



Foreclosure Defense

Search this group

Search Group

NY trial court dismissal b/c note attached to complaint has no endorsement and assignment is bad - no standing

[Options](#)

★ 14 messages - [Collapse all](#) - [Report discussion as spam](#)

April Charney [View profile](#)

[More options](#) Feb 2, 9:24 pm

Deutsche Bank Natl. Trust Co. v McRae

2010 NY Slip Op 20020

Decided on January 25, 2010

Supreme Court, Allegany County

Walker, J.

"Today, with multiple and (and often unrecorded) assignments of mortgage obligations and multiple securitizations often related to the same debt, the courts should carefully scrutinize the status of parties who claim the right to enforce these mortgage obligations. For the unrepresented homeowner, the issues of standing and real party in interest status of the foreclosing party are never considered. Without such scrutiny, there is a risk that the courts will give the judicial "seal of approval" to foreclosures against unrepresented homeowners who have little, if any, understanding of these issues, much less the legal significance thereof. To quote my colleague in Kings County, "[a]llowing this case to proceed on behalf of a plaintiff without standing at the commencement of the action would [also] open the door to potential fraud and place in jeopardy the integrity of title to the property to be foreclosed." "...

http://www.nycourts.gov/reporter/3dseries/2010/2010_20020.htm

order ny no note with endorsement no valid assignment dismissal Deutsche Bank Natl_ Trust Co_ v McRae (2010 NY Slip Op 20020).mht



23K [View](#) [Download](#)

[Reply](#) [Reply to author](#) [Forward](#) [Report spam](#) Rate this post: ★★★★★

Discussion subject changed to "YES!! NY trial ct dismissed b/c NOTE attached t

shelbym...@aol.com [View profile](#)

[More options](#) Feb 3, 4:16 am

This highly relevant NY case provides us with further support that we must look closely at the NOTE to see if it has an endorsement. Interesting, here, is that the Court appears to demand an ASSIGNMENT of the NOTE as well. It mentions physical delivery. The assignment was timely (one day before); however, but still rejected by the Court as improper. AND the NOTE at time of Complaint bore no

Home

Discussions

[+ new post](#)

Members

Pages

Files

[About this group](#)

[Edit my membership](#)

Sponsored links

[Trial Solutions](#)

Electronic Evidence

Discovery

www.TrialSolutions.net

[Hodes Pessin & Katz, P.A.](#)

Attorneys at Law

Big firm talent, small firm appeal

www.hpkllegal.com

[CDs: Up to 3.15% APY](#)

Ally Bank High Yield Online CDs.

Open an Account Today, Member

FDIC

www.Ally.com

See your message here

endorsement!! The lack of NOTE endorsement would appear in Florida as the equivalent of the lack of mortgage assignment.

I WONDER IF WE HAVE a "FAIL TO ENDORSE NOTE" CASE IN FLORIDA?
Anyone got one??

Keith Halpern, Staff Attorney
Legal Services of North Florida, Inc.

"Plaintiff relies further upon a written instrument of assignment — not physical delivery of the Note and the Mortgage. First Franklin purported to assign the Mortgage and the Note to Plaintiff by an "Assignment of Mortgage," dated January 20, 2009 (the "Purported Assignment"). The Purported Assignment provides, in relevant part, as follows:

Said Assignor hereby assigns unto the above named Assignee the said Mortgage, and the full benefit of all the powers and of all the covenants and Provisions therein contained, and the said Assignor hereby grants and conveys unto the said Assignee, the Assignor's beneficial interest under the Mortgage. (Emphasis added).

As the above-quoted language clearly indicates, it does not assign the Note, or the underlying obligation. Indeed, the operative language ends with the assignor assigning its "beneficial interest under the Mortgage" alone, with no reference to the debt.

By contrast, McKinney's Real Property Law §258 [Form O], contains a form assignment of mortgage which clearly assigns both the mortgage and the underlying debt, as follows:"

Keith A. Halpern, Attorney
Legal Services of North Florida, Inc.
121 North Jackson Street
Quincy, Florida 32351
(850) 875-9881 (850) 875-2008 (telefax)

[- Show quoted text -](#)

[Reply](#) [Reply to author](#) [Forward](#) [Report spam](#) Rate this post: 

[April Charney](#) [View profile](#)

[More options](#) Feb 3, 6:54 am

We still have many, many "produce the note" judges in Florida. I suspect most of the judges still fit this description. But with education we can change that gloss on the UCC.

From: foreclosure-defense@googlegroups.com on behalf of shelbym...@aol.com
Sent: Wed 2/3/2010 4:16 AM
To: foreclosure-defense@googlegroups.com
Subject: YES!! NY trial ct dismissed b/c NOTE attached to complaint has no endorsement & no assign of debt - no standing

This highly relevant NY case provides us with further support that we must look closely at the NOTE to see if it has an endorsement. Interesting, here, is that the Court appears to demand an ASSIGNMENT of the NOTE as well. It mentions physical delivery. The assignment was timely (one day before); however, but still rejected by the Court as improper. AND the NOTE at time of Complaint bore no endorsement!! The lack of NOTE endorsement would appear in Florida as the equivalent of the lack of mortgage assignment.

I WONDER IF WE HAVE a "FAIL TO ENDORSE NOTE" CASE IN FLORIDA?
Anyone got one??

Keith Halpern, Staff Attorney
Legal Services of North Florida, Inc.

