

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

GMAC MORTGAGE, LLC,

Plaintiff,

v.

Case No.: 07013084CI

DEBBIE VISICARO, et al.,

Defendant(s).

TRANSCRIPT OF: PROCEEDINGS
BEFORE: Honorable Anthony Rondolino
DATE: April 7, 2010
TIME: 4:05 p.m.
PLACE: Pinellas County Courthouse
Room 317
545 First Avenue North
St. Petersburg, Florida
REPORTED BY: Kimberly Ann Roberts
Notary Public
State of Florida at Large

ORIGINAL

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APPEARANCES:

STEVEN CHAPMAN FRASER, ESQUIRE
Law Offices of David J. Stern, PA
900 South Pine Island Road
Suite 400
Plantation, Florida 33324-3920
 Appeared via telephone for Plaintiff

MICHAEL ALEX WASYLIK, ESQUIRE
Ricardo, Wasylik & Kaniuk, PL
Post Office Box 2245
Dade City, Florida 33526
 Appeared for Defendant

1 The transcript of proceedings, before the
2 Honorable Anthony Rondolino, taken on the 7th day
3 of April, 2010, at the Pinellas County Courthouse,
4 Room 317, 545 First Avenue North, St. Petersburg,
5 Florida, beginning at 4:05 p.m., reported by
6 Kimberly Ann Roberts, Notary Public in and for the
7 State of Florida at Large.

8 * * * * *

9 THE COURT: Okay. We're here today in
10 GMAC versus Visicaro. This is a motion for
11 rehearing regarding the previously drafted
12 motion for summary judgment. Are we ready to
13 proceed?

14 MR. WASYLIK: Yes, Your Honor.

15 MR. FRASER: Yes, sir.

16 THE COURT: Okay.

17 MR. WASYLIK: Your Honor, my name is
18 Michael Wasylik. I'm here for Defendants
19 Debbie and Frank Visicaro. We are here, as
20 the Court has already noted, on the motion for
21 rehearing of the previously granted motion for
22 summary judgment on the plaintiff's behalf.

23 We have submitted a fairly detailed
24 brief on the reasons we believe that the
25 motion was -- should not have been granted in

1 the initial hearing.

2 And in support of that, Your Honor, we
3 have cited numerous cases mostly from the 2nd
4 DCA which demonstrate the fact that there was
5 no admissible evidence submitted by the
6 plaintiff in support of the motion.

7 THE COURT: And I've reviewed your
8 submissions and read numerous cases, including
9 the ones that you've submitted; in addition,
10 the Court's reviewed other cases.

11 What's the plaintiff's position
12 regarding the motion at this time?

13 MR. FRASER: I object, and do not abuse
14 your discretion by denying their motion for
15 rehearing. You've considered all the evidence
16 before you when you entered the summary
17 judgment back in January of 2010.

18 The opposing party then could not offer
19 proof to support their position on any genuine
20 and material facts. Right now, Your Honor,
21 there are no convincing exigent, you know,
22 circumstances being offered up at the time.

23 THE COURT: Did you not read the
24 motion? It sounds like you're making a very
25 generalized argument, and this is an, as I

1 viewed it, extremely targeted motion which
2 basically elaborates on the assertions that
3 were raised at the time of the motion for
4 summary judgment.

5 As I recall that, counsel appeared on
6 behalf of his clients. I think it was by
7 phone --

8 MR. WASYLIK: That's correct, Your
9 Honor.

10 THE COURT: -- and made arguments that
11 the Court really gave short shrift to it, did
12 not review the cases at that time.

13 Since that time, for a number of
14 reasons, the Court has delved further into it
15 prior to receiving the motion for rehearing,
16 which the Court believes to be very well
17 drafted, and independent of the motion have
18 researched the issues that are raised in the
19 motion.

20 I've had several events which have
21 occurred in cases which cause the Court to
22 have great concern about the validity of the
23 filings in our mortgage foreclosure cases, and
24 that precipitated my reevaluation of the
25 evidentiary considerations.

1 I'll give you an example of that. I
2 have one case that was called up for summary
3 judgment hearing, and I thought it was going
4 to be the typical granted situation, and then
5 a lawyer showed up for the defendant homeowner.

6 I was beginning to recite to the lawyer
7 what I had typically recited, that there was
8 no affidavits in opposition. And the lawyer
9 said, "Well, I thought you might be interested
10 in this," and handed me some documents which
11 were out of another file in our circuit, and
12 as it turned out, it was the same note and
13 mortgage that was in a separate and
14 independent file.

