

Copies and the Affidavit Trap

- this document is not a substitute for the advice of an attorney –

It came in the mail one month before trial. Notice that the plaintiffs were submitting it as a “Business Record Affidavit” along with the notice of hearing. This was their first play against my response of allegations of fraud and deceit. Surprised and confused, I was not sure what it really meant. But I knew it was time for a change in plans.

I was told that that was all they needed to foreclose. That all my other allegations and proof of fraud were now meaningless. That affidavit backed computer printout of a payment history was all they needed. I had been told how Texas was big on affidavits, but this just blew me away. And no matter how hard I looked, I just couldn't see it. I could not understand just how any one else would either. All I saw in that document was just another fraud.

Nevertheless, these were well-respected members of high-end skyscraper firms with litigation experience. Their words sunk in deep... I had to prepare for the battle.

The big secret here is that the person preparing the document and signing the affidavit has to be at the hearing for cross-examination purposes. I have questions that need to be answered and if they are not there to answer the questions in front of the judge, then the affidavit is meaningless and the document is just hearsay and therefore not admissible as evidence. If they do show up, then just tear 'em up!

For an affidavit-backed document to be effective, the contents and statements within it must be accurate and legitimate. When they make this stuff up from scratch as they did with me, it shows, and more so in some than in others. No problem, the task now is to pick it apart in front of the judge so that he can see it for what it is.

This is a trick that a lot of foreclosure mills use. They try very hard to make these things look official. And if you don't bring it to the attention of the court and call them on it, then they will get away with it.

Be prepared for the worst. Make your record. Prepare for the appeal.

Promissory notes.

A copy of the note must be attached to an affidavit showing that (1) the attachment is a true copy of the original, (2) the plaintiff is the present owner and holder of the note, and (3) if the cause of action seeks collection of the note, the defendant did not make the payment or payments [*Zarges v. Bevan*, 652 S.W.2d 368, 369 (Tex. 1983) ; *Texas Nat. Corp. v. United Systems International Inc.*, 493 S.W.2d 738, 741 (Tex. 1973) ; *Blankenship v. Robins*, 899 S.W.2d 236, 238 (Tex. App.--Houston [14th Dist.] 1994, no writ) --noting that defendant failed to deny genuineness of signature on note, thus admitting its execution].

Rule 166a(e), Texas Rules of Civil Procedure, states that copies of papers referred to in summary judgment affidavits must be sworn or certified. The supreme court has held that copies of documents which are attached to a properly prepared affidavit are sworn copies within the meaning of Rule 166a(e). *Republic Nat. Leasing Corp. v. Schindler*, 717 S.W.2d 606, 607 (Tex. 1986); *Zarges v. Bevan*, 652 S.W.2d 368, 369 (Tex.1983); *Life Insurance Company of Virginia v. Gar-Dal, Inc.*, 570 S.W.2d 378, 380 (Tex.1978).

136. *Id.* at 191-92. Proof of ownership may be established by offering either the original of the note showing a proper sequence of indorsements or by offering a sworn copy of a note together with an affidavit of ownership. *Zarges v. Bevan*, 652 S.W.2d 368, 369 (Tex. 1983). The plaintiffs in *Hou-Tex* did neither.

In *Zarges v. Bevan*,³³² the supreme court stated that, absent controverting summary judgment proof, an affidavit attached to a motion for summary judgment that incorporated by reference a certified copy of a note attached to plaintiff's first amended petition, was enough to prove the movants were owners and holders of the note.³³³ *Zarges* illustrates again the importance of specifically calling to the court's attention, by appropriate response, defects in the movant's motion.³³⁴

We conclude that production of the note has not been established. We recognize that if an original note is attached to a proper identifying affidavit, the affidavit need not state that plaintiff is the owner and holder because these facts are then presumed. *Texas National Corp. v. United Systems International, Inc.*, 493 S.W.2d 738, 741 (Tex. 1973). In *Texas National*, the supreme court recommended that the original note be attached to the motion for summary judgment or to an affidavit, but this recommendation was made in the context of concern for the required proof that the plaintiff is the owner and holder. The court did not suggest that an original document may be considered in support of a motion for summary judgment without competent summary-judgment evidence identifying it. The court referred to its previous opinion in *Youngstown Sheet & Tube Co. v. Penn*,³⁶³ S.W.2d 230, 234 (Tex. 1963), in which an original document was attached to a pleading and an affidavit stated that the document was executed by the parties and was incorporated by reference. This affidavit was held to be sufficient in the absence of an exception in the trial court. The opinion apparently assumes that in the absence of such an affidavit, the document would not have supported the summary judgment.

The Texas Supreme Court was faced with a similar situation in *Texas National Corp. v. United Systems International, Inc.*, 493 S.W.2d 738 (Tex. 1973), though the issue arose in the context of a motion for summary judgment. The court explained, "If a sworn or certified copy, rather than the original of the note, is used, the [sworn] motion or affidavit should clearly evidence that the plaintiff is the present owner and holder and in possession of the note." *Id.* at 741; see also *Life Ins. Co. v. Gar-Dal, Inc.*, 570 S.W.2d 378, 381 (Tex. 1978).

tear it up!

your honor...

