IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

BETHANY VALLEJOS,

Appellant,

CASE NO.: 2011-CV-000007-A-O
(Lower Court Case No.: 2010-SC-4454-O)

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC,

Appellee.
_____/

DATE: October 24, 2013

Appeal from the County Court
for Orange County, Florida
Deborah B. Ansbro, County Court Judge.

Heather A. Harwell, Esquire,
for Appellant.

Dana M. Stern, Esquire,
for Appellee.

Before Lubet, Murphy and Higbee, JJ.

ORDER REVERSING SUMMARY JUDGMENT

PER CURIAM.

This is a credit card collection case. Appellant (the defendant below), Bethany Vallejos, ("Appellant" or "Vallejos"), appeals from an Order granting final summary judgment to Portfolio Recovery Associates, LLC ("Appellee" or "Portfolio"). The Court has jurisdiction over

this appeal pursuant to Florida Rule of Appellate Procedure 9.030(c) (1) (A). We dispense with oral argument, Fla. R. App. P. 9.320, and reverse.

FACTS

Bethany Vallejos bought items using a credit card. Portfolio claims that an entity known as CitiFinancial opened an account in appellant's name, she ran up a balance of $2,689.43 and CitiFinancial assigned this debt. Portfolio claims it now owns this debt and brought a small claims action to recover the money.

The first count of Portfolio's complaint is entitled "Money Lent" while the second sounds in unjust enrichment. Vallejos, who was and is represented by counsel, filed an Answer and Affirmative Defenses.

Portfolio moved for summary judgment and Vallejos opposed the motion. It was granted and judgment entered in the amount of $2,689.43, plus interest. Vallejos timely appealed.

STANDARD OF REVIEW

"We, of course, review the final summary judgment de novo." *Chiropractic One, Inc. v. State Farm Mut. Auto*., 92 So. 3d 871, 873 (Fla. 5th DCA 2012). In order to determine the propriety of a summary judgment, a reviewing court should determine whether there is any genuine issue regarding any material fact and whether the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510 (c). The party seeking summary judgment has the burden to prove conclusively the nonexistence of any genuine issue of material fact. On appeal, a reviewing court should consider the evidence contained in the record, including any supporting affidavits, in the light most favorable to the nonmoving party. If the slightest doubt exists, summary judgment must be reversed. *Delta Fire Sprinklers, Inc. v. OneBeacon Ins. Co*., 937 So. 2d 695, 697-98 (Fla. 5th DCA 2006).

"Until it is determined that the movant has successfully met [its] burden, the opposing party is under no obligation to show that issues do remain to be tried." *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966).

PARTIES' POSITIONS AND DISCUSSION

In support of its motion, Portfolio relied upon two affidavits, among other things. One of these affidavits was by April Vandruff, an employee of Citicorp Credit Services, Inc. ("CCSI") which she describes in her affidavit as "an affiliate of CitiFinancial." (A100, Vandruff Aff. ¶ 1.) She avers that she doubles as records custodian for both CitiFinancial and CCSI. She states that the records of CitiFinancial indicate that an account was "opened on or acquired by CitiFinancial on 12/8/2004 in the name of BETHY VALLEJOS." (*Id*. at ¶ 4) (emphasis added). In the next paragraph, Vandruff states:

> That the records of Citi*bank* indicate that as of the date the Account was sold, there was due and payable on the Account $2,689.43. The affiant further states that, to the best of his/her knowledge, information and belief there were no uncredited payments against the said debt at the time of the sale.

(*Id*.¶ 5) (emphasis added) (emphasis added).

Vandruff goes on to swear that "[t]hat the records of Citi*bank* indicate that the last payment received on the account by Citi*bank* was posted to the account on 6/3/2007." (*Id*. ¶ 6) (emphasis added).