15 There was a different plaintiff pursuing
16 a foreclosure proceeding on the same note and
17 mortgage as the one that was being proceeded
18 on. Both of the cases contained allegations
19 in the original complaints that the separate
20 plaintiffs were the owners and holders of the
21 note. Both of them had a count to reestablish,
22 and both of them had gone so far as to have
23 affidavits filed in support of a summary
24 judgment whereby an individual represented to
25 the Court in the affidavit that the separate

1 plaintiffs had possessed the note and had lost
2 the note while it was in their possession.

3 Interestingly, both affidavits, although
4 they were different plaintiffs, purported the
5 same facts and they were executed by the same
6 individual in alleged capacity as a director
7 of two separate corporations, one of which was
8 ultimately found to me to be an assignee of
9 the original note.

10 So that really increased my interest in
11 this subject matter, because I really honestly
12 -- I don't have any confidence that any of the
13 documents the Court's receiving on these mass
14 foreclosures are valid.

15 But be that as it may, I'm still
16 granting summary judgments unless it appears
17 on the face of the submissions that there is a
18 problem. And I've had a discussion with some
19 of the other judges about whether the Court
20 can grant a summary judgment based upon
21 inadmissible evidence.

22 And it has been argued to me that the
23 evidence not objected to can be received by a
24 Court in trial, and so it certainly could be
25 considered by a Court at a summary judgment

1 hearing.

2 Now, that's about all that's keeping me
3 from denying summary judgment hearings even an
4 -- motions in unopposed mortgage foreclosure
5 cases. So I've said enough.

6 I'll go back to the defendant and say,
7 would you like to address, say, the
8 proposition that the affidavit, which was
9 objected to, is inadmissible; that is, it's
10 not offered properly to support the facts upon
11 which it's asserted?

12 There's what seems to be the equivalent
13 of a business record establishment in the
14 affidavit, but there's no business record.

15 So do you have any specific arguments
16 that contradict or shed a different light on
17 the numerous 2nd District cases which have
18 been cited by the movant?

19 MR. WASYLIK: Your Honor, I believe the
20 Court said "defendant." I think you meant the
21 plaintiff.

22 THE COURT: The plaintiff, yes.

23 MR. FRASER: Yes, Judge. You know,
24 Courts can take hearsay evidence at the
25 summary judgment proceeding. I believe there

1 is a case -- I don't have it with me --

2 THE COURT: Yes, what is that, Courts
3 can take it?

4 MR. FRASER: Yeah. Sure. My
5 understanding is that a Court can at the
6 summary judgment level accept hearsay.

7 THE COURT: Over objection? I --

8 MR. FRASER: I do have a case that
9 stands for the proposition, not on me, that
10 Courts can take hearsay evidence at a summary
11 judgment level.

12 THE COURT: Okay.

13 MR. FRASER: Whether or not over
14 objection, if it's objected to, I --

15 THE COURT: Over objection?

16 MR. FRASER: -- I have no case to either
17 refute or support that.

18 THE COURT: You're going to have to
19 speak up. I know that when you're getting
20 pummeled, it's hard to talk loudly, so
21 perhaps --

22 MR. FRASER: Judge, my position is that
23 the Court -- you have the discretion to accept
24 hearsay evidence at summary judgment hearing.
25 There is -- today before you, my argument --

1 and I do not have the motion in front of
2 me --

3 THE COURT: So let me get this right.
4 We're here for the hearing, it was adequately
5 scheduled, you had plenty of time, there are
6 numerous case citations in his motion. You
7 don't have it in front of you?

8 MR. FRASER: No, I do not, Judge.

9 THE COURT: Okay. And you're purporting
10 to base your opposition on a case that's out
11 there that you don't have with you that I
12 should rely on.

13 MR. FRASER: But --

14 THE COURT: Yes, sir.

15 MR. FRASER: -- my argument today is you
16 have the discretion under Willis v. L.W. Foster
17 Sportswear Company, 352 So.2d 922, Florida
18 Appellate 2nd District -- it's a 1971 case --
19 whereby you have the discretion to deny any
20 motion for rehearing because there must be
21 convincing exigent circumstances before
22 accepting any new affidavits being offered up
23 for the first time.

24 THE COURT: Well, how about the idea
25 that I was wrong, and instead of having an

1 appeal where I'd be overturned and we had
2 wasted all of that time, that I would rule
3 correctly?