... the documents that the plaintiffs have introduced to this court are lacking key elements that would prove their authenticity anyway.

such as their submitted representations of the deed of trust, and the promissory note, obviously reduced down from their original 14 inch size along with redacted loan numbers.

the only document that they have entered into evidence with a sworn affidavit, known as "Business Record Affidavit" stating that the attached records "are the original or an exact copy of the original" is really nothing more than a manipulated computer printout of data from two separate business entities alleging a payment history.

if this were original, or even a copy of original, there would be two separate documents, one from each entity, and a document or two explaining their relationship toward one another.

proper identification of the parties involved would be a priority issue and things like ambiguity in an entities name would be eliminated by not using an acronym instead of a full and proper company name, the loan number would not be redacted, the social security number would not be redacted and the invoice number would not be redacted.

the plaintiffs have created a new loan number, and use it when referring to the alleged debt obligation.

their purpose for redacting the numbers on their submitted documents is to confuse and hide the facts concerning this alleged debt obligation.

except for my name appearing in the middle of this stuff, there is absolutely no way to verify any of it!

more important is the sworn affidavit that accompanies the business record, paragraph 4.

"These records are kept by American Home Mortgage Servicing Inc. in the regular course of business, and it was the regular course of business of American Home Mortgage Servicing Inc. for an employee or representative of American Home Mortgage Servicing Inc., with knowledge of the act, event, condition, opinion, or diagnosis that was recorded, to make this record or to transmit the information to be included in this record. The record was made at or near the time or reasonably after the act, event, condition, opinion, or diagnosis that was recorded. The records attached to this affidavit are the original or exact duplicates of the original."

the time period referred to is important to note as the data in these records have dates that go back a full two years before American Home Mortgage Servicing Inc. existed.

According to American Home Mortgage Servicing Inc. internet web site (www.ahmsi3.com/), American Home Mortgage Servicing Inc. was Established in April 2008.

this business record affidavit is a "make it up as we go" creation of american home mortgage servicing inc., and american home mortgage servicing inc. does not have owner, holder or holder in due course rights.

they have created a new loan number in an attempt to confuse and hide facts concerning the alleged debt obligation.

they have not brought the originals as required by law and regulations.

they have ignored my repeated requests to view the original note.

texas civil rules of procedure

RULE 45 DEFINITION AND SYSTEM-----

When a copy of the signed original is tendered for filing, the party or his attorney filing such copy is required to maintain the signed original for inspection by the court or any party incident to the suit, should a question be raised as to its authenticity.

and i think i'm raising a question here as to the authenticity of everything they've got.

texas civil rules of procedure

RULE 45 DEFINITION AND SYSTEM-----

All pleadings shall be construed so as to do substantial justice.

where's the justice in this?

texas civil rules of procedure

RULE 76. MAY INSPECT PAPERS-----

Each attorney at law practicing in any court shall be allowed at all reasonable times to inspect the papers and records relating to any suit or other matter in which he may be interested.

how more reasonable a time than right now?

The Texas Business and Commerce Code Sec. 3.501 (b) (2) (A) and (B) "Presentment" requires exhibition of the instrument for the purpose of enforcement ... or produce the note. ...

Business Affidavits

Admissible or Inadmissible

Texas Rules of Evidence

Article VIII: Hearsay

Computer data as hearsay: Rule 801 2 - "Computer data that is compilation of information entered by a person is hearsay."¹

Impeachment: Rule 801 4 (3)

Vicarious admissions : Rule 801 (e) (2) (D) A statement made by an agent or employee is admissible against a party if (1) the statement is made by the party's agent or employee, (2) the statement concerns a matter within the scope of the agency ore employment, and (3) the statement is made during the existence of the relationship.²

Hearsay Exceptions; Availability of Declaratory Immaterial: Rule 803 (6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnose, made at or near the time by, or form information transmitted by, a person with knowledge, if kept in the course of a regularly conduced business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902 (10), unless the source information or the method or circumstances of preparation indicate lack of trustworthiness.

Hearsay Exceptions; Availability of Declaratory Immaterial: Rule 803 (15) Statements Affecting an Interest in Property. A statement contained in a document purporting to establish or affect an interest in property if the matter

¹ Murray, 804 S.W2d at 284 (computer printout is often simply "the feeding back of data placed into a computer by a person; although the data may be in a different form than it was when it was fed into the computer, it retains its status as the statement or statements made by a person" and thus fits the definition of hearsay).

² Big Mack Trucking Co. v. Dickerson, 497 S.W2d 283, 287-88 (Tex. 1973)

stated was relevant to the purpose of the document, unless dealing with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

Rule 803

Unreflective Statements

Rule 803 (1)

Present sense impression. A hearsay statement is admissible under the present-sense-impression exception if the statement (1) describes or explains an event or condition and (2) was made while the declarant was perceiving the event or condition or immediately thereafter.³

(1)Statement describes or explains event. The exception encompasses only statements that describe or explain an event or condition.