"Plaintiff relies further upon a written instrument of assignment - not physical delivery of the Note and the Mortgage. First Franklin purported to assign the Mortgage and the Note to Plaintiff by an "Assignment of Mortgage," dated January 20, 2009 (the "Purported Assignment"). The Purported Assignment provides, in relevant part, as follows:

Said Assignor hereby assigns unto the above named Assignee the said Mortgage, and the full benefit of all the powers and of all the covenants and Provisions therein contained, and the said Assignor hereby grants and conveys unto the said Assignee, the Assignor's beneficial interest under the Mortgage. (Emphasis added).

As the above-quoted language clearly indicates, it does not assign the Note, or the underlying obligation. Indeed, the operative language ends with the assignor assigning its "beneficial interest under the Mortgage" alone, with no reference to the debt.

By contrast, McKinney's Real Property Law §258 [Form O], contains a form assignment of mortgage which clearly assigns both the mortgage and the underlying debt, as follows:"

Keith A. Halpern, Attorney
Legal Services of North Florida, Inc.
121 North Jackson Street
Quincy, Florida 32351
(850) 875-9881 (850) 875-2008 (telefax)

- Show quoted text -



winmail.dat

10K [View](#) [Download](#)

[Reply](#) [Reply to author](#) [Forward](#) [Report spam](#) Rate this post:

Larry T. Griggs, P.A. [View profile](#)

[More options](#) Feb 3, 8:46 am

How does this work? Usually, the Plaintiff brings the original note and mortgage to the final hearing (SJ or whatever)

Do you have to wait until the final hearing for the Plaintiff to produce the note and then make an oral motion if the original, endorsed note is not produced?

Do you file a motion for an order requiring the Plaintiff to produce the original?

ltg

From: foreclosure-defense@googlegroups.com
[mailto:foreclosure-defense@googlegroups.com] On Behalf Of April Charney
Sent: Wednesday, February 03, 2010 6:55 AM
To: foreclosure-defense@googlegroups.com
Subject: RE: YES!! NY trial ct dismissed b/c NOTE attached to complaint has no endorsement & no assign of debt - no standing

We still have many, many "produce the note" judges in Florida. I suspect most of the judges still fit this description. But with education we can change that gloss on the UCC.

From: foreclosure-defense@googlegroups.com on behalf of shelbym...@aol.com
Sent: Wed 2/3/2010 4:16 AM

To: foreclosure-defense@googlegroups.com
Subject: YES!! NY trial ct dismissed b/c NOTE attached to complaint has no endorsement & no assign of debt - no standing

This highly relevant NY case provides us with further support that we must look closely at the NOTE to see if it has an endorsement. Interesting, here, is that the Court appears to demand an ASSIGNMENT of the NOTE as well.

It mentions physical delivery. The assignment was timely (one day before); however, but still rejected by the Court as improper. AND the NOTE at time of Complaint bore no endorsement!! The lack of NOTE endorsement would appear in Florida as the equivalent of the lack of mortgage assignment.

I WONDER IF WE HAVE a "FAIL TO ENDORSE NOTE" CASE IN FLORIDA?
Anyone got one??

Keith Halpern, Staff Attorney

Legal Services of North Florida, Inc.

"Plaintiff relies further upon a written instrument of assignment - not physical delivery of the Note and the Mortgage. First Franklin purported to assign the Mortgage and the Note to Plaintiff by an "Assignment of Mortgage," dated January 20, 2009 (the "Purported Assignment"). The Purported Assignment provides, in relevant part, as follows:

Said Assignor hereby assigns unto the above named Assignee the said Mortgage, and the full benefit of all the powers and of all the covenants and Provisions therein contained, and the said Assignor hereby grants and conveys unto the said Assignee, the Assignor's beneficial interest under the Mortgage. (Emphasis added).

As the above-quoted language clearly indicates, it does not assign the Note, or the underlying obligation. Indeed, the operative language ends with the assignor assigning its "beneficial interest under the Mortgage" alone, with no reference to the debt.

By contrast, McKinney's Real Property Law §258 [Form O], contains a form assignment of mortgage which clearly assigns both the mortgage and the underlying debt, as follows:"

Keith A. Halpern, Attorney
Legal Services of North Florida, Inc.
121 North Jackson Street
Quincy, Florida 32351
(850) 875-9881 (850) 875-2008 (telefax)

- Show quoted text -



winmail.dat
16K [View](#) [Download](#)

[Reply](#) [Reply to author](#) [Forward](#) [Report spam](#) Rate this post:

Valarie Linnen [View profile](#) [More options](#) Feb 3, 9:32 am

On this topic, is anyone having success challenging the Notice of Filing Original Note and Mortgage when the notice of filing is not accompanied by an affidavit from a records custodian? I mean, wouldn't such be hearsay? The only hearsay exemption that would appear to apply would be for records of regularly conducted business activity under 90.803(6)(a) *IF* the ownership could be confirmed by testimony of a records custodian.

Valarie

From: la...@larrygriggs.com
To: foreclosure-defense@googlegroups.com
Subject: RE: YES!! NY trial ct dismissed b/c NOTE attached to complaint has no endorsement & no assign of debt - no standing
Date: Wed, 3 Feb 2010 08:46:36 -0500

How does this work? Usually, the Plaintiff brings the original note and mortgage to the final hearing (SJ or whatever)

Do you have to wait until the final hearing for the Plaintiff to produce the note and then make an oral motion if the original, endorsed note is not produced?

