

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JULIA FELTUS,)
)
 Appellant,)
)
 v.)
)
 U.S. BANK NATIONAL ASSOCIATION, as)
 TRUSTEE of MASTR ADJUSTABLE RATE)
 MORTGAGES TRUST 2007-3,)
)
 Appellee.)
 _____)

Case No. 2D10-3727

Opinion filed October 19, 2011.

Appeal from the Circuit Court for DeSoto
County; James S. Parker, Judge.

Jacquelyn Mack of The Mack Law Firm,
Englewood, for Appellant.

Roy A. Diaz and Diana B. Matson of
Smith, Hiatt & Diaz, P.A., Ft. Lauderdale
for Appellee.

WHATLEY, Judge.

Julia Feltus appeals a final summary judgment of foreclosure in favor of
U.S. Bank National Association, as Trustee of Mastr Adjustable Rate Mortgages Trust
2007-3 (U.S. Bank or the Bank). We reverse because material issues of fact as to

which entity holding the promissory note executed by Feltus existed at the time the trial court entered summary judgment.

On August 24, 2009, U.S. Bank filed an unverified complaint seeking to reestablish a lost promissory note and to foreclose the mortgage on Feltus's home. U.S. Bank attached to the complaint a copy of the note and the mortgage, but both documents showed the lender to be Countrywide Bank, N.A. In the count to reestablish the note pursuant to section 673.3091, Florida Statutes (2009), U.S. Bank alleged that the note was executed by Feltus on February 16, 2007; U.S. Bank is the owner and holder of the note; the original note has been lost and is not in U.S. Bank's custody or control; the note was continuously in the possession and control of the Bank's assignor and predecessor from the date of execution until the loss, at which time the assignor and predecessor was entitled to enforce the note; and the note has not been paid or otherwise satisfied, assigned, or transferred, or lawfully seized. Notably, these allegations did not include an allegation that Countrywide had assigned the note to U.S. Bank.

After Feltus filed a motion to dismiss alleging that U.S. Bank had failed to establish that it owned or held the subject note, on November 16, 2009, U.S. Bank filed an affidavit of indebtedness executed by Kathy Repka, an assistant secretary of BAC Home Loan Servicing, L.P., f/k/a Countrywide Home Loan Servicing, L.P. Repka asserted that her affidavit was based on the loan payment records of the servicing agent and her familiarity with those records. After she explained that the purpose of the records was "to monitor and maintain the account relating to a note and mortgage that are the subject matter of the pending case," Repka asserted that U.S. Bank owns and

holds the note described in its complaint. Then on November 18, 2009, U.S. Bank filed another copy of the note as a supplemental exhibit to its complaint. In contrast to the copy attached to the complaint that contained no endorsements, this copy contained two endorsements that were side by side on the last page—the first stated "PAY TO THE ORDER OF: COUNTRYWIDE HOME LOANS, INC. WITHOUT RECOURSE COUNTRYWIDE BANK, N.A." and the second stated "PAY TO THE ORDER OF: _____ WITHOUT RECOURSE COUNTRYWIDE HOME LOANS, INC."

Notwithstanding this filing, eight days after Feltus filed her answer and affirmative defenses, on May 26, 2010, U.S. Bank filed a motion for summary final judgment alleging that it "owns and holds a promissory note and mortgage" and that the original note had been lost and is not in U.S. Bank's control. But on June 4, 2010, the Bank filed a reply to Feltus's affirmative defenses in which it asserted that it is now in possession of the original note, which it attached and which is the same note it filed on November 18, 2009. The Bank further asserted that because the note is endorsed in blank and it is in possession of the note, it is the bearer and entitled to foreclose the mortgage. See Riggs v. Aurora Loan Servs., LLC, 36 So. 3d 932, 933 (Fla. 4th DCA 2010) (noting that pursuant to Uniform Commercial Code, negotiation of note by transfer of possession with blank endorsement makes transferee the holder of the note entitled to enforce it).