- A. Statement made while declarant was perceiving event or condition or “immediately thereafter”. Obviously, what constitutes “immediately” requires judicial discretion, but Texas courts have both admitted and excluded declarations made 30 minutes after the event.⁴*

Reliable Documents

Rule 803 (5): Recorded recollection

Rule 803 (5) created a hearsay exception for memoranda and records that contain a witness’s recollection about a matter at issue. There are four prerequisites to admissibility under this exception: (1) the witness must once have had personal knowledge but now does not recall the matter well enough to testify fully and accurately, (2) the statement contained in the recorded recollection must have been either made or adopted by the witness, (3) the recorded recollection must accurately reflect the witness’s prior knowledge,

³ Implicit in the requirement that the statement be made while the declarant was perceiving the event or condition or immediately there after is that the declarant have personal knowledge of the facts contained in the statement.

⁵ Jack B Weinstein & Margret A. Berger, Weinstein’s Federal Evidence §803.03[2], at 803-15 (Joseph M. McLaughlin ed., 2d ed. 2009).

⁴ Harris v. State, 736 S.W.2d 166,167 (Tex. App. – Houston {14th Dist.} 1987, no pet.),Moore v Drummet, 478 S.W.2d 177, 182 (Tex. Civ. App. – Houston [14 the District] 1972, no writ)

and (4) the recollection must have been recorded when the event was fresh in the witness's memory.⁵

Rule 803 (6): Records of regularly business conducted activity.

Rule 803 (6) creates an exception to the hearsay rule for records of "acts, events, conditions, opinions, or diagnoses" if those records were made at or near the time of events described and were made by a person with knowledge of the events (or from information transmitted by a person with such knowledge).

A business record may nonetheless be ruled inadmissible if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."⁶

Rule 803 (6) (4) Record made by a person with knowledge of the event or from information transmitted by a person with knowledge. The source of information must be someone with personal knowledge of the events contained within the record.⁷ The party opposing the admission of the business records has the burden to show lack of trustworthiness.

Rule 803 (6) (9) Reasons to exclude business records. Even if the components of Rule 803 (6)'s evidentiary foundation have been established, business records (or certain statements within those records) may still be excluded for the following reasons.

Rule 803 (6) (9) (a) lack of trustworthiness. Rule 803 (6) states that a business record may be ruled inadmissible if "the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."⁸

⁵ Tex. R. Evid. 803 (5); Johnson v. State, 967 S.W.2d 410, 416 (Tex. Crim. App. 1998)

⁶ Crane v. State, 786 S.W.2d 338, 353-54 (Tex. Crim App. 1990); Philpot v. State, 897 S.W.2d 848,852 (Tex App. Dallas 1995, pet. Ref'd); Porter v. State, 578 S.W.2d 742, 746 (Tex. Crim. App. 1979)

⁷ Venable v. State, 113 S.W.3d 797, 800-01 (Tex. App. – Beaumont 2003, pet. Ref')

⁸ Crane v. State, 786 S.W.2d 338, 353-54 (Tex. Crim App. 1990); Philpot v. State, 897 S.W.2d 848,852 (Tex App. Dallas 1995, pet. Ref'd); Porter v. State, 578 S.W.2d 742, 746 (Tex. Crim. App. 1979)

Lack of trustworthiness is most frequently found when the record was prepared in anticipation of litigation.

Rule 803 (10): Absence of public record or entry. As with Rule 803 (7), dealing with the absence of business records, Rule 803 (10) permits the absence of a public record to be evidence of the nonoccurrence of an event of a fact that would have been found in the particular public record had it occurred or existed.

Article IX: Authentication & Identification

Rule 901 (b) (1)

However, a bare assertion that a particular document is a specifically described item is insufficient authentication.⁹

Rule 902 (10) Business records accompanied by affidavit

The prerequisites to authentication by affidavit under Rule 902 (10) include (1) the records and the affidavit must be filed with the court clerk at least 14 days before trial, (2) notice of such filing must be given to all parties, (3) the records must be made available for inspection and copying, and (4) the affidavit must conform to the Rules 803 (6) and 803 (7).

⁹ Mega Child Care, 29 S.W.3d at 308 (witness's testimony that an exhibit was a copy of administrative judge's order opinion and order was insufficient authentication when "she was not the author of the opinion and order; neither did she purport to have any personal knowledge of the opinion and order by which she could confidently authenticate a copy").

Rule 166a(e), Texas Rules of Civil Procedure, states that copies of papers referred to in summary judgment affidavits must be sworn or certified. The supreme court has held that copies of documents which are attached to a properly prepared affidavit are sworn copies within the meaning of Rule 166a(e). *Republic Nat. Leasing Corp. v. Schindler*, 717 S.W.2d 606, 607 (Tex. 1986); *Zarges v. Bevan*, 652 S.W.2d 368, 369 (Tex.1983); *Life Insurance Company of Virginia v. Gar-Dal, Inc.*, 570 S.W.2d 378, 380 (Tex.1978).