Do you file a motion for an order requiring the Plaintiff to produce the original?

ltg

From: foreclosure-defense@googlegroups.com [mailto:foreclosure-defense@googlegroups.com] On Behalf Of April Charney
Sent: Wednesday, February 03, 2010 6:55 AM
To: foreclosure-defense@googlegroups.com
Subject: RE: YES!! NY trial ct dismissed b/c NOTE attached to complaint has no endorsement & no assign of debt - no standing

We still have many, many "produce the note" judges in Florida. I suspect most of the judges still fit this description. But with education we can change that gloss on the UCC.

From: foreclosure-defense@googlegroups.com on behalf of shelbym...@aol.com
Sent: Wed 2/3/2010 4:16 AM
To: foreclosure-defense@googlegroups.com
Subject: YES!! NY trial ct dismissed b/c NOTE attached to complaint has no endorsement & no assign of debt - no standing

This highly relevant NY case provides us with further support that we must look closely at the NOTE to see if it has an endorsement. Interesting, here, is that the Court appears to demand an ASSIGNMENT of the NOTE as well. It mentions physical delivery. The assignment was timely (one day before); however, but still rejected by the Court as improper. AND the NOTE at time of Complaint bore no endorsement!! The lack of NOTE endorsement would appear in Florida as the equivalent of the lack of mortgage assignment.

I WONDER IF WE HAVE a "FAIL TO ENDORSE NOTE" CASE IN FLORIDA?
Anyone got one??

Keith Halpern, Staff Attorney

Legal Services of North Florida, Inc.

"Plaintiff relies further upon a written instrument of assignment — not physical delivery of the Note and the Mortgage. First Franklin purported to assign the Mortgage and the Note to Plaintiff by an "Assignment of Mortgage," dated January 20, 2009 (the "Purported Assignment"). The Purported Assignment provides, in relevant part, as follows:

Said Assignor hereby assigns unto the above named Assignee the said Mortgage, and the full benefit of all the powers and of all the covenants and Provisions therein contained, and the said Assignor hereby grants and conveys unto the said Assignee, the Assignor's beneficial interest under the Mortgage. (Emphasis added).

As the above-quoted language clearly indicates, it does not assign the Note, or the underlying obligation. Indeed, the operative language ends with the assignor assigning its "beneficial interest under the Mortgage" alone, with no reference to the debt.

By contrast, McKinney's Real Property Law §258 [Form O], contains a form

assignment of mortgage which clearly assigns both the mortgage and the underlying debt, as follows:"

Keith A. Halpern, Attorney
Legal Services of North Florida, Inc.
121 North Jackson Street
Quincy, Florida 32351
(850) 875-9881 (850) 875-2008 (telefax)

- Show quoted text -

[Reply](#) [Reply to author](#) [Forward](#) [Report spam](#) Rate this post: 

April Charney [View profile](#) [More options](#) Feb 3, 10:21 am

The summary judgment rule is clear on how and when affidavits and documents in support of the demand for judgment have to be filed. The rule is your guide.

- Show quoted text -

[Reply](#) [Reply to author](#) [Forward](#) [Report spam](#) Rate this post: 

April Charney [View profile](#) [More options](#) Feb 3, 10:28 am

I challenge in the context of lack of admissible evidence in the summary judgment process. Otherwise, the filing of a document in a court file is not the submission of same into evidence in a form the court (or a jury) could consider.

- Show quoted text -

[Reply](#) [Reply to author](#) [Forward](#) [Report spam](#) Rate this post: 

Discussion subject changed to "NOTICE OF FILING ORIG NOTE, MORTGAGE"

shelbym...@aol.com [View profile](#) [More options](#) Feb 3, 4:29 pm

Valarie: To extent consistent with April's experience, there are 2 cases I work with in regards to Authentication of materials submitted by Plaintiffs for purposes of SJ:

I enjoy F.E. Booker v. Sarasota, [707 So.2d 866](#) (Fla. 1ST DCA, 1998) ("A Florida court may not consider an unauthenticated document in ruling on a motion for summary judgment, EVEN WHERE IT APPEARS that the such document, IF properly authenticated, may have been dispositive. See Tunnell v. Hicks, 574 So.2d 264, 266 (Fla. 1st DCA 1991)") (Emphasis Added).

Depending on Defendant's procedural position (answer/no ans filed) prior to SJ, I also enjoy the heightened proof threshold that some "affidavit" and "Notice of Filing" cases trigger even without a pending Summary Judgment. I've found instructional (but not on your direct point) the case of Hughes v. Home Savings of America, F.S.B., 675 So.2d 649 (Fla. 2D DCA, 1996); 21 Fla. L. Wkly D 1393.

Of course indenture, allonge, assignment, copies are relatively meaningless for SJ, but if you object to early on, then Plaintiff gets affidavits. Often those affidavits are without proper authority and affiant doesn't have the personal knowledge or accuracy to withstand your deposition.

Possibly consistent with r. 1.510 [F.R.C.P.](#), "[t]he fact that [a copy of the note and mortgage] were attached to the original complaint does not breathe life into an amended complaint which ws void of exhibits." While this is not directly on point, I think instructional is that Hughes cites Olin's Inc. v. Avis Rental Car System,

Inc., 105 So.2d 497 (Fla 3d DCA 1958): "when a trial court has for consideration a Plaintiff's [MSJ] BEFORE Defendant has answered, the [SJ] should not be granted unless it is clear that an issue of material fact CANNOT BE PRESENTED." (Emphasis Added).

