FORECLOSURE DEFENSE

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PREPARED BY: RYAN C. CURTIS

FORECLOSURE DEFENSES

A. PLEADING

a. PLEAD PROPERLY-CERTAINTY AND PARTICULARITY IS REQUIRED WHEN PLEADING DEFENSES AND PLEADING CONCLUSIONS OF LAW UNSUPPORTED BY ALLEGATIONS OF ULTIMATE FACT IS LEGALLY INSUFFICIENT.

b. PLEADING CONCLUSORY-USUALLY DEFICIENT. *ZITO V. WASHINGTON FED. SAV & LOAN ASS'N OF MIAMI BEACH*, 318 SO.2D 175, 176 (FLA 3D DCA 1975).

c. INITIALLY, GENERAL PLEADING SHOULDN'T DOOM DEFENSE. SEE *HOWDESHELL V. FIRST NATIONAL BANK OF CLEARWATER*, 369 SO.2D 432 (FLA 2D DCA 1979)- COURT DIVERGED FROM USUAL INSISTENCE UPON PLEADING DEFENSES WITH ULTIMATE FACTS.

d. IF INSUFFICIENTLY PLED, COURTS GENERALLY PERMIT THEM TO BE AMENDED. SEE *ZITO.*

e. PERMISSION TO AMEND ANSWER TO ADD NEW DEFENSES IS LIBERALLY GRANTED-*BILL WILLIAMS AIR CONDITIONING & HEATING, INC. V. HAYMARKET CO-OP BANK*, 566 SO.2D 52 (FLA 1ST DCA 1990)

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B. CONTRACTUAL DEFENSES -LOAN DOCUMENTS ARE CONTRACTS SO CONTRACT DEFENSES ARE AVAILABLE.

a. LACK/FAILURE OF **CONSIDERATION**-SEE *HOWDERSHELL*

b. FAILURE TO COMPLY WITH **NOTICE** PROVISIONS-*GOMEZ V. AMERICAN SAV & LOAN ASS'N*, 515 SO.2D 301 (FLA 4TH DCA 1987). SEE ALSO *STELIAN LAZURAN V. CITIMORTGAGE, INC.*, (FLA 4D DCA 2010)

c. FAILURE TO COMPLY WITH **RELEASE** PROVISIONS-*DUNCAN PROPERTIES INC. V. KEY LARGO OCEAN VIEW INC.*, 360 SO.2D 471 (FLA 3D DCA 1978)

C. FRAUD-*MEYERSON V. BOYCE*, 97 SO.2D 488 (FLA 3D DCA 1957)

D. DURESS-*SMITH V. PAUL REVERE LIFE INS. CO.*, 998 F.SUPP 1412 (S.D. FLA 1997)

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a. **WAIVER**-INTENTIONAL RELINQUISHMENT OF A KNOWN RIGHT EXISTING IN FAVOR OF LENDER. *FLAGLER CENTER BUILDING LOAN CORP. V. CHEMICAL REALTY CORP.*, 363 SO.2D 344 (FLA 3D DCA 1976)

b. **ESTOPPEL**-JUSTIFIABLE RELIANCE PROMPTING A CHANGE IN CONDUCT BY THE MORTGAGOR. LAMBERT V. DRACOS, 403 SO.2D 481 (FLA 1ST DCA 1981)

c. **STATUTE OF LIMITATIONS**-SEE 95.11(2)(C) F.S.-MUST BRING ACTION WITHIN FIVE YEARS OF CAUSE OF ACTION.