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In *Zarges v. Bevan*,³³² the supreme court stated that, absent controverting summary judgment proof, an affidavit attached to a motion for summary judgment that incorporated by reference a certified copy of a note attached to plaintiff's first amended petition, was enough to prove the movants were owners and holders of the note.³³³ *Zarges* illustrates again the importance of specifically calling to the court's attention, by appropriate response, defects in the movant's motion.³³⁴

We conclude that production of the note has not been established. We recognize that if an original note is attached to a proper identifying affidavit, the affidavit need not state that plaintiff is the owner and holder because these facts are then presumed. *Texas National Corp. v. United Systems International, Inc.*, 493 S.W.2d 738, 741 (Tex. 1973). In *Texas National*, the supreme court recommended that the original note be attached to the motion for summary judgment or to an affidavit, but this recommendation was made in the context of concern for the required proof that the plaintiff is the owner and holder. The court did not suggest that an original document may be considered in support of a motion for summary judgment without competent summary-judgment evidence identifying it. The court referred to its previous opinion in *Youngstown Sheet & Tube Co. v. Penn*,³⁶³ S.W.2d 230, 234 (Tex. 1963), in which an original document was attached to a pleading and an affidavit stated that the document was executed by the parties and was incorporated by reference. This affidavit was held to be sufficient in the absence of an exception in the trial court. The opinion apparently assumes that in the absence of such an affidavit, the document would not have supported the summary judgment.

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*368 652 S.W.2d 368

Supreme Court of Texas.

Sidney T. ZARGES, et ux., Petitioners,

v.

Norman H. BEVAN, Respondent.

No. C-1967.

June 15, 1983.

Holders sued maker on a promissory note. The 171st District Court, El Paso County, Edwin F. Berliner, J., rendered summary judgment for the holders. The El Paso Court of Appeals, Eighth Supreme Judicial District, Osborn, J., 645 S.W.2d 589, reversed, and holders appealed. The Supreme Court held that a photocopy of the note attached to the affidavit of the holder, who swore it was a true and correct copy, was proper summary judgment evidence and was sufficient to prove the status of owners and holders of the note absent controverting summary judgment proof.

Judgment of Court of Appeals reversed and judgment of trial court affirmed.

West Headnotes

Judgment ☞ 185(4)

228 ----

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185 Evidence in General

228k185(4) Documentary Evidence or Official Record.

[See headnote text below]

Judgment ☞ 185.3(16)

228 ----

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular

Cases

228k185.3(16) Negotiable Instruments.

Photocopy of note attached to affidavit of holder, who swore it was true and correct copy, was proper summary judgment evidence and was sufficient as matter of law to prove status of owners and holders of note absent controverting summary judgment proof.

Scott, Hulse, Marshall, Feuille, Finger & Thurmond, L. Randall Lee, El Paso, for petitioners.

Benjamin F. Youngblood, III, Tuck R. Chapin, San Antonio, for respondent.

OPINION ON REHEARING

PER CURIAM.

The per curiam opinion of this court handed down on April 27, 1983 is withdrawn, and the following is substituted there for.

This is a suit for collection of a real estate lien note executed by defendant, Norman H. Bevan, as the general partner of Investors *369. Properties, Ltd. The trial court granted the Zargeses a summary judgment for the \$34,000 due on the note. The court of appeals reversed and remanded, holding that the summary judgment proof in the case did not establish as a matter of law that the Zargeses were the owners and holders of the note. 645 S.W.2d 589. We reverse the judgment of the court of appeals and affirm the trial court's judgment.

Dr. and Mrs. Zarges were limited partners in Investment Properties, Ltd. In July 1975, they loaned the partnership \$34,000, and a real estate lien note was signed by Bevan, as general partner. No payments were made on the note, so in March 1978, the Zargeses filed suit to collect on the note. A "certified true and correct copy" of the note was attached to their petition. In July 1978, Mr. Zarges' deposition was taken in which he stated he did not know where the original of the note was. Subsequently, the Zargeses stated in affidavits attached to their motion for summary judgment that they were the lawful owners and holders of the note, and that a certified true and correct copy of the note was attached to Plaintiff's First Amended Original Petition which was incorporated into their affidavits. In his response to Plaintiff's Motion for Summary Judgment, Bevan asserted there were two fact issues that needed to be litigated, but did not controvert the Zargeses' assertions that they were the owners of the note nor did he object to the sufficiency of their affidavits.

The court of appeals reversed and remanded the trial court's granting of the summary judgment. The court of appeals held that since Mr. Zarges testified in his deposition that he did not know where the original of the note was, he failed to establish as a matter of law that he was the holder and owner of the note.

In *Life Insurance Company of Virginia v. Gar-Dal, Inc.*, 570 S.W.2d 378, 380 (Tex.1978), we held that a photocopy of a note attached to the affidavit of plaintiff who swore it was a true and correct copy was proper summary judgment evidence. In this case the Zargeses' summary judgment proof was sufficient as a matter of law to prove their status as owners and holders of the note absent controverting summary judgment proof to the contrary. See *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 679 (Tex.1979). Their affidavits established that they were the sole owners

and holders of the note, and a certified true and correct copy was attached.

Therefore, the decision of the court of appeals conflicts with *Life Insurance Company of Virginia v. Gar-Dal, supra*. We grant petitioners' application for writ of error and, without hearing oral argument, reverse the judgment of the court of appeals and affirm the judgment of the trial court. Tex.R.Civ.P. 483.