One material fact, certainly are unauthenticated documents that tend to show, ambiguously, that the Plaintiff has failed to own the paper underwhich it sues.

Olin's case quotes a federal case saying: "But although a [MSJ], served before the service of answer to his Complaint may not be denied on the ground that it is necessarily and inevitably tendered too early, the general cautions against the allowance of such motions . . . must be kept in view. [A] court must not grant [SJ] upon motion therefor tendered before the service of an answer, unless in the situation presented, it APPEARS TO A CERTAINTY that no answer which the adverse party might properly serve could present a genuine issue of fact." 105 So.2d at 499.

Keith Halpern, Staff Attorney
Legal Services of North Florida, Inc.

- Show quoted text -

...

[read more »](#)

[Reply](#) [Reply to author](#) [Forward](#) [Report spam](#) Rate this post: 

[mckillop...@gmail.com](#) [View profile](#) [More options](#) Feb 4, 10:28 am

This cite on Booker is [707 So.2d 886](#), not 866

Respectfully,

Dan McKillop, J.D.

Signature Logo

555 S. Osprey Ave

SARASOTA, FL 34236

Phone: (941) – 400 – 8998

Fax: (941) - 953 - 5117

This transmission is protected by the Electronic Communications Privacy Act, 18 U.S.C. Sections 2510-2521 and intended to be delivered only to the named addressee(s) and may contain information that is confidential, proprietary, attorney work-product or attorney-client privileged. If this information is received by anyone other than the named addressee(s), the recipient should immediately notify the sender by E-MAIL and by telephone 941.400.8998 and obtain instructions as to the disposal of the transmitted material. In no event shall this material be read, used, copied, reproduced, stored or retained by anyone other than the named addressee(s), except with the express consent of the sender or the named addressee(s). Thank you.

From: foreclosure-defense@googlegroups.com
[mailto:foreclosure-defense@googlegroups.com] On Behalf Of
shelbym...@aol.com

Sent: Wednesday, February 03, 2010 4:29 PM

To: foreclosure-defense@googlegroups.com

Subject: NOTICE OF FILING ORIG NOTE, MORTGAGE; Authentication of
Copies of
Docs for SJ

Valarie: To extent consistent with April's experience, there are 2 cases I work with in regards to Authentication of materials submitted by Plaintiffs for purposes of SJ:

I enjoy F.E. Booker v. Sarasota, [707 So.2d 866](#) (Fla. 1ST DCA, 1998) ("A Florida court may not consider an unauthenticated document in ruling on a motion for summary judgment, EVEN WHERE IT APPEARS that the such document, IF properly authenticated, may have been dispositive. See Tunnell v. Hicks, 574 So.2d 264, 266 (Fla. 1st DCA 1991)") (Emphasis Added).

Depending on Defendant's procedural position (answer/no ans filed) prior to SJ, I also enjoy the heightened proof threshold that some "affidavit" and "Notice of Filing" cases trigger even without a pending Summary Judgment. I've found instructional (but not on your direct point) the case of Hughes v. Home Savings of America, F.S.B., 675 So.2d 649 (Fla. 2D DCA, 1996); 21 Fla. L. Wkly D 1393.

Of course indenture, allonge, assignment, copies are relatively meaningless for SJ, but if you object to early on, then Plaintiff gets affidavits. Often those affidavits are without proper authority and affiant doesn't have the personal knowledge or accuracy to withstand your deposition.

Possibly consistent with r. 1.510 [F.R.C.P.](#), "[t]he fact that [a copy of the note and mortgage] were attached to the original complaint does not breathe life into an amended complaint which ws void of exhibits." While this is not directly on point, I think instructional is that Hughes cites Olin's Inc. v. Avis Rental Car System, Inc., 105 So.2d 497 (Fla 3d DCA 1958): "when a trial court has for consideration a Plaintiff's [MSJ] BEFORE Defendant has answered, the [SJ] should not be granted unless it is clear that an issue of material fact CANNOT BE PRESENTED." (Emphasis Added).

One material fact, certainly are unauthenticated documents that tend to show, ambiguously, that the Plaintiff has failed to own the paper underwhich it sues.

Olin's case quotes a federal case saying: "But although a [MSJ], served before the service of answer to his Complaint may not be denied on the ground that it is necessarily and inevitably tendered too early, the general cautions against the allowance of such motions . . . must be kept in view. [A] court must not grant [SJ] upon motion therefor tendered before the service of an answer, unless in the situation presented, it APPEARS TO A CERTAINTY that no answer which the adverse party might properly serve could present a genuine issue of fact." 105 So.2d at 499.

Keith Halpern, Staff Attorney
Legal Services of North Florida, Inc.

- Show quoted text -

...

[read more »](#)



image001.jpg
12K [View](#) [Download](#)

[Reply](#) [Reply to author](#) [Forward](#) [Report spam](#) Rate this post:

Discussion subject changed to "F.E. Booker v. Sarasota, Inc. d/b/a Credit Manag

[shelbym...@aol.com](#) [View profile](#)

[More options](#) Feb 4, 10:39 am

I am looking at the case printout now and the F.E. Booker v. Sarasota, Inc. case is [707 So.2d 886](#), 1998 Fla. App. LEXIS 2138; 23 Fla. L. Weekly D 642. (Fla 1ST DCA 1998).

