issue has not been reviewed de novo by the trial court.

This Court will not review a judgment of a subordinate court unless there a final adjudication. *Tantillo v. Miliman*, 87 So.2d 413 (Fla. 1956). In *Tantillo*, this Court held that "[i]t is a rule that a judgment of a subordinate court will not be reviewed here on appeal unless there is a final adjudication of the cause[.]" In the case at bar, the Third District Court of Appeal reversed the **award** of attorney's fees and remanded the cause to the trial court (R.

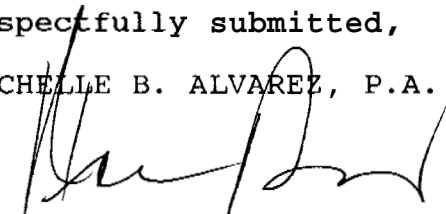
46). The trial court has not yet reviewed the issue of attorney's fees. Thus, this Court does not have jurisdiction to review the claim for attorney's **fees**.

In Florida Farm Bureau Casualty Insurance Company v. Fichera, 385 So.2d 183 (Fla 4th DCA 1980), the Fourth District Court of Appeal dismissed an appeal because the trial court had reserved jurisdiction on the issue of attorney's fees. In the case at bar, the Order appealed, with regards to the issue on attorney's **fees**, is not "...a final order subject to plenary appeal, nor is it a non-final order subject to interlocutory appeal pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)." Id. at 184. In effect, what the Mortgagors attempt to do is to have this Court review an Order which is not in effect. This Court must decline to review a non-existent order. This Court must dismiss the appeal on the issue of attorney's fees because the Third District Court of Appeal reversed and remanded the issue to the trial court, (R. 46), and the issue has not been reviewed by the trial court de novo.

CONCLUSION

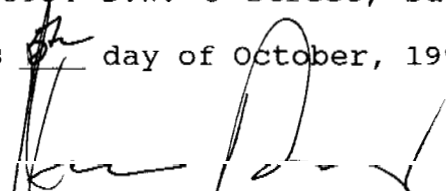
Based on the foregoing argument of counsel and citations of authority, the Mortgagee respectfully requests that the judgment re-establishing the lost note and mortgage, foreclosing on the mortgage, and awarding pre-judgment interest, costs and attorney's fees be affirmed.

Respectfully submitted,
MICHELLE B. ALVAREZ, P.A.


MICHELLE B. ALVAREZ, Esquire
800 Douglas Road
Suite 170, Building B
Coral Gables, Florida 33134
(305) 446-1331

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to JORGE L. GONZALEZ, Attorney for the Appellant, 3934 S.W. 8 Street, Suite 302, Coral Gables, Florida 33134 on this th day of October, 1992.


MICHELLE B. ALVAREZ

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,835

JOSE V. SILVA and ALMA E. SILVA,
Appellants,

vs.

SERAFIN HERNANDEZ,
Appellee.

APPENDIX TO
RESPONDENT'S BRIEF ON THE MERITS
On Discretionary Review From the
Third District Court of Appeal

APPENDIX TO
RESPONDENT'S BRIEF ON THE MERITS

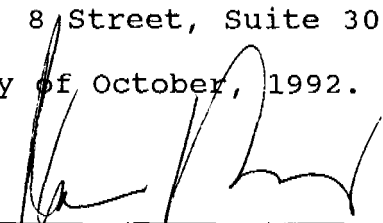
MICHELLE B. ALVAREZ, P.A.
MICHELLE B. ALVAREZ, ESQ.
Florida Bar No. 615617
Attorney for Respondent
800 Douglas Road
Suite 170, Building B
Coral Gables, Florida 33134
(305) 446-1331

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true **and** correct copy of the **foregoing** APPENDIX was furnished by mail to Jorge L. **Gonzalez**, Attorney for the Appellant, 3934 S.W. 8 Street, Suite 302, Coral Gables, Florida 33134 on this 5th day of October, 1992.



MICHELLE B. ALVAREZ