Bevan's motion for rehearing is overruled.

NUMBER 13-03-00013-CV
COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI BEDINBURG

ALFREDO MIGUEL COUTURIER,
JORGE MIGUEL COUTURIER, AND
JORGE MIGUEL BOJALIL,
Appellants,

v.

TEXAS STATE BANK,
Appellee.

**On appeal from the 93rd District Court of Hidalgo
County, Texas.**

MEMORANDUM OPINION

Before Justices Hinojosa, Yañez, and Castillo

Memorandum Opinion by Justice Hinojosa

Appellee, Texas State Bank (ATSB@), brought suit against appellants, Alfredo Miguel Couturier, Jorge Miguel Couturier, and Jorge Miguel Bojalil, to collect on three promissory notes and corresponding guaranties. The parties settled one note and corresponding guaranty, and TSB filed a motion for summary judgment for the two remaining notes and corresponding guaranties. The trial court granted the motion, and this appeal ensued. In three issues, appellants contend the trial court erred in granting TSB=s motion for summary judgment and in denying their motion for continuance of the summary judgment hearing. We affirm.

Because the issues of law presented by this case are well settled and the parties are familiar with the facts, we will not recite the law and facts in this opinion except as necessary to advise the parties of the Court=s decision and the basic reasons for it. *See* TEX. R. APP. P. 47.4.

A. SUFFICIENCY OF THE EVIDENCE

In their first issue, appellants contend there is insufficient evidence to support the trial court=s order granting TSB=s traditional motion for summary judgment. Specifically, appellants assert that TSB failed to (1) establish that it is the holder and owner of the notes, and (2) provide the court with a copy of the notes in an appropriate form.

The standard of review for a traditional motion for summary judgment is well settled. *See Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997); *Nixon*

v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548-49 (Tex. 1985); *Alejandro v. Bell*, 84 S.W.3d 383, 390 (Tex. App.BCorpus Christi 2002, no pet.).

To collect on a promissory note, the holder or payee need only establish that (1) there is a note, (2) it is the legal owner and holder of the note, (3) the defendant is the maker of the note, and (4) a certain balance is due and owing on the note. *See Blankenship v. Robins*, 899 S.W.2d 236, 238 (Tex. App.BHouston [14th Dist.] 1994, no writ); *Resolution Trust Corp. v. Thurlow*, 820 S.W.2d 51, 52 (Tex. App.BSan Antonio 1991, no writ). Thus, TSB was required to prove by summary judgment evidence that it is the present legal owner and holder of the note sued upon. *See Blankenship*, 899 S.W.2d at 238; *Schindler v. AG Aero Distrib., Inc.*, 502 S.W.2d 581, 585 (Tex. Civ. App.BCorpus Christi 1973, no writ).

In support of its motion for summary judgment, TSB attached the following summary judgment evidence: (1) a business-records affidavit from TSB Executive Vice-President Robert Norman; (2) copies of the promissory notes at issue; and (3) copies of their corresponding guaranties. In the affidavit, Norman states that the notes and guaranties evidenced by the copies attached are now held by [TSB].@

The promissory notes show that appellants signed one note with First State Bank & Trust (AFSB@) and the second note with Border Bank (ABB@). In the affidavit, Norman states that through merger, TSB succeeded to all rights, title, and interest of both FSB and BB. Appellants argue that TSB was required to present proof that FSB and BB transferred the notes to TSB. However, when a merger takes effect, all rights, title, and

interest to all property vests in the surviving entity A without further act or deed, and without any transfer or assignment having occurred.@ TEX. BUS. CORP. ACT ANN. art. 5.06 ' A(2) (Vernon Supp. 2004-05). Appellants do not challenge the statements in Norman=s affidavit regarding the merger, nor do they present any controverting evidence. We conclude that the summary judgment evidence is sufficient to show that title vested in TSB and no additional evidence is necessary.

Furthermore, the summary judgment evidence is sufficient to establish that TSB is the legal owner and holder of the notes. *See Tex. Nat=l Corp. v. United Sys. Int=l, Inc.*, 493 S.W.2d 738, 741 (Tex. 1973); TEX. R. CIV. P. 166a(f); *see also Williams v. Bank One, N.A.*, 15 S.W.3d 110, 112 (Tex. App.BWaco 1999, no pet.) (noting that Bank One sufficiently proved up note by attaching business-records affidavit with copy of note appended); *Batis v. Taylor Made Fats, Inc.*, 626 S.W.2d 605, 607 (Tex. App.BFort Worth 1981, writ ref=d n.r.e.) (finding affidavit of custodian of business records sufficient summary judgment evidence).

Accordingly, we conclude that the summary judgment evidence presented by TSB is sufficient as a matter of law to establish TSB=s right to collect on the promissory notes. Appellants= first issue is overruled.

B. AFFIRMATIVE DEFENSE

In their second issue, appellants complain that the trial court erred in granting TSB=s motion for summary judgment because their affirmative defense of limitations

was properly before the court and sufficient to create a fact issue. Appellants assert they raised their limitations defense in their First Amended Answer, which was offered for filing on October 10, 2002, the date of the summary judgment hearing.