Keith A. Halpern, Attorney
Legal Services of North Florida, Inc.
121 North Jackson Street
Quincy, Florida 32351
(850) 875-9881 (850) 875-2008 (telefax)

- Show quoted text -

...

[read more »](#)

[Reply](#) [Reply to author](#) [Forward](#) [Report spam](#) Rate this post: 

Discussion subject changed to "YES!! NY trial ct dismissed b/c NOTE attached t

Patricia Parker [View profile](#) [More options](#) Feb 4, 3:08 pm

I am with April on this. Rule 1.510 governs summary judgment. The affidavit usually refers to the note but does not have a certified copy attached to the affidavit. R. 1.510(e). Any loan payment amounts referred to in the affidavit also don't have any records to back the figures up. It is all hearsay. You need to file a counter affidavit attacking the amounts due and owing as well as the standing issue, etc. There is a case from the 1970's, one of the parties is Ferris, that addresses the issue of attaching records to affidavits.

Patricia Parker
Parker & DuFresne, PA
8777 San Jose Blvd., Suite 301
Jacksonville, FL 32217
plpar...@jaxlawcenter.com
(904) 733-7766/ fax (904) 733-2919

CONFIDENTIALITY NOTICE: The information and all attachments contained in this electronic communication are legally privileged and confidential information, subject to the attorney-client privilege and intended only for the use of the intended recipients. If the reader of this message is not an intended recipient, you are hereby notified that any review, use, dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately of the error by return e-mail and please permanently remove any copies of this message from your system and do not retain any copies, whether in electronic or physical form or otherwise. Thank you.

On Feb 3, 2010, at 10:28 AM, April Charney wrote:

- Show quoted text -

...

[read more »](#)

[Reply](#) [Reply to author](#) [Forward](#) [Report spam](#) Rate this post: 

Valarie Linnen [View profile](#) [More options](#) Feb 4, 3:17 pm

Great point. Judge Rice's affidavit outline (found in April's materials) says that affidavits submitted in support of an MSJ must be based on admissible evidence:

Must Be Based on Admissible Evidence.

Affidavits should set forth facts which would be admissible at trial. *Humphrys v. Jarrell*, 104 So. 2d 404 (Fla. 2d DCA 1958) *1 Walden; see *Warden v. Chase Manhattan Bank, USA, N.A.*, [872 So. 2d 432](#) (Fla. 4th DCA 2004). Allegations in an affidavit that set forth incompetent and inadmissible matter, such as hearsay or opinion testimony, that would be inadmissible at trial, should be disregarded by the trial court. *Id.* at 409; see also *Palmer v. Liberty Nat'l Life Ins. Co.*, 499 So. 2d 903 (Fla. 1st DCA 1986), rev. denied, 499 So. 2d 903 (Fla. 1987) ("If evidence presented to the trial judge as a part of his consideration of a motion for summary judgment is incompetent and would be inadmissible during trial, that evidence should not be considered in ruling on the motion."); *Ham v. Heintzelman's Ford, Inc.*, [256 So. 2d 264](#) (Fla. 4th DCA 1972)("affidavit predicated on inadmissible hearsay does not comply with the summary judgment rule and cannot be utilized either in support of or in opposition to summary judgment").

Document Supplying Basis for Knowledge - Must be Attached and Authenticated. When a document supplies the basis for an affiant's personal knowledge, the affiant must attach the document to the affidavit. Fla. R. Civ. P. 1.510(e); see, e.g., *CSX Transp., Inc. v. Pasco County*, [660 So. 2d 757](#) (Fla. 2d DCA 1995)(court reversed summary judgment where witness based statements on reports, but failed to attach reports to affidavit); *Zoda v. Hedden*, 596 So. 2d 1225 (Fla. 2d DCA 1992)(attorney not competent to testify in affidavit as to property transactions reflected in settlements, deeds, and judgments contained in public records, since attorney was not custodian of public records, and consequently, was unable to authenticate documents referred to in his affidavit); *Topping v. Hotel George V*, [268 So. 2d 388](#) (Fla. 2d DCA 1972)(attorneys' affidavit stating he was familiar with client's records and the records reflected certain information constituted inadmissible hearsay); *Rowland v. Wolf*, [192 So. 2d 47, 49](#) (Fla. 3d DCA 1966)(court rejected Plaintiff's affidavit that defendant acknowledged debt in writing where Plaintiff failed to attach letters from defendant); *Crosby v. Paxon Elec. Co.*, 534 So. 2d 787 (Fla. 1st DCA 1988), appeal after remand, [576 So. 2d 906](#) (Fla. 1st DCA 1991). If the affiant lacks possession of a copy of the document, affiant must state so in the affidavit and describe the document, state when and where affiant saw it and under what circumstances, who has possession, and what efforts have been made to obtain it or a copy of it. [FRCP 1.510 Comment](#).

Valarie

From: plpar...@jaxlawcenter.com
To: foreclosure-defense@googlegroups.com
Subject: Re: YES!! NY trial ct dismissed b/c NOTE attached to complaint has no endorsement & no assign of debt - no standing
Date: Thu, 4 Feb 2010 15:08:58 -0500

I am with April on this. Rule 1.510 governs summary judgment. The affidavit usually refers to the note but does not have a certified copy attached to the affidavit. R. 1.510(e). Any loan payment amounts referred to in the affidavit also don't have any records to back the figures up. It is all hearsay. You need to file a counter affidavit attacking the amounts due and owing as well as the standing issue, etc. There is a case from the 1970's, one of the parties is Ferris, that addresses the issue of attaching records to affidavits.

