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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

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Jennifer Taylor Hayes and Timothy Hayes

v.

Deutsche Bank National Trust Company, as trustee of
Ameriquest Mortgage Securities, Inc.,
Asset Backed Pass-Through Certificates, Series 2004-R5,
and Ocwen Loan Servicing, LLC

Appeal from Baldwin Circuit Court
(CV-17-901069)

MENDHEIM, Justice.

AFFIRMED. NO OPINION.

Bolin, Wise, Bryan, Sellers, and Mitchell, JJ., concur.

Parker, C.J., and Stewart, J., dissent.

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PARKER, Chief Justice (dissenting).

Jennifer Taylor Hayes and Timothy Hayes appeal from a summary judgment entered against them by the Baldwin Circuit Court on their counterclaim against Deutsche Bank National Trust Company, as trustee of Ameriquest Mortgage Securities, Inc., Asset Backed Pass-Through Certificates, Series 2004-R5, and Ocwen Loan Servicing, LLC (hereinafter referred to collectively as "the Bank"). Because the Hayeses provided substantial evidence that the Bank breached the terms of their mortgage by failing to credit payments made by the Hayeses, I would reverse the summary judgment.

In 2004, the Hayeses executed a mortgage on their house in Fairhope to secure a loan from Deutsche Bank National Trust Company. By 2013, they had fallen behind on their payments. The Bank foreclosed and, when the Hayeses did not move out, sued for ejectment in the Baldwin Circuit Court. The Hayeses counterclaimed, alleging breach of contract and wrongful foreclosure, arguing that the Bank had failed to apply certain payments to their account. The terms of the loan required the Bank to apply payments or to return them.

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The Bank moved for a summary judgment on the Hayeses' counterclaim. The Hayeses responded to the Bank's motion with deposition testimony of Timothy Hayes that "there were many payments made '05, '06, '07, '08, '09, always different mortgage servicing companies. There were payments made in those periods. They're not being credited at all." The circuit court entered a summary judgment in favor of the Bank, and the Hayeses appeal.

This Court reviews an appeal from a summary judgment de novo, that is, "[w]e apply the same standard of review the trial court used in determining whether the evidence presented to the trial court created a genuine issue of material fact." Nationwide Prop. & Cas. Ins. Co. v. DPF Architects, P.C., 792 So. 2d 369, 372 (Ala. 2000). To prevail on a motion for a summary judgment, the movant "must make a prima facie showing that there are no genuine issues of material fact and that he is entitled to a judgment as a matter of law. ... If this showing is made, the burden then shifts to the nonmovant to rebut the movant's prima facie showing by 'substantial evidence.'" Lee v. City of Gadsden, 592 So. 2d 1036, 1038 (Ala. 1992). "Substantial evidence" is "evidence of such

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weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989); § 12-21-12, Ala. Code 1975.

The Hayeses argue that they presented substantial evidence that the Bank had breached the terms of the loan and that the foreclosure was therefore wrongful. In response, the Bank argues that Timothy's deposition testimony does not constitute substantial evidence because it was uncorroborated by any financial records or documents and was insufficiently specific to satisfy Rule 56(e), Ala. R. Civ. P. I disagree.

This Court has never held that, in a breach-of-contract or wrongful-foreclosure action, testimony must be corroborated by financial records or documents to constitute substantial evidence. Indeed, it is hornbook law that testimony itself may stand alone as substantial evidence of the existence of a fact. See Fleming James, Jr., & Geoffrey C. Hazard, Jr., Civil Procedure 270 (2d ed. 1977) ("Where there is direct testimony of the existence of a simple fact ... such testimony is generally held in civil cases to satisfy the test of sufficiency -- it will, as we say, justify or warrant a

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finding by the trier that the fact existed."), Joseph L. Lester, Alabama Evidence § 3:16 (2019 ed.) ("[T]he testimony of one percipient witness to the truth of a certain material proposition of fact will satisfy the sufficiency requirement for that proposition."); cf. Smith v. State, 53 Ala. App. 27, 29, 296 So. 2d 925, 927 (Crim. App. 1974) (holding that, at trial, "[a] fact may be established as firmly by the testimony of one witness as by the testimony of an entire community"). Furthermore, this Court has held that corroboration goes to credibility, and credibility is a determination for the finder of fact. See Hardy v. Hardin, 200 So. 3d 622, 633 n.9 (Ala. 2016) ("In Hardin's appellate brief, he characterizes Hardy's testimony as 'self serving' and 'uncorroborated.' But it is the role of the fact-finder ... to assess credibility and to resolve conflicts in the evidence."). Thus, even though Timothy's deposition testimony was not corroborated by documents, it was substantial evidence.

Moreover, Timothy's testimony satisfied Rule 56(e) because it contained specific facts, not legal conclusions. This Court has addressed the specificity requirement of Rule 56(e). Adams v. Tractor & Equip. Co., 180 So. 3d 860, 870 (Ala. 2015). In that case, the defendant moved for a summary

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judgment, and the plaintiff submitted an affidavit stating that he had reviewed a contract provision but had not signed it. There, as here, the movant argued that the statement was "conclusory" and not sufficiently specific. This Court held: "Although [the plaintiff's] ... affidavit was not detailed, it contained a recitation of specific facts -- that he had reviewed the guaranty provision at issue and that he did not sign the guaranty provision -- that constituted substantial evidence demonstrating a genuine issue of material fact" 180 So. 3d at 870. Adams also cited Bradley Outdoor, Inc. v. Colonial Bank, 952 So. 2d 359, 362-63 (Ala. 2006), for the proposition that "an affidavit that contained legal conclusions, not statements of fact, was insufficient to create a genuine issue of material fact." Adams, 180 So. 3d at 870. Thus, under the distinction recognized by Adams, "specific facts" means historical facts as opposed to legal conclusions. In this case, the facts Timothy testified to -- that he made payments to the Bank during certain years and that those payments were not credited to his account -- are historical facts, not legal conclusions. Thus, this testimony satisfied Rule 56(e).

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Accordingly, Timothy's deposition testimony was substantial evidence in support of the Hayeses' claim of breach of contract and wrongful foreclosure. Because this evidence created a genuine issue of material fact, summary judgment was improper. Therefore, I would reverse the summary judgment.