A summary judgment proceeding is a trial within the meaning of rule 63 of the Texas Rules of Civil Procedure. See TEX. R. CIV. P. 63; *Goswami v. Metro. Sav. & Loan Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988). Limitations is an affirmative defense that must be specifically pleaded, or it is waived. TEX. R. CIV. P. 94; *Land Title Co. v. F. M. Stigler, Inc.*, 609 S.W.2d 754, 756 (Tex. 1980); *Wun-Yi Tsai v. Wells*, 725 S.W.2d 271, 275 (Tex. App. Corpus Christi 1986, no writ).

TSB argues that appellants' limitations defense was not properly before the court because appellants did not seek leave to file their amended answer within seven days of the hearing, and the trial court did not consider it. See TEX. R. CIV. P. 63; *Domizio v. Progressive County Mut. Ins. Co.*, 54 S.W.3d 867, 876 (Tex. App. Austin 2001, pet. denied) (determining that where trial court did not consider amended pleading and leave to file was not requested, amended pleading was not timely filed and appellate court would not conclude that leave should have been granted); *Guereque v. Thompson*, 953 S.W.2d 458, 463-64 (Tex. App. El Paso 1997, pet. denied) (same); cf. *Goswami*, 751 S.W.2d at 490 (holding that where record is silent of any basis to conclude that the amended petition was not considered by the trial court . . . leave of court is presumed. @).

Assuming, without deciding, that appellants' affirmative defense was properly before the trial court, we conclude that it is nevertheless insufficient to defeat TSB's

motion for summary judgment. Where, as here, a movant has presented evidence sufficient to establish his right to summary judgment as a matter of law, a non-movant must present enough evidence to create an issue of fact in regard to his affirmative defense in order to defeat that summary judgment. *Nichols v. Smith*, 507 S.W.2d 518, 520 (Tex. 1974); *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 728 (Tex. App.BCorpus Christi 1994, writ denied).

Appellants= amended answer stated, A[e]ven if the Plaintiff proves the allegations in its petition, the Defendants are not liable to the Plaintiff because . . . Plaintiff=s claims are barred by the Statute of Limitations.@ Appellants did not allege any facts in support of their defense, nor did they present any evidence or affidavits. A[T]he pleading of an affirmative defense will not, in itself, defeat a motion for summary judgment by a plaintiff whose proof conclusively establishes his right to an instructed verdict if no proof were offered by his adversary in a conventional trial on the merits.@ *Nichols*, 507 S.W.2d at 520. A pleading does not constitute summary judgment proof. *Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979) (citing *Hidalgo v. Sur. Sav. & Loan Ass'n.*, 462 S.W.2d 540 (Tex. 1971)).

Because appellants did no more than allege the affirmative defense of limitations in their answer, we conclude that appellants did not raise a fact issue to defeat TSB=s motion for summary judgment. Appellants= second issue is overruled.

C. MOTION FOR CONTINUANCE

In their third issue, appellants contend the trial court erred in denying their motion for continuance. A trial court may grant a continuance of a summary judgment hearing to allow the party opposing the motion more time to conduct discovery when it appears from the affidavits that the party cannot for reasons stated present by affidavit facts essential to justify his opposition. TEX. R. CIV. P. 166a(g); *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 685 (Tex. 2002). The decision to grant or deny a motion for continuance rests within the sound discretion of the trial court, and we will not disturb that decision on appeal unless the record discloses a clear abuse of discretion. *State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863, 865 (Tex. 1988) (citing *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986)); *Clemons v. Citizens Med. Ctr.*, 54 S.W.3d 463, 468-69 (Tex. App. BCorpus Christi 2001, no pet.).

To request a continuance, a party must file either a verified motion or an affidavit explaining the need for further discovery. *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996). No motion for continuance shall be granted except for sufficient cause supported by affidavit, or by consent of the parties, or by operation of law. TEX. R. CIV. P. 251; *Rosedale Partners, Ltd. v. Resolution Trust Corp.*, 882 S.W.2d 622, 630 (Tex. App. BCorpus Christi 1994, writ denied). Generally, a court is presumed to have correctly exercised its discretion when it denies a motion that does not comply with the rules governing continuances. *Rosedale Partners*, 882 S.W.2d at 630.

In this case, the parties did not consent to a continuance nor was there any basis under operation of law. Appellants filed a motion for continuance on October 1, 2002,

asserting that they had not had an opportunity to engage adequate discovery to determine the facts surrounding [TSB=s] claims and to evaluate the merit of those claims and assert proper defenses.@ Appellant=s counsel signed a verification which stated: The facts set out in the foregoing Motion for Continuance are true and correct to the best of my information and belief.@

An affidavit which does not positively and unqualifiedly represent the facts as disclosed in the affidavit to be true and within the affiant's personal knowledge is legally insufficient.@ *Humphreys v. Caldwell*, 888 S.W.2d 469, 470 (Tex. 1994) (citing *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984)); see also *N. P. Davis & Co. v. Campbell & Clough*, 35 Tex. 779, 781 (1872) (affidavits must be made to actual knowledge of the facts, not to the best of the knowledge and belief@ of the affiant); *Caperton v. Wanslow*, 18 Tex. 125, 133 (1856) (finding affidavit based on information and belief of the party@ manifestly insufficient).