4 You know, I guess you're telling me I've
5 got the discretion to be -- continually be
6 wrong. What we're trying to address here is
7 the fact that not that they failed to bring
8 something up or that they've sat on their
9 hands or anything. They attended the hearing,
10 they pointed these matters out to the Court,
11 the Court ruled unfavorably, they're giving me
12 another chance before they appeal.

13 Now, to point out the case law -- and
14 I'm sort of thinking, well, gee, I'm not
15 hearing anything upon which I could base
16 admitting the evidence that was the foundation
17 for the summary judgment over their objection
18 other than your assertion that there is some
19 unnamed, unknown, uncited case out there which
20 supports the propositions. I've got a little
21 trouble with that.

22 I mean, do you need a minute or two to
23 go scramble around and get that case for me?

24 MR. FRASER: No, Judge.

25 THE COURT: Well, I really want you to

1 send that to me. So I'm going to request that
2 you send me the cases upon which you're
3 asserting that I'm well within my reasonable
4 exercise of my discretion to ignore all of
5 these 2nd District Court cases, his objection,
6 and allow hearsay as the only basis to support
7 the summary judgment.

8 MR. FRASER: That -- that -- you know,
9 that was not my argument.

10 My argument is that at the summary
11 judgment level you can consider hearsay
12 evidence.

13 MR. WASYLIK: Your Honor, may I
14 respond --

15 MR. FRASER: I'm not saying -- I'm not
16 -- my argument is not, no, Judge, do not
17 follow everything that -- my argument is
18 this: You ruled correctly at the summary
19 judgment hearing. You can accept hearsay
20 evidence at the summary judgment hearing.

21 MR. WASYLIK: I apologize.

22 THE COURT: No. Go ahead.

23 MR. FRASER: That it's within your
24 discretion to deny their motion for rehearing
25 because at the time that the summary judgment

1 was entered into it was entered into --

2 THE COURT: Okay. Well, let me just --

3 MR. FRASER: -- correctly. That's our
4 position.

5 THE COURT: -- okay. Well, you know,
6 I'm not really trying to be argumentative.
7 I'm trying to --

8 MR. FRASER: Sure.

9 THE COURT: -- you know, I'm trying to
10 rule correctly, and I'm in the hot seat
11 because I'm the one who gets appealed and
12 reversed on the thing if I just listen to you
13 and I don't have a -- you know, a founded
14 basis for it.

15 What I did was, I just put "summary
16 judgment and hearsay" in Westlaw. The very
17 first case that comes up is a January 12 case
18 out of the 1st District. And it said,
19 "Unsworn medical record review report attached
20 to records custodian affidavit presented by
21 insured in opposition to the uninsured
22 motorist's motion for summary judgment motion
23 was hearsay and could not be considered when
24 ruling on the summary judgment motion."

25 The next case, Mitchell versus

1 Westfield, "Objected on the ground the
2 affidavit and attached schedule was hearsay,
3 insufficient to establish damages on summary
4 judgment. We agree."

5 Lloyds Underwriters, "Hearsay statements
6 on the matter would not be admissible into
7 evidence and could not be relied upon to create
8 an issue of fact of summary judgment."

9 Every single case that I'm going through
10 here says can't do it. That's totally
11 consistent with all of the cases that I've
12 reviewed.

13 So I'm just begging you to send me some
14 cases that would help me because I've got --
15 well, in one morning, I've got 50 summary
16 judgments in mortgage foreclosures.

17 I'm looking down at these affidavits,
18 and I'm telling you what's going on in the
19 judge's mind. I'm looking at them and saying,
20 nobody has objected to this, but maybe I
21 shouldn't be granting this summary judgment.

22 So you might help me out if you could
23 give me a case which stands for the
24 proposition that maybe simply if it's not
25 objected to, I can consider it. I know that's

1 not the case here. But, I mean, that would at
2 least be something, because I haven't even
3 found any cases which support the proposition
4 I can rely on hearsay even if it's not
5 objected to.

6 MR. FRASER: The affidavit in the
7 instant case is distinguishable than the
8 affidavit in the first case in which you cited
9 in Westlaw. I think that -- ours is a signed
10 affidavit.

11 THE COURT: Yeah, but the affidavit does
12 not constitute a basis upon which the personal
13 knowledge of the facts contained therein can
14 be determined. It's a business record
15 qualification affidavit is what it is.