She continues:

> That pursuant to a Purchase and Sale Agreement between between Citi*bank* and Portfolio Recovery Associates LLC dated 6/26/2008, CitiFinancial agreed to sell, transfer, assign, convey, grant, bargain, set over and deliver to Portfolio Recovery Associates, LLC, its successors and assigns, good and marketable title to certain accounts and their unpaid balance free and clear of any

> encumbrance, equity, lien, pledge, claim or security interest. As part of this Purchase and Sale Agreement, the above referenced account was sold, transferred, assigned, granted, bargained, set over and delivered to Portfolio Recovery Associates, LLC, its successors and assigns by a Bill of Sale, Assignment and Assumption Agreement between CitiFinancial and Portfolio Recovery Associates, LLC dated 10/30/2008.

(Id. at ¶ 7) (emphasis added).

The Bill of Sale, Assignment and Assumption Agreement of October 30, 2008 which is referenced in paragraph seven of Vandruff's affidavit states among other things that

> For value received and subject to the terms and conditions of the Purchase and Sale Agreement dated June 26, 2008, between [Portfolio] and [CitiFinancial] (the "Agreement"), CitiFinancial does hereby transfer, sell, assign, convey, grant, bargain, set over and deliver to Buyer and to Buyer's successors and assigns, all of CitiFinancial's right, title and interest in and to the Account described in section 1.2 of the Agreement.

(A101).

Tanya Hollenbeck also submitted an affidavit in support of this motion for summary judgment. (A33). She says that she is the records custodian of Portfolio and that CitiFinancial "sold, assigned and transferred" Vallejos's account to Portfolio on October 30, 2008 "according to the business records." (*Id*. at ¶ 3). In addition she avers that "[a]ccording to the account records transferred to [Portfolio] from [CitiFinancial] and maintained in the ordinary course of business by [Portfoilio] there was due and payable from BETHNY (sic) VELEJOS ("Debtor") to [Portfolio] the sum of $2,689.43 . . . as of 10/30/2008. . . ." (Id. at ¶ 4.) There are no documents annexed to the Hollenbeck affidavit.

Also contained in the motion record and presumably submitted in support – although it is not mentioned in either affidavit relied upon by Portfolio - is a "Welcome to Portfolio Recovery Associates!" notice addressed to "Bethy Vallejos." (A115). At the top, there is an account

number and the name "CitiFinancial/KINGSWERE FURNITURE AS AS." The stated balance is $2,690.46.

SUMMARY JUDGMENT

> Because summary judgment forecloses the litigant from the benefit of a trial on the merits, courts must exercise caution in granting summary judgment. *Bifulco v. State Farm Mut. Auto. Ins. Co.*, 693 So. 2d 707, 709 (Fla. 4th DCA 1997). Accordingly, the procedural strictures in Florida Rule of Civil Procedure 1.510 are neither niceties nor technicalities, but must be observed. *Id.* "[I]f the record reflects the existence of any genuine issue of material fact ... or ... raises even the slightest doubt that an issue might exist, that doubt must be resolved against the moving party and summary judgment must be denied." *Nard, Inc. v. DeVito Contracting & Supply, Inc.*, 769 So. 2d 1138, 1140 (Fla. 2d DCA 2000).

Hicks v. Hoagland, 953 So. 2d 695, 697-98 (Fla. 5th DCA 2007).

This case was brought in Small Claims Division. The Small Claims Rules refer to summary disposition (as did the motion judge). Those rules provide that "[a]t pretrial conference or at any subsequent hearing, if there is no triable issue, the court shall summarily enter an appropriate order or judgment." Fla. Sm. Cl. R. 7.135. The order appealed from is one for summary judgment which is how Portfolio labeled its dispositive motion. In our view, it makes no difference in this case whether the question is framed in terms of a "triable issue" or "genuine issue of material fact;" "summary disposition" or "summary judgment." We are satisfied, based upon our de novo review of the record, that Portfolio was not entitled to a judgment in its favor.

Florida Rule of Civil Procedure1.510 (e) provides in relevant part that

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit

> affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits.

Fla. R. Civ. P. 1.510 (e).

