Virtually every Motion for Summary Judgment in foreclosure cases is predicated on an "Affidavit of Amounts Due and Owing" introduced by the Plaintiff. I've always been bothered by these affidavits because it just doesn't seem right that one flimsy form document signed by a mindless "Robo Signer" should be all that is required to entitle any old Plaintiff to kick my neighbor out of her home, then chase her to the ends of the earth for the money claimed due in this one flimsy piece of paper. Some brilliant legal research by my colleague Michael Fuino (3L at Stetson Law) confirms that these affidavits are flawed and should not be permitted to be relied upon to grant summary judgment.

## Perry Mason Goes to Foreclosure Court

The analysis and case law below provides all the legal support necessary to make an intelligent legal argument, but you can begin the challenge to the affidavit with a Perry Mason, "Well golly your honor, I'm afraid I can't figger this here affidavit out at all…."Lookiee here it just says…Defendant owes Plaintiff all this here money. Now exactly who is it these big shot banker boys and fancy lawyers want you to give all this money to? The Plaintiff that first appeared in the case before they made their Motion to Substitute Party Plaintiff? One of them companies mish mashed up there in that Plaintiff that I can't even figger out who they are or where they are, Duetsche Bank? The Ixis Trust, an FSB?

And now the real kicker. "Your honor, by my count we got us here six Defendants. There's 1)Bob Smith, his wife 2)Mary Smith, some company called 3)MERS {and what is this MERS thing your honor? I mean how did they get here} 4. They Shady Acres Homeowner's Association; 5) The City of Mayberry and; 6) Visa Credit Card Company. Now I know they probably mean to tell you that Bob and Mary Smith are "the Defendant" that owes them the money, but the problem is "Mary Smith" don't owe no one any money….lookee here, she didn't sign any Note so they can't claim she's "the Defendant" that owes the money.

The point is I've never seen an affidavit that clearly identifies who they allege is obligated to pay the money claimed in the affidavit. That's a basic flaw that I'm never gonna let slide again. And now to the legal argument.

## Plaintiff Failed to Attach Documents Referred to in the Affidavit-Failure to Attach Documents Violates Fla. Stat. §90.901 (1989)

Florida Statue §90.901 (1989) states, in pertinent part, that "[a]uthentication or identification of evidence is required as a condition precedent to its admissibility." The failure to authenticate documents referred to in affidavits renders the affiant incompetent to testify as to the matters referred to in the affidavit. *See* Fla. R. Civ. Pro. 1.510(e) (which reads, in pertinent part, that "affidavits…shall show affirmatively that the affiant is competent to testify to the matters stated therein"); Zoda v. Hedden, 596 So. 2d 1225, 1226 (Fla. 2d DCA 1992) (holding, in part, that failure to attach certified copies of public records rendered affiant, who was not a custodian of said records, incompetent to testify to the matters stated in his affidavit as affiant was unable to authenticate the documents referred to therein.)

In most affidavits, the affiant affirmatively states that he is "familiar with the books of account and have examined all books, records, and documents kept by SERVICER FOR PLAINTIFF concerning the transactions alleged in the Complaint." Furthermore, the affiant avers that the "Plaintiff or its assigns, is owed…$408,809.30." Nevertheless, the affiants fail to attach any of the books, records or documents referred to in the Affidavit. In addition, the affiants do not meet the definition of "custodian," which is "a person or institution that has charge or custody (of…papers)." *See* Black's Law Dictionary, 8th ed. 2004, *custodian*. By the affiants own admission "[t]he books, records, and documents which [Spradling] has examined are managed by employees or agents whose duty it is to keep the books accurately and completely." *Emphasis added*. Thus, the affiant has only examined the books, records, and documents which he refers to in the Affidavit while the true custodians of these documents are the employees or agents whose duty it is to keep the books accurately and completely. In essence, the affiants aver to records which they did not submit nor could they testify for the authenticity of just as the affiant in Zoda did.