We conclude that the verification based upon appellants= counsel=s information and belief@ is insufficient to support the motion for continuance. See *Hawthorne v. Guenther*, 917 S.W.2d 924, 929-30 (Tex. App. Beaumont 1996, writ denied) (finding verification based upon "knowledge and belief" rather than upon personal knowledge insufficient to support motion for continuance); *Bray v. Miller*, 397 S.W.2d 103, 106 (Tex. Civ. App. Dallas 1965, no writ) (finding statement made on information and belief does not constitute affidavit that will support motion for continuance).

Because appellants' motion for continuance does not comply with the requirements established for seeking a continuance, *see* TEX. R. CIV. P. 166a(g) and *Tenneco*, 925 S.W.2d at 647, we conclude the trial court did not abuse its discretion in denying the motion. Appellants' third issue is overruled.

The trial court's order granting appellee's motion for summary judgment is affirmed.

FEDERICO G. HINOJOSA

Justice

Memorandum Opinion delivered and filed this
the 18th day of August, 2005.

On appeal, appellants assert the trial court had before it all the facts necessary to support their defense of limitations because the court took judicial notice of the court file, including the docket sheet. However, A[a] docket entry forms no part of the record which may be considered; it is a memorandum made for the trial court and clerk's convenience. @ *Aguirre v. Phillips Props.*, 111 S.W.3d 328, 333 (Tex. App.BCorpus Christi 2003, pet. denied). While docket entries may be used to supply facts in certain situations to correct clerical errors in judgments or orders, they remain inherently unreliable because they lack the formality of orders and judgments. @ *Energol Int'l Corp. v. Modern Indus. Heating, Inc.*, 722 S.W.2d 149, 151 n.2 (Tex. App.BDallas 1986, no writ) (discussing *N-S-W Corp. v. Snell*, 561 S.W.2d 798, 799 (Tex. 1977)); *see generally* *Guyot v. Guyot*, 3 S.W.3d 243, 246-48 (Tex. App.BFort Worth 1999, no pet.); *cf.* *Ross v. Arkwright Mut. Ins. Co.*, 892 S.W.2d 119, 129 (Tex. App.BDallas 1994, no writ) (holding that properly authenticated docket sheets served with affidavits were proper summary judgment proof where affidavits relied in part on the docket sheets to show that no extraordinary writs or other process had been issued, and the affidavits also contained statements based on affiant's involvement in and personal knowledge of the suit).

IN THE COURT OF APPEALS, THIRD DISTRICT OF TEXAS,

AT AUSTIN

NO. 3-92-022-CV

DONALD R. TEEGAN, MARION BARICH AND FRANK BARICH,

APPELLANTS

vs.

GARY G. WRIGHT,

APPELLEE

FROM THE DISTRICT COURT OF BURNET COUNTY, 33RD JUDICIAL
DISTRICT

NO. 12,038, HONORABLE JAMES R. MEYERS, JUDGE PRESIDING

This cause arose from a suit for deficiency on a note. Gary G. Wright sued Frank Barich, Marion Barich, and Donald R. Teegan, partners in BB&T of Texas ("BB&T"), for a deficiency allegedly owing after foreclosure of a deed of trust which secured a promissory note executed by Donald R. Teegan, a partner in BB&T. The cause was tried to the court, which rendered judgment for Wright in an amount of approximately \$425,000. The Bariches and Teegan appeal. We will reverse the judgment of the trial court and render judgment that Wright take nothing.

BACKGROUND

BB&T of Texas, a general partnership composed of the Bariches and Teegan, bought 910.5 acres of land from Wright in August 1983. Teegan, on behalf of BB&T, signed a real estate lien note in an amount of \$763,925, payable to Wright, and secured the loan by executing a deed of trust. BB&T apparently defaulted on the note in May 1987. Wright foreclosed on the property pursuant to the deed of trust in June 1988, bidding on and

purchasing the land for \$500,000. The suit for the alleged deficiency on the note was tried in October 1991. The trial court entered its findings of fact and conclusions of law in December 1991. The Bariches and Teegan perfected their appeal and now advance ten points of error challenging the trial court's judgment.

DISCUSSION

In their first point of error, appellants argue that the trial court erred in finding that Wright was the holder of the note since there is no evidence to support that finding. In deciding a no-evidence point, we must consider only the evidence and inferences tending to support the finding of the trier of fact and disregard all evidence and inferences to the contrary. *Alm v. Aluminum Co. of Am.*, 717 S.W.2d 588, 593 (Tex. 1986), *cert. denied*, 111 S. Ct. 135 (1990); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965). *See generally* William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence"*, 69 Tex. L. Rev. 515 (1991).