Patricia Parker
Parker & DuFresne, PA
8777 San Jose Blvd., Suite 301
Jacksonville, FL 32217
plpar...@jaxlawcenter.com
(904) 733-7766/ fax (904) 733-2919

CONFIDENTIALITY NOTICE: The information and all attachments contained in this electronic communication are legally privileged and confidential information, subject to the attorney-client privilege and intended only for the use of the intended recipients. If the reader of this message is not an intended recipient, you are hereby notified that any review, use, dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately of the error by return e-mail and please permanently remove any copies of this message from your system and do not retain any copies, whether in electronic or physical form or otherwise. Thank you.

On Feb 3, 2010, at 10:28 AM, April Charney wrote:

I challenge in the context of lack of admissible evidence in the summary judgment process. Otherwise, the filing of a document in a court file is not the submission of same into evidence in a form the court (or a jury) could consider.

- Show quoted text -

...

[read more »](#)

[Reply](#) [Reply to author](#) [Forward](#) [Report spam](#) Rate this post: 

[mckillop...@gmail.com](#) [View profile](#) [More options](#) Feb 4, 3:54 pm

Every affidavit I've ever seen is a violation of the Best Evidence rule. Affidavit states the testimony based on business records of the Plaintiff/servicer, but those documents are never attached.

It's not just rule 1.510, but also a statute in the evidence code. I'm just too lazy to look it up. Not sure why more people don't argue the best evidence rule at summary judgments.

Respectfully,

Dan McKillop, J.D.

Signature Logo

555 S. Osprey Ave

SARASOTA, FL 34236

Phone: (941) – 400 – 8998

Fax: (941) - 953 - 5117

This transmission is protected by the Electronic Communications Privacy Act, 18 U.S.C. Sections 2510-2521 and intended to be delivered only to the named addressee(s) and may contain information that is confidential, proprietary, attorney work-product or attorney-client privileged. If this information is received by anyone other than the named addressee(s), the recipient should immediately notify the sender by E-MAIL and by telephone 941.400.8998 and obtain instructions as to the disposal of the transmitted material. In no event shall this material be read, used, copied, reproduced, stored or retained by anyone other than the named addressee(s), except with the express consent of the sender or the named addressee(s). Thank you.

From: foreclosure-defense@googlegroups.com
[mailto:foreclosure-defense@googlegroups.com] On Behalf Of Valarie Linnen
Sent: Thursday, February 04, 2010 3:17 PM
To: foreclosure-defense@googlegroups.com
Subject: RE: YES!! NY trial ct dismissed b/c NOTE attached to complaint has

no endorsement & no assign of debt - no standing

Great point. Judge Rice's affidavit outline (found in April's materials) says that affidavits submitted in support of an MSJ must be based on admissible evidence:

Must Be Based on Admissible Evidence.

Affidavits should set forth facts which would be admissible at trial. *Humphrys v. Jarrell*, 104 So. 2d 404 (Fla. 2d DCA 1958) *1 Walden; see *Warden v. Chase Manhattan Bank, USA, N.A.*, [872 So. 2d 432](#) (Fla. 4th DCA 2004). Allegations in an affidavit that set forth incompetent and inadmissible matter, such as hearsay or opinion testimony, that would be inadmissible at trial, should be disregarded by the trial court. *Id.* at 409; see also *Palmer v. Liberty Nat'l Life Ins. Co.*, 499 So. 2d 903 (Fla. 1st DCA 1986), rev. denied, 499 So. 2d 903 (Fla. 1987) ("If evidence presented to the trial judge as a part of his consideration of a motion for summary judgment is incompetent and would be inadmissible during trial, that evidence should not be considered in ruling on the motion."); *Ham v. Heintzelman's Ford, Inc.*, [256 So. 2d 264](#) (Fla. 4th DCA 1972) ("affidavit predicated on inadmissible hearsay does not comply with the summary judgment rule and cannot be utilized either in support of or in opposition to summary judgment").

Document Supplying Basis for Knowledge - Must be Attached and

Authenticated. When a document supplies the basis for an affiant's personal knowledge, the affiant must attach the document to the affidavit. Fla. R. Civ. P. 1.510(e); see, e.g., *CSX Transp., Inc. v. Pasco County*, [660 So. 2d 757](#) (Fla. 2d DCA 1995)(court reversed summary judgment where witness based statements on reports, but failed to attach reports to affidavit); *Zoda v. Hedden*, 596 So. 2d 1225 (Fla. 2d DCA 1992)(attorney not competent to testify in affidavit as to property transactions reflected in settlements, deeds, and judgments contained in public records, since attorney was not custodian of public records, and consequently, was unable to authenticate documents referred to in his affidavit); *Topping v. Hotel George V*, [268 So. 2d 388](#) (Fla. 2d DCA 1972)(attorneys' affidavit stating he was familiar with client's records and the records reflected certain information constituted inadmissible hearsay); *Rowland v. Wolf*, [192 So. 2d 47, 49](#) (Fla. 3d DCA 1966)(court rejected Plaintiff's affidavit that defendant acknowledged debt in writing where Plaintiff failed to attach letters from defendant); *Crosby v. Paxon Elec. Co.*, 534 So. 2d 787 (Fla. 1st DCA 1988), appeal after remand, [576 So. 2d 906](#) (Fla. 1st DCA 1991). If the affiant lacks possession of a copy of the document, affiant must state so in the affidavit and describe the document, state when and where affiant saw it and under what circumstances, who has possession, and what efforts have been made to obtain it or a copy of it. [FRCP 1.510](#) Comment.