The affiant's failure to attach the documents referred to in the Affidavit without being custodian of same is a violation of the authentication rule promulgated in Fla. Stat. §90.901 (1989), which renders them incompetent to testify to the matters stated therein as the Second District in Zoda held. Therefore, the Affidavit should be struck in whole.

**Failure to Attach Documents Violates Fla. R. Civ. Pro. 1.510(e)**

Fla. R. Civ. Pro. 1.510(e) provides, in part, that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Failure to attach such papers is grounds for reversal of summary judgment decisions. *See* CSX Transp., Inc. v. Pasco County, 660 So. 2d 757 (Fla. 2d DCA 1995) (reversing summary judgment granted below where the affiant based statements on reports but failed to attach same to the affidavit.)

As previously discussed, the affiants refer to books, records, and documents kept by SERVICER which allegedly concerned the transaction referred to in the Complaint against the Defendant. Nevertheless, as previously demonstrated, Affiant has not attached any of these books, records or documents. This failure to do so is a violation of Fla. R. Civ. Pro. 1.510(e) and is grounds for a reversal of a summary judgment decision in favor of the Plaintiff. Therefore, the Affidavit should be struck in whole.

**Affidavit Was Not Based Upon Affiant's Personal Knowledge**

As a threshold matter, the admissibility of an affidavit rests upon the affiant having personal knowledge as to the matters stated therein. *See* Fla. R. Civ. Pro. 1.510(e) (reading, in pertinent part, that "affidavits shall be made on personal knowledge"); Enterprise Leasing Co. v. Demartino, 15 So. 3d 711 (Fla. 2d DCA 2009); West Edge II v. Kunderas, 910 So. 2d 953 (Fla. 2d DCA 2005); In re Forefeiture of 1998 Ford Pickup, Identification No. 1FTZX1767WNA34547, 779 So. 2d 450 (Fla. 2d DCA 2000). Additionally, a corporate officer's affidavit which merely states conclusions or opinion is not sufficient, even if it is based on personal knowledge. Nour v. All State Supply Co., So. 2d 1204, 1205 (Fla. 1st DCA 1986).

The Third District, in Alvarez v. Florida Ins. Guaranty Association, 661 So. 2d 1230 (Fla. 3d DCA 1995), noted that "the purpose of the personal knowledge requirement is to prevent the trial court from relying on hearsay when ruling on a motion for summary judgment and to ensure that there is an admissible evidentiary basis for the case rather than mere supposition or belief." Id at 1232 (quoting Pawlik v. Barnett Bank of Columbia County, 528 So. 2d 965, 966 (Fla. 1st DCA 1988)). This opposition to hearsay evidence has deep roots in Florida common law. In Capello v. Flea Market U.S.A., Inc., 625 So. 2d 474 (Fla. 3d DCA 1993), the Third District affirmed an order of summary judgment in favor of Flea Market U.S.A as Capello's affidavit in opposition was not based upon personal knowledge and therefore contained inadmissible hearsay evidence. *See also* Doss v. Steger & Steger, P.A., 613 So. 2d 136 (Fla. 4th DCA 1993); Mullan v. Bishop of Diocese of Orlando, 540 So. 2d 174 (Fla. 5th DCA 1989); Crosby v. Paxson Electric Company, 534 So. 2d 787 (Fla. 1st DCA 1988); Page v. Stanley, 226 So. 2d 129 (Fla. 4th DCA 1969). Thus, there is ample precedent for striking affidavits in full which are not based upon the affiant's personal knowledge.

Here, the entire Affidavit is hearsay evidence as affiant has absolutely no personal knowledge of the facts stated therein. As an employee of Servicer, which purports to be the servicer of the loan, he has no knowledge of the underlying transaction between the Plaintiff and the Defendant. Neither affiant nor servicer: (1) were engaged by the Plaintiff for the purpose of executing the underlying mortgage transaction with the Defendant; or (2) had any contact with the Defendant with respect to the underlying transaction between the Plaintiff and Defendant. In addition, the Affidavit fails to set forth with any degree of specificity what duties Servicer performs for the Plaintiff, save for one line which states that Servicer "is responsible for the collection of this loan transaction and pursuit of any delinquency in payments."At best, servicer acted as a middleman of sorts, whose primary function was to transfer of funds between the various assignees of the underlying Mortgage and Note. Servicer is not the named Plaintiff in this case, nor does the Affidavit aver that either affiant or servicer is the agent of the Plaintiff.