Viewed in the light of the strictures of this rule, we note several shortcomings in the affidavits submitted by Portfolio in support of its motion for summary judgment. First, while April Vandruff said she is records custodian for both CCSI and CitiFinancial, she claimed no such position at Citibank. Nevertheless she twice swore to what "the records of Citibank" said. (A100; Vandruff Aff. ¶ 5,6). She had no authority to do so, demonstrated no personal knowledge of the facts asserted and was thus not "competent to testify" to those matters. It is not even clear what Citibank, as opposed to Citifinancial, has to do with this case.

The chain of the assignment of the alleged Vallejos debt to Portfolio is of great import as it is the basis of Portfolio's standing. The Vandruff and Hollenbeck affidavits refer to two agreements between CitiFinancial and Portfolio - one on June 26, 2008 and one on October 30, 2008. Only one page of the October 30, 2008, agreement between CitiFinancial and Portfolio is part of the appellate record. It appears to have been simply attached to the Vandruff's affidavit. It was not specifically made an exhibit nor does she say that it is a record of CitiFinancial or CCSI, by whom, she is employed. Further troubling to us is the fact that this October 30, 2008, "Bill of Sale, Assignment and Assumption Agreement" makes reference to another agreement between Portfolio and CitiFinancial.[1] We are told in the document provided that section 1.2 of the agreement dated June 26, 2008, describes the accounts which had been transferred. That June 26, 2008 agreement, however, was not made part of the record below as required by Florida Rule of Civil Procedure 1.510. Finally, while the October 30, 2008, attachment refers to

[1] Vandruff, in her affidavit, says that the June 26, 2008, agreement was between Portfolio and Citi*bank*, not CitiFinancial. (*See* A100; Vandruff Aff. at ¶ 7).

CitiFinancial as having been a party, with Portfolio, to the June 26 contract, Vandruff says in her affidavit that it was Citi*bank.* (*See* A100; Vandruff Aff. ¶ 7).

Vandruff's knowledge, if she has any, of the assignment of the Vallejos account, is based upon documents which she does not attach to her affidavit and the ones she does attach are not sworn to be true copies.

In *Coleman v. Grandma's Place, Inc.*, 63 So. 3d 929 (Fla. 4th DCA 2011), it was unclear what a summary judgment affiant had personal knowledge of as she stated had knowledge "and/or" had reviewed the file in question but she did not attach the file. Similarly, here, Vandruff states that she has personal knowledge of facts or acquired knowledge "based upon review of business records of CitiFinancial or CCSI." (A100;Vandruff Aff. ¶ 1). Those documents are not identified and only a single document has been attached the affidavit. Also, Vandruff swore to what "the records of Citibank indicate" even though she established no connection with Citibank. She affirms that Vallejos's account was "opened on *or acquired by* CitiFinancial on 12/8/2004." Which is it? If the account was "acquired by" CitiFinancial from another party from whom was it obtained? With that question lingering, there is at least a question of fact about the chain of title to Portfolio. Further, critical documents evidencing the assignment, the June 26, 2008 agreement between CitiFinancial or Citibank and Portfolio and section 1.2 of the Bill of Sale agreement between CitiFinancial and Portfolio are not in evidence or, if they are, their accuracy has not been attested to. The cursory bill of sale dated October 30, 2008 (A101) was apparently inserted into the motion record as a stand-alone document but its authenticity was never sworn to by Vandruff or Hollenbeck. Finally, Vallejos points out that the complaint and affidavits state the amount due as $2,689.43 yet the record also contains notices from Portfolio to Vallejos demanding different sums. (See A98, 115, 117). Those Portfolio

notices also make reference to what appears to be the previous holder of the account as "CitiFinancial/KINGSWERE FURNITURE AS AS." (*Id*.) Presumably "AS AS" means "as assignee."

The Hollenbeck and Vandruff affidavits do not explain the discrepancies in amounts claimed nor do they identify Kingswere Furniture. These are just two more unanswered factual issues which could easily have been addressed.