An essential element of a cause of action on a promissory note is that the plaintiff be the owner or holder of the note at the time of the suit. *Jernigan v. Bank One, Tex., N.A.*, 803 S.W.2d 774, 775 (Tex. App.--Houston [14th Dist.] 1991, no writ). A general denial is sufficient to raise that issue and places the burden on the plaintiff to prove its status. *Schindler v. AG Aero Distribs., Inc.*, 502 S.W.2d 581, 585 (Tex. Civ. App.--Corpus Christi 1973, no writ). A holder is defined as "a person who is in possession of a document of title or an instrument or a certificated investment security drawn, issued, or indorsed to him or to his order or to bearer or in blank." Tex. Bus. & Com. Code Ann. ? 1.201(20) (West Supp. 1992).

Appellants in this case entered a general denial, thereby putting in issue Wright's allegations that he is the owner or holder of the note, that the note is due, and the amount due and owing on the note. *See Derbigny v. Bank One*, 809 S.W.2d 292, 294 (Tex. App.--Houston [14th Dist.] 1991, no writ). In an ordinary trial on the merits, a plaintiff can discharge its burden by producing and introducing the original note into evidence. *Alexander v. Houston Oil Field Material Co.*, 386 S.W.2d 540, 543 (Tex. Civ. App.--Tyler 1965, writ ref'd n.r.e.).

In this case, Wright introduced in evidence only a copy of the note and did not specifically testify that he was the current owner or holder of the note. Wright did, however, testify that the exhibit was a true and correct, albeit reduced, copy of the note, showing himself as the payee and BB&T as the payor. The copy of the note, introduced as Plaintiff's Exhibit No. 1, bears the date of August 18, 1983. The record reveals no other testimony specifically addressing Wright's current status as the owner or holder of the note.

Wright nevertheless claims that the following exchanges made during cross examination constitute sufficient evidence to support the trial court's finding that Wright was the owner and holder of the note:

Q Now, you testified, Dr. Wright, that the amount due on the note that you hold [sic] on June 7th 1988, was and I was trying to write fast, \$806,763.50?

A That's correct.

Q And you first applied the \$500,000.00 [realized on foreclosure sale] to the interest which was due on your note?

A Interest due on my note?

Despite counsel's shift in verb tense in the first question, we believe these exchanges, to the extent that they reflect Wright's ownership of the note, indicate only that Wright was the owner or holder at the time of the foreclosure sale, not that he retained ownership at the time he filed his deficiency suit over three years after the foreclosure sale. Moreover, counsel for Wright conceded at oral argument that there is no other record evidence showing that Wright is the current holder of the note.

In a suit on a note, the plaintiff must prove that he is the owner or holder of the note; otherwise, the defendant maker might be forced to pay the same note twice. *Perkins v. Crittenden*, 462 S.W.2d 565, 567 (Tex. 1970). Wright could have discharged his burden by introducing the actual note into evidence. *See Alexander*, 386 S.W.2d at 543. Wright failed to do so. Moreover, Wright did not testify that he was the owner or holder of the note at the time of trial.

The Texas Supreme Court was faced with a similar situation in *Texas National Corp. v. United Systems International, Inc.*, 493 S.W.2d 738 (Tex. 1973), though the issue arose in the context of a motion for summary judgment. The court explained, "If a sworn or certified copy, rather than the original of the note, is used, the [sworn] motion or affidavit should clearly evidence that the plaintiff is the present owner and holder and in possession of the note." *Id.* at 741; *see also Life Ins. Co. v. Gar-Dal, Inc.*, 570 S.W.2d 378, 381 (Tex. 1978).

We hold that where, as here, a plaintiff at trial produces only a copy of the original note, but fails to testify that he is the current holder of the note, there is no evidence to support the trial court's finding that the plaintiff is the owner or holder of the note sued upon. ⁽¹⁾ Where a plaintiff does not testify under oath that he is the holder of the note, the defendant is afforded no protection from the risk that the note has been negotiated to a third party.

Because we sustain appellants' first point of error, we need not reach the remaining points two through ten.

CONCLUSION

By failing to discharge his burden to show that he is the current owner or holder of the note sued upon, Wright failed to establish an essential element of his *prima facie* case. We therefore reverse the judgment of the trial court and render judgment that Wright take nothing.

Bea Ann Smith, Justice

[Before Justices Powers, Aboussie and B. A. Smith]

Reversed and Rendered

Filed: November 18, 1992

[Do Not Publish]

1. We perceive no conflict between our holding in this case and that in *Zarges v. Bevan*, 652 S.W.2d 368 (Tex. 1983), where the supreme court affirmed a trial-court order granting a motion for summary judgment in a suit on a note. The defendant claimed that, because the plaintiff had testified in his deposition that he did not know where the original of the note was, there was a fact issue as to ownership sufficient to preclude summary judgment. The supreme court disagreed, holding that plaintiff's affidavit swearing that he was the owner of the note and that the attached photocopy of the note was a true and correct copy was summary-judgment proof sufficient as a matter of law to prove his status absent controverting summary-judgment evidence.

Apart from any distinctions between a summary-judgment proceeding and a trial on the merits, in *Zarges*, the plaintiff swore by affidavit that he was the owner of the note sued upon. In this case, Wright made no such sworn affirmation.

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