d. **UNCLEAN HANDS** DOCTRINE-REQUIRES A SHOWING OF THE LENDER'S ACTIVE PARTICIPATION IN ILLEGAL OR FRAUDULENT CONDUCT. *QUALITY ROOF SERVICES, INC. V. INTERVEST NATIONAL BANK*, 21 SO.3D 883 (FLA 4TH DCA 2009). SEE ALSO *TRIBECA LENDING CORPORATION V. REAL ESTATE DEPOT, INC.*, (FLA 4TH DCA 2010)

e. ABSENCE OF **IMPAIRMENT OF SECURITY** (NON MONITARY DEFAULT, I.E. TAXES & INSURANCE)-BORROWER MAY BE ABLE TO DEFEAT ACCELERATION AND FORECLOSURE BY SHOWING THAT THE DEFAULT DOES NOT IMPAIR SECURITY. *DELGADO V. STRONG*, 360 SO.2D 73 (FLA 1978)

f. **TENDER** OF PAYMENT-*DUKE V. REED*, 396 SO.2D 1218 (FLA 3D DCA 1981)

g. **USURY**-SEE F.S. 687.02

F. LACK OF STANDING- THE PROPER PARTY WITH STANDING TO FORECLOSE A NOTE AND/OR MORTGAGE IS THE HOLDER OF THE NOTE AND MORTGAGE OR THE HOLDER'S REPRESENTATIVE.

a. *MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. V. AZIZE*, 965 SO.2D 151 (FLA 2D DCA 2007)

b. *VERIZZO V. BANK OF NEW YORK*, 28 20.3D 976 (FLA 2D DCA 2010)

c. *JERRY A. RIGGS, SR., v. AURORA LOAN SERVICES, LLC* (FLA 4TH DCA 2010)- ENDORSEMENT IN BLANK WAS SUFFICIENT.

d. *BAC FUNDING CONSORTIUM INC., V. JEAN-JACQUES*, 28 SO.3D 936 (FLA 2D. DCA 2010).

e. *GREGORY TAYLOR V. DEUTSCHE BANK NATIONAL TRUST COMPANY, ETC.* (FLA 5TH DCA 2010)

G. SUMMARY JUDGMENT

a. "ANY DOUBT AS TO THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT MUST BE RESOLVED AGAINST THE MOVANTS WHOSE BURDEN IS TO ESTABLISH THE ABSENCE OF SUCH AN ISSUE." *ADAM SMITH ENTERPRISES, INC. V. BARNES*, 539 SO.2D 549, 552 (FLA. 2D DCA 1989)

b. "WHEN CONSIDERING A MOTION FOR SUMMARY JUDGMENT, THE COURT SHOULD TAKE A STRICT READING OF THE PAPERS FILED BY THE MOVING PARTY AND A LITERAL READING AND CONSTRUCTION OF THE PAPERS FILED BY THE OPPOSING PARTY" *SWIFT INDEPENDENT PACKING CO. V. BASIC FOOD INTERNATIONAL, INC.*, 461 SO.2D 1017 (FLA 4TH DCA 1984)

c. *WINTERS V. SAMI*, 462 SO.2D 521 (FLA 4TH DCA 1985)-REVERSED SUMMARY JUDGMENT FINDING A LEGITIMATE CONTROVERSY OVER THE TERMS OF PAYMENT OF THE UNDERLYING OBLIGATION AND NOTING THAT THE BORROWER HAD MADE ALL BUT ONE OF THE DISPUTED PAYMENTS [COULD ARGUE IN CONTEXT OF MODIFICATON PAYMENT]

d. SUMMARY JUDGMENT MAY BE REVERSED IF COURT FINDS GENUINE ISSUE RAISED BY DEFENDANT'S AFFIRMATIVE DEFENSES THAT ARE NOT CONCLUSIVELY REFUTED ON THE RECORD-SEE *BILL WILLIAMS*

e. REVERSE WARRANTED WHEN THE PARTIES AFFIDAVITS FILED IN SUPPORT AND IN OPPOSITION TO SUMMARY JUDGMENT CONFLICT AS TO THE AMOUNT DUE. *CHARLES E. BURKETT V. ASSOCS V. VICK*, 546 SO.2D 1190 (FLA 5TH DCA 1989)

f. WHILE SUMMARY JUDGMENT DYNAMICS IN MORTGAGE FORECLOSURE DIFFERS MARKEDLY FROM THAT OF NEGLIGENCE CLAIMS, THE LENDER NEVERTHELESS CAN EXPECT TO PROCEED THROUGH THE MORE TORTUOUS PATH OF TRIAL IF THE BORROWER SUFFICIENTLY PLEADS THE REQUISITE ALLEGATIONS AND