16 MR. FRASER: Paragraph Two of our
17 affidavit says that based upon their personal
18 knowledge, they're authorized to make certain
19 statements therein.

20 THE COURT: You know what I'd really
21 like to see? I'd like to see in one of these
22 cases where a defense lawyer cross-examines,
23 takes a deposition of these people, and we can
24 see whether they ought be charged with perjury
25 for all of these affidavits.

1 I would just love to see that, because
2 I'm going to tell you the truth, I had a
3 lawyer on the phone from Miami telling me that
4 they've got somebody in their office who is
5 authorized by reason of a power of attorney
6 filed as a public record. So that was
7 supposed to be the support that they have for
8 these personal knowledge affidavits.

9 MR. WASYLIK: Sir, that was in this
10 case.

11 THE COURT: Okay.

12 MR. WASYLIK: That was this affidavit.
13 I apologize for interrupting. I just wanted
14 -- I remember the Court coming to that
15 conclusion at the time.

16 THE COURT: Okay.

17 MR. WASYLIK: If I may briefly, I think
18 I may assist the Court in very briefly
19 directing the Court to Page Seven of our
20 brief, which addresses the issue of hearsay.

21 Both cases that we have cited on Page
22 Seven, which is the CSX Transport case -- was
23 actually cited on Page Six, but quoted on Page
24 Seven. The last line of that, Your Honor,
25 says, "Thus, the affidavit is based on hearsay

1 and is not sufficient to support summary
2 judgment."

3 The next case, Your Honor, cited Zoda v.
4 Hedden --

5 THE COURT: I've got Zoda in my hand.

6 MR. WASYLIK: -- and the last line we
7 cite of Zoda v. Hedden says, "His affidavit
8 was based on hearsay and was incompetent to
9 support summary judgment."

10 Your Honor, I believe that the Rule
11 1.510(e), which sets out the requirements for
12 affidavits, requires that the affidavit be
13 made on personal knowledge. Hearsay, of
14 course, is not personal knowledge. Business
15 records, unless they meet the hearsay
16 exception, do not qualify.

17 And I think, Your Honor, that
18 conclusively addresses the issue of whether or
19 not affidavits that are hearsay can be used to
20 support for summary judgment.

21 Your Honor, the point about whether or
22 not it's objected to, I think, is a point that
23 while not alive in this issue today is
24 something that probably the Court should --
25 the Court would be well to continue to

1 consider.

2 However, with respect to hearsay in
3 affidavits when that hearsay is objected to, I
4 think, Your Honor, that both the rule
5 expressly prohibits it and the case law
6 interpreting that rule also expressly prohibits
7 it.

8 And I think the reason for that, Your
9 Honor, the basis for that will be more clear
10 when the Court considers the last case that we
11 cited in our brief, which is the Bifulco case,
12 Bifulco v. State Farm, 693 So.2d 707.

13 And, Your Honor, that's a 4th DCA case
14 from 1997. But I think it illustrates the
15 point pretty well. And the reason, Your
16 Honor, that the Courts are to -- this is my
17 word -- rigidly apply the requirements of
18 1.510(e) regarding evidence -- summary

19 judgment evidence is because granting of
20 summary judgment cuts off a party's right to
21 trial, which the Bifulco court observes is a
22 constitutional right.

23 The standard, Your Honor, in granting
24 summary judgment, again, cited in the first
25 -- the opening page of our brief -- I'll flip

1 to that -- but the standard, Your Honor, I
2 think the Court is well familiar with, is that
3 the facts, the evidence before the Court on
4 summary judgment, have to be shown beyond the
5 slightest doubt, beyond the slightest doubt.

6 And that's Mivan or Mivan, M-i-v-a-n,
7 Florida versus Metric Constructors, Inc., 857
8 So.2d 901, and that's a 5th DCA case from
9 2003, talking about the slightest doubt. Your
10 Honor, where there is the slightest doubt of
11 -- that's a higher burden than a criminal
12 defendant enjoys.

13 A non-movant in summary judgment enjoys
14 an actual higher burden. A slightest doubt
15 is, of course, a stricter standard than a more
16 reasonable -- than a reasonable doubt. And so
17 like a criminal defendant who comes clothed in
18 a presumption of innocence to the Court, a

19 non-movant in a summary judgment proceeding
20 comes to the Court clothed in the presumption
21 that the judgment should not be entered
22 against them, that they will get their right
23 to trial, you know, barring the conclusive
24 proof by the plaintiff in using the admissible
25 evidence described by the rule.

