

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ROBERT J. BOYE and CARMEN B.)
FORGIONE,)
)
Appellants,)
)
v.)
)
CITIMORTGAGE, INC., n/k/a)
NATIONSTAR MORTGAGE, LLC,)
)
Appellee.)
_____)

Case No. 2D11-2604

Opinion filed May 23, 2012.

Appeal from the Circuit Court for Lee
County; James R. Thompson, Judge.

Robert J. Hynds of The Hagen Law
Firm, Fort Myers, for Appellant.

Ryan J. Weeks of Albertelli Law,
Tampa, for Appellee.

KELLY, Judge.

The appellants, Robert J. Boye and Carmen B. Forgione, challenge the
final summary judgment of foreclosure entered in favor of Citimortgage, Inc., n/k/a
Nationstar Mortgage, LLC. Because genuine issues of material fact remain regarding

appellants' affirmative defense of lack of notice, we reverse and remand for further proceedings.

On March 4, 2009, Citimortgage filed a complaint against appellants seeking foreclosure, alleging that appellants had not made any payments on their mortgage since September 1, 2008. Appellants filed an answer and affirmative defenses asserting, in part, that Citimortgage had not provided them with proper notice of the default prior to accelerating the debt as required under the mortgage. Appellants also sought discovery from Citimortgage requesting numerous documents relating to the loan including any items showing a declaration of default. Thereafter, Citimortgage filed a motion for summary judgment. While the motion for summary judgment was pending, appellants filed a motion to compel discovery based on Citimortgage's failure to produce the items requested, specifically the letter of default. The trial court granted appellants' motion to compel. When Citimortgage failed to produce the letter, appellants filed a motion for sanctions as well as a motion for continuance of the trial. After a hearing, the trial court denied both of appellants' motions and entered a final judgment of foreclosure.

"A movant is entitled to summary judgment 'if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file 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.' " Estate of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Care Ctr., 928 So. 2d 1272, 1274 (Fla. 2d DCA 2006) (quoting Fla. R. Civ. P. 1.510(c)). The party moving for summary judgment has the burden to prove the absence of a genuine issue of material

fact. "Where a defendant pleads affirmative defenses, the plaintiff moving for summary judgment must either factually refute the affirmative defenses by affidavit or establish their legal insufficiency." Bryson v. Branch Banking and Trust Co., 75 So. 3d 783, 785 (Fla. 2d DCA 2011). This court must view "every possible inference in favor of the party against whom summary judgment has been entered." Estate of Githens ex rel. Seaman, 928 So. 2d at 1274 (quoting Maynard v. Household Fin. Corp. III, 861 So. 2d 1204, 1206 (Fla. 2d DCA 2003)). If the record 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).

Here, the record reflects genuine issues of material fact regarding whether appellants had been provided with the notice of default. At the summary judgment hearing, counsel for Citimortgage acknowledged that it did not have a copy of the notice and although Citimortgage introduced testimony that its records indicated the notice was sent, there was no evidence to establish that the notice was mailed to the proper address. See Star Lakes Estates Ass'n, Inc. v. Auerbach, 656 So. 2d 271 (Fla. 3d DCA 1995) (reversing summary judgment of foreclosure and stating that although proof of mailing normally raises a rebuttable presumption that mail was received, such presumption only arises when there is proof that mail is being sent to the correct address). Because Citimortgage failed to prove that it provided appellants with the requisite notice of default as required by the mortgage, it did not meet its burden of proof on summary judgment and is not entitled to judgment as a matter of law. See Konsulian v. Busey Bank, N.A., 61 So. 3d 1283 (Fla. 2d DCA 2011); Frost v. Regions

Bank, 15 So. 3d 905, 906-07 (Fla. 4th DCA 2009). Therefore, we reverse the final judgment of foreclosure and remand for further proceedings.

Reversed and remanded.

WHATLEY and MORRIS, JJ., Concur.