Because affiant has no personal knowledge of the underlying transaction between the Plaintiff and Defendant, any statement he gives which references this underlying transaction (such as the fact that the Plaintiff is allegedly owed sums of monies in excess of $400,000) is, by its very nature, hearsay. The Florida Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fla. Stat. §90.801(1)(c) (2007). Here Spradling is averring to a statement (that the Plaintiff is allegedly owed sums of money) which was made by someone other than himself (namely, the Plaintiff) and is offering this as proof of the matter asserted (that Plaintiff is entitled to enforce the Note and Mortgage and that Plaintiff is entitled to a judgment as a matter of law.) At best, the only statements which Spradling can aver to are those which regard the transfer of funds between the various assignees of the Mortgage and Note.

The Plaintiff may argue that while affiants's statements may be hearsay, they should nevertheless be admitted under the "Records of Regularly Conducted Business Activity" exception. Fla. Stat. §90.803(6) (2007). This rule provides that notwithstanding the provision of §90.802 (which renders hearsay statements inadmissible), hearsay statements are not inadmissible, even though the declarant is available as a witness, if the statement is

[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. *Emphasis added*.

There are, however, several problems with this argument. To begin, and as previously demonstrated, no memorandums, reports, records, or data compilation have been offered by the Plaintiff. Furthermore, the books, records, and documents referred to by affiant in the Affidavit (which, of course, were not attached) were kept by affiant, who cannot be a person with knowledge as affiant does not have any personal knowledge of underlying transaction between the Plaintiff and the Defendant. Finally, affiant, as the source of this information, shows a lack of trustworthiness because affiant failed to attach the books, records, and documents to the Affidavit and because neither affiant nor servicer have knowledge of the underlying transaction between the Plaintiff and the Defendant.

Because affiant's statements in the Affidavit are not based upon personal knowledge, they are inadmissible hearsay evidence. As no hearsay exception applies to these statements, the Affidavit should be struck in whole.

**Affidavit Included Impermissible Conclusions of Law Not Supported by Facts**

An affidavit in support of a motion for summary judgment may not be based upon factual conclusions or opinions of law. Jones Constr. Co. of Cent. Fla., Inc. v. Fla. Workers' Comp. JUA, Inc., 793 So. 2d 978, 979 (Fla. 2d DCA 2001). Furthermore, an affidavit which states a legal conclusion should not be relied upon unless the affidavit also recites the facts which justify the conclusion. Acquadro v. Bergeron, 851 So. 2d 665, 672 (Fla. 2003); Rever v. Lapidus, 151 So. 2d 61, 62 (Fla. 3d DCA 1963).

Here, the Affidavit contained conclusions of law which were not supported by facts stated therein. Specifically, affiant averred that the Plaintiff was entitled to enforce the Note and Mortgage and that the Plaintiff was entitled to a judgment as a matter of law, two legal conclusions, but did not support this conclusion with statements which referenced exactly who the Plaintiff was entitled to enforce the Note and Mortgage against. In fact there is no mention of any of the parties in question save for one cryptic line in where affiant states that "[s]pecifically, I have personal knowledge of the facts regarding the sums which are due and owing to Plaintiff or its assigns pursuant to the Note and Mortgage which is the subject matter of the lawsuit" and another which states "I am familiar with the books of account…concerning the transactions alleged in the Complaint." Nowhere in the Affidavit does affiant state that the Plaintiff is entitled to enforce the Note and Mortgage against the Defendant nor does affiant state that the Plaintiff is entitled to a judgment as a matter of law because the Defendant owes the Plaintiff money. At best the Affidavit accuses someone of owing the Plaintiff $408,809.30 and that the Plaintiff should be able to enforce some Note and Mortgage against that particular

someone.  By not clearly identifying the parties in question, affiant has not adequately supported his two legal conclusions.