1 So when put in the context of the
2 constitutional right of the parties to have
3 their trial on any facts that could decide
4 their case, I think that that would -- that
5 pretty thoroughly rebuts the discretion
6 argument being lobbied by the plaintiff in
7 this case.

8 THE COURT: Well, I have in my hand when
9 you started your argument Zoda and CSX. Both
10 of those cases deal with an insufficiency of
11 an affidavit based upon examination of
12 business records or the contents of records,
13 and they both are 2nd District cases which
14 seem to be very closely on point with the case
15 that we have today.

16 I'm also enlightened by Jones versus
17 Florida Workers' Compensation, which is a 2001
18 2nd District case that finds that the
19 affidavit was insufficient in that it had
20 allegations that all the assertions and
21 allegations in the complaint are true, that
22 kind of an affidavit is insufficient.

23 I also reviewed Hurricane Boats versus
24 Certified Industrial Fabricators and found
25 that affidavit to be insufficient when it

1 related to the allegations in the complaint
2 being true.

3 I'll note that there are -- there is a
4 significant difference in the foundation a
5 witness has for establishment of business
6 records and the ability of that witness to
7 testify about those facts. Authentication
8 of a record is different than admissibility.

9 And I'll note the case of Dollar
10 versus State of Florida, which is 685 So.2d
11 901. Similar concerns have been expressed by
12 the Courts with regard to the authentication
13 of official records in Monroe County versus
14 McCormick at 692 So.2d 214 and other cases.

15 In regard to the inadmissibility and
16 hearsay, this Court has determined that the
17 1st, 2nd, 3rd and 4th and 5th Districts have
18 all recited in cases the fact that inadmissible
19 hearsay cannot be considered at a summary
20 judgment and applies this rule, not only to the
21 affidavits of the plaintiff in support of -- or
22 a movant in support of a summary judgment, but
23 also affidavits in opposition.

24 The 5th DCA in Mullan versus the
25 Bishop of the Diocese at 540 So.2d 174

1 reversed a summary judgment based upon
2 hearsay. The 1st District in Rose versus
3 ADT, 989 So.2d 1244, reversed a summary
4 judgment. And the 1st District in Pawlik,
5 P-a-w-l-i-k, at 528 So.2d 965 had some
6 observations about the inadmissible hearsay,
7 the 3rd District in Capello, 625 So.2d 474.

8 And to perhaps address the concerns
9 that I brought up about the non-objection, I
10 have found one case which appears to stand for
11 the proposition that even under circumstances
12 where the -- there was an unopposed affidavit,
13 the appellate court reversed lower court. And
14 this was in a forfeiture case, 2nd District
15 Court of Appeal. This is the In Re: Forfeiture
16 of a 1980 Ford Pickup, 779 So.2d 450. There
17 was a summary judgment proceeding.

18 The detective's affidavit was
19 inadmissible hearsay and, thus, was not
20 competent to support the summary judgment of
21 forfeiture in the case, even though it's noted
22 in the opinion that "We reversed the
23 forfeiture because it was based upon a summary
24 judgment that the trial court had entered in
25 reliance on unopposed but insufficient

1 affidavits, pursuant to the Florida Rule of
2 Civil Procedure 1.510(e)."

3 So based upon those and other cases, the
4 Court has had -- I'm going to have to grant
5 the motion and set aside the previously
6 improvidently entered summary judgment in this
7 case. All right.

8 MR. WASYLIK: Your Honor, would you like
9 me to take a crack at drafting the order then?

10 THE COURT: Yes. Make it simple.

11 MR. WASYLIK: Yes, Your Honor.

12 THE COURT: Okay. Thank you very much,
13 Counsel.

14 MR. FRASER: Thank you.

15 THE COURT: All right.

16 MR. FRASER: Bye.

17 (At 4:25 p.m., the proceedings
18 conclude.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA:

COUNTY OF HILLSBOROUGH:

I, Kimberly Ann Roberts, Notary Public in and for the State of Florida at Large, do hereby certify that I reported in shorthand the foregoing proceedings at the time and place therein designated; that my shorthand notes were thereafter reduced to typewriting under my supervision; and that the foregoing pages are a true and correct, verbatim record of the aforesaid proceedings.

Witness my hand and seal April 12, 2010, in the City of Tampa, County of Hillsborough, State of Florida.


Kimberly Ann Roberts
Notary Public
State of Florida at Large