Valarie

From: plpar...@jaxlawcenter.com
To: foreclosure-defense@googlegroups.com
Subject: Re: YES!! NY trial ct dismissed b/c NOTE attached to complaint has no endorsement & no assign of debt - no standing
Date: Thu, 4 Feb 2010 15:08:58 -0500

I am with April on this. Rule 1.510 governs summary judgment. The affidavit usually refers to the note but does not have a certified copy attached to the affidavit. R. 1.510(e). Any loan payment amounts referred to in the affidavit also don't have any records to back the figures up. It is all hearsay. You need to file a counter affidavit attacking the amounts due and owing as well as the standing issue, etc. There is a case from the 1970's, one of the parties is Ferris, that addresses the issue of attaching records to affidavits.

Patricia Parker

Parker & DuFresne, PA

8777 San Jose Blvd., Suite 301

Jacksonville, FL 32217

plpar...@jaxlawcenter.com

(904) 733-7766/ fax (904) 733-2919

CONFIDENTIALITY NOTICE: The information and all attachments contained in this electronic communication are legally privileged and confidential information, subject to the attorney-client privilege and intended only for the use of the intended recipients. If the reader of this message is not an intended recipient, you are hereby notified that any review, use, dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately of the error by return e-mail and please permanently remove any copies of this message from your system and do not retain any copies, whether in electronic or physical form or otherwise. Thank you.

On Feb 3, 2010, at 10:28 AM, April Charney wrote:

I challenge in the context of lack of admissible evidence in the summary judgment process. Otherwise, the filing of a document in a court file is not the submission of same into evidence in a form the court (or a jury) could consider.

- Show quoted text -

...

[read more »](#)



image001.jpg
12K [View](#) [Download](#)

[Reply](#) [Reply to author](#) [Forward](#) [Report spam](#) Rate this post: 

Valarie Linnen [View profile](#)

[More options](#) Feb 4, 4:32 pm

It seems [Fla. Stat. 673.3091](#) applies over the best evidence rule in foreclosure cases? Does anyone disagree with that?

Best Evidence Rule: An original document is required in order to prove the contents of the document. [Fla. Stat. § 90.952](#) (2009). The original document is not required if the original was lost or destroyed, unless the proponent of the evidence lost or destroyed the document in bad faith. [Fla. Stat. § 90.954](#) (2009).

If the proponent of the evidence has voluntarily destroyed the best evidence of the fact, the proponent cannot introduce secondary evidence of the same fact without first introducing evidence to explain the destruction of the evidence and to repel all inferences of fraudulent design arising therefrom. In re McCollum's Estate, [88 So. 2d](#) 537, 539 (Fla. 1956).

Lost Note Rule: To maintain a mortgage foreclosure, Plaintiff must either present the original promissory note or give a satisfactory explanation for its failure to do so. [Fla. Stat. § 673.3091](#) (2009); W.H. Downing v. First Nat'l Bank of Lake City, [81 So. 2d](#) 486 (Fla. 1955); Nat'l Loan Investors, L.P. v. Joymar Assocs., [767 So. 2d](#) 549, 551 (Fla. 3d DCA 2000); Pastore-Borroto Dev., Inc. v. Marevista Apartments, M.B., Inc., 596 So. 2d 526 (Fla. 3d DCA 1992); see also In re Am. Equity Corp., 332 B.R. 645 (Bankr. M.D. [Fla. 2005](#)) (holding that creditors, who were the assignees of mortgages and could not find the original promissory

notes, could not enforce the notes and their claims were disallowed as secured claims).

Valarie Linnen, Esq.
Probate, Property & Appellate Law
237-1 9th Avenue North
2nd Floor
Jacksonville Beach, Florida 32250
vlin...@fl-appeals.com
904.242.0515 Tel
904.685.2336 Fax

From: mckillop...@gmail.com
To: foreclosure-defense@googlegroups.com
Subject: RE: YES!! NY trial ct dismissed b/c NOTE attached to complaint has no endorsement & no assign of debt - no standing
Date: Thu, 4 Feb 2010 15:54:04 -0500

Every affidavit I've ever seen is a violation of the Best Evidence rule. Affidavit states the testimony based on business records of the Plaintiff/servicer, but those documents are never attached.

It's not just rule 1.510, but also a statute in the evidence code. I'm just too lazy to look it up. Not sure why more people don't argue the best evidence rule at summary judgments.

Respectfully,

Dan McKillop, J.D.

555 S. Osprey Ave
SARASOTA, FL 34236
Phone: (941) – 400 – 8998
Fax: (941) - 953 - 5117

This transmission is protected by the Electronic Communications Privacy Act, 18 U.S.C. Sections 2510-2521 and intended to be delivered only to the named addressee(s) and may contain information that is confidential, proprietary, attorney work-product or attorney-client privileged. If this information is received by anyone other than the named addressee(s), the recipient should immediately notify the sender by E-MAIL and by telephone 941.400.8998 and obtain instructions as to the disposal of the transmitted material. In no event shall this material be read, used, copied, reproduced, stored or retained by anyone other than the named addressee(s), except with the express consent of the sender or the named addressee(s). Thank you.