We view U.S. Bank's filing of a copy of the note that it later asserted was the original note as a supplemental exhibit to its complaint to reestablish a lost note as an attempt to amend its complaint in violation of Florida Rule of Civil Procedure 1.190(a). U.S. Bank did not seek leave of court or the consent of Feltus to amend its

complaint. A pleading filed in violation of rule 1.190(a) is a nullity, and the controversy should be determined based on the properly filed pleadings. Warner-Lambert Co. v. Patrick, 428 So. 2d 718 (Fla. 4th DCA 1983).

Before a court may grant summary judgment, the pleadings, depositions, answers to interrogatories, admissions, and any affidavits must " 'conclusively show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " Allenby & Assocs., Inc. v. Crown St. Vincent Ltd., 8 So. 3d 1211, 1213 (Fla. 4th DCA 2009) (quoting Fini v. Glascoe, 936 So. 2d 52, 54 (Fla. 4th DCA 2006)). The party moving for summary judgment bears the burden to show conclusively that there is a complete absence of any genuine issue of material fact. Id.

The properly filed pleadings before the court when it heard the Bank's motion for summary judgment were a complaint seeking to reestablish a lost note, Feltus's answer and affirmative defenses alleging that the note attached to the complaint contradicts the allegation of the complaint that U.S. Bank is the owner of the note, a motion for summary judgment alleging a lost note of which U.S. Bank is the owner, an affidavit of indebtedness alleging that U.S. Bank was the owner and holder of the note described in the complaint, and U.S. Bank's reply to Feltus's affirmative defenses asserting that it was now in possession of the original note, which it attached to the reply. But the note attached to the complaint showed the lender to be Countrywide Bank, N.A. And the complaint failed to allege that "[t]he person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred."

§ 673.3091(a). In addition, the affidavit of indebtedness revealed no basis for the affiant's assertion that U.S. Bank owns and holds the note. The affiant is an assistant secretary for the alleged servicing agent of the Bank, and she asserted that she had personal knowledge of the loan based on the loan payment records. She did not assert any personal knowledge of how U.S. Bank would have come to own or hold the note. See Shafran v. Parrish, 787 So. 2d 177, 179 (Fla. 2d DCA 2001) ("When affidavits are filed to establish the factual basis of the motion [for summary judgment], they must be made on personal knowledge, demonstrate the affiant's competency to testify, and be otherwise admissible in evidence.").

The trial court erred in entering final summary judgment of foreclosure because the documents before it created a genuine issue of material fact of who owned or held the note. Accordingly, we reverse and remand for further proceedings.

CRENSHAW, J., Concur.
CASANUEVA, J., Concur with opinion.

CASANUEVA, Judge, Concurring.

I fully concur with the majority opinion and write only to point out further failings in the affidavit of indebtedness.

The affidavit of indebtedness was the sole affidavit offered in support of U.S. Bank's motion for summary judgment. The affiant was an assistant secretary employed by the Bank's loan servicing agent. She set forth, under oath, that her direct personal knowledge was restricted to that learned in maintaining the loan payment records of the servicing agent. And, as the majority opinion points out, she did not

assert any personal knowledge of how U.S. Bank had come to own or hold the note. Beyond this deficiency noted in the majority opinion, the affiant also stated that U.S. Bank had accelerated the entire principal balance due and had "retained Smith, Hiatt & Diaz, P.A. to represent it in this matter." Because the affiant's competency was based only on her review of the loan payment records, she was not competent to aver as to actions of the Bank in accelerating the loan or hiring counsel, and her averments are hearsay and inadmissible at trial. The Bank could have easily established the facts of acceleration of the note and hiring of counsel with affidavits from the Bank's official in charge of foreclosing this loan and/or the Bank's counsel to establish the fact of hiring and of the fee arrangement. Such bank official or counsel would have direct personal knowledge, would be competent, and would have presented evidence admissible at trial.

The affidavit the Bank submitted fell woefully short of these requirements and could not aid the Bank in any way to support its motion for summary judgment of foreclosure.