If that seems like picking of nits, we view the Vandruff affidavit as suffering from several major infirmities. First, she mentions Citibank several times. Citibank, if Vandruff is to be believed, played some role in the relevant events yet Vandruff is not a Citibank employee and not a records custodian and therefore lacks knowledge of Citibank's involvement in this matter, if any. Second, her affidavit has a portion of a Bill of Sale attached but that document is not sworn to as required by Florida Rule of Civil Procedure 1.510. Third, a relevant portion of that document, section 1.2 is missing. Fourth, the referenced agreement between Portfolio and CitiFinancial or Citibank (the papers say both) is not attached.

We conclude that while Vandruff and Hollenbeck may have been knowledgeable of certain matters of certain things on account of their access to documents maintained by their employers in the regular course of business, their affidavits fall short of establishing both a chain of title to Portfolio and the amount due on the *Vallejos* account and, if any, to whom it was due. We note that it was no help to us for both these affiants to claim the contents of her affidavit to be true to the best of her "knowledge information and belief based either on personal knowledge or review of the business records of CitiFinancial and/or CCSI." (A100 at ¶ 1). Whatever else this may mean, we find that it is not a simple statement of personal knowledge as required by Rule 1.510 (e). Further, the supporting documents – if they were supportive - were never made

exhibits to the affidavits filed by Portfolio. This will not do. "[M]erely attaching an unsworn document . . . to a motion for summary judgment does not, without more, satisfy the procedural strictures inherent in Florida Rule of Civil Procedure 1.510(e)." *First Union Nat. Bank of Fla. v. Ruiz*, 785 So. 2d 589, 591 (Fla. 5th DCA 2001) (*citing Bifulco v. State Farm Mut. Auto. Ins. Co.*, 693 So.2d 707, 708 (Fla. 4th DCA 1997)). We appreciate that this was a small claims matter and that proceedings there can tend to the less formal. Nevertheless, a party is only entitled to summary disposition where there is no triable issue and the Vandruff and Hollenbeck affidavits, while submitted in support of the summary judgment motion, actually *create* triable issues rather than eliminate them.

This is not a motion, as Portfolio contends, where the opponent relies upon a "paper issue." The so-called "paper issue" principle or doctrine come into play where "[o]nce the movant tenders competent evidence to support his motion, the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue." *Johnson v. Gulf Life Ins. Co.*, 429 So. 2d 744, 746 (Fla. 3rd DCA 1983). Portfolio contends that because Vallejos has not come forward with counter affidavit or other evidence, it should prevail. We disagree because the Vandruff and Hollenbeck affidavits suffer from such infirmities that Portfolio cannot be said to have tendered competent evidence to support it motion, at least not sufficient competent evidence. Thus, we reject Portfolio's "paper issue" argument.

The parties have raised other arguments on appeal but in view of our disposition we need not address them. We express no opinions on the merits of any of the claims or defenses raised. We believe it worthy of note, however, that Portfolio has asserted claims for both "money lent" (Count I) and "unjust enrichment" (Count II). We further note that Florida courts have held that a plaintiff cannot pursue a quasi-contract claim for unjust enrichment if an express contract exists

concerning the same subject matter. *Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So. 2d 696, 697 (Fla. 1st DCA 2008). *See also See also Atlantis Estate Acquisitions, Inc. v. DePierro*, 4D-11-295, 2013 WL 1748642 (April 24, 2013).

Based upon the foregoing, it is hereby ORDERED and ADJUDGED that the Final Summary Judgment entered by the County Court on January 7, 2011, in favor of the appellee, Portfolio Recovery Associates, LLP, be and hereby is REVERSED and this matter is REMANDED to the County Court for further proceedings consistent with this Order.

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished via U.S. mail to:

Heather A. Harwell, Esq.
3230 Land O'Lakes Boulevard
Suite 10620
Land O' Lakes, Florida 34639;

- and -

Dana M. Stern, Esq.
HAYT, HAYT & LANDAU, P.L.
7765 S.W. 87th Avenue
Miami, Florida 33173-2535

on this 25th day of October , 2013.

/S/_____

Judicial Assistant