From: foreclosure-defense@googlegroups.com [mailto:foreclosure-defense@googlegroups.com] On Behalf Of Valarie Linnen
Sent: Thursday, February 04, 2010 3:17 PM
To: foreclosure-defense@googlegroups.com
Subject: RE: YES!! NY trial ct dismissed b/c NOTE attached to complaint has no endorsement & no assign of debt - no standing

Great point. Judge Rice's affidavit outline (found in April's materials) says that affidavits submitted in support of an MSJ must be based on admissible evidence:

Must Be Based on Admissible Evidence.

Affidavits should set forth facts which would be admissible at trial. *Humphrys v. Jarrell*, 104 So. 2d 404 (Fla. 2d DCA 1958) *1 Walden; see *Warden v. Chase Manhattan Bank, USA, N.A.*, [872 So. 2d 432](#) (Fla. 4th DCA 2004). Allegations in an affidavit that set forth incompetent and inadmissible matter, such as hearsay or opinion testimony, that would be inadmissible at trial, should be disregarded by the trial court. *Id.* at 409; see also *Palmer v. Liberty Nat'l Life Ins. Co.*, 499 So. 2d 903 (Fla. 1st DCA 1986), rev. denied, 499 So. 2d 903 (Fla. 1987) ("If evidence presented to the trial judge as a part of his consideration of a motion for summary judgment is incompetent and would be inadmissible during trial, that evidence

should not be considered in ruling on the motion."); Ham v. Heintzelman's Ford, Inc., [256 So. 2d](#) 264 (Fla. 4th DCA 1972)("affidavit predicated on inadmissible hearsay does not comply with the summary judgment rule and cannot be utilized either in support of or in opposition to summary judgment").

Document Supplying Basis for Knowledge - Must be Attached and Authenticated. When a document supplies the basis for an affiant's personal knowledge, the affiant must attach the document to the affidavit. Fla. R. Civ. P. 1.510(e); see, e.g., CSX Transp., Inc. v. Pasco County, [660 So. 2d](#) 757 (Fla. 2d DCA 1995)(court reversed summary judgment where witness based statements on reports, but failed to attach reports to affidavit); Zoda v. Hedden, 596 So. 2d 1225 (Fla. 2d DCA 1992)(attorney not competent to testify in affidavit as to property transactions reflected in settlements, deeds, and judgments contained in public records, since attorney was not custodian of public records, and consequently, was unable to authenticate documents referred to in his affidavit); Topping v. Hotel George V, [268 So. 2d](#) 388 (Fla. 2d DCA 1972)(attorneys' affidavit stating he was familiar with client's records and the records reflected certain information constituted inadmissible hearsay); Rowland v. Wolf, [192 So. 2d](#) 47, 49 (Fla. 3d DCA 1966)(court rejected Plaintiff's affidavit that defendant acknowledged debt in writing where Plaintiff failed to attach letters from defendant); Crosby v. Paxon Elec. Co., 534 So. 2d 787 (Fla. 1st DCA 1988), appeal after remand, [576 So. 2d](#) 906 (Fla. 1st DCA 1991). If the affiant lacks possession of a copy of the document, affiant must state so in the affidavit and describe the document, state when and where affiant saw it and under what circumstances, who has possession, and what efforts have been made to obtain it or a copy of it. [FRCP 1.510](#) Comment.

Valarie

From: plpar...@jaxlawcenter.com
To: foreclosure-defense@googlegroups.com
Subject: Re: YES!! NY trial ct dismissed b/c NOTE attached to complaint has no endorsement & no assign of debt - no standing
Date: Thu, 4 Feb 2010 15:08:58 -0500

I am with April on this. Rule 1.510 governs summary judgment. The affidavit usually refers to the note but does not have a certified copy attached to the affidavit. R. 1.510(e). Any loan payment amounts referred to in the affidavit also don't have any records to back the figures up. It is all hearsay. You need to file a counter affidavit attacking the amounts due and owing as well as the standing issue, etc. There is a case from the 1970's, one of the parties is Ferris, that addresses the issue of attaching records to affidavits.

Patricia Parker

Parker & DuFresne, PA

8777 San Jose Blvd., Suite 301

Jacksonville, FL 32217

plpar...@jaxlawcenter.com

(904) 733-7766/ fax (904) 733-2919

CONFIDENTIALITY NOTICE: The information and all attachments contained in this electronic communication are legally privileged and confidential information, subject to the attorney-client privilege and intended only for the use of the intended recipients. If the reader of this message is not an intended recipient, you are hereby notified that any review, use, dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately of the error by return e-mail and please permanently remove any copies of this message from your system and do not retain any copies, whether in electronic or physical form or otherwise. Thank you.

On Feb 3, 2010, at 10:28 AM, April Charney wrote:

I challenge in the context of lack of admissible evidence in the summary judgment process. Otherwise, the filing of a document in a court file is not the submission of same into evidence in a form the court (or a jury) could consider.

- Show quoted text -

...

[read more »](#)



image001.jpg
12K [View](#) [Download](#)

[Reply](#) [Reply to author](#) [Forward](#) [Report spam](#) Rate this post: 

End of messages

[« Back to Discussions](#)

[« Newer topic](#) [Older topic »](#)

[Create a group](#) - [Google Groups](#) - [Google Home](#) - [Terms of Service](#) - [Privacy Policy](#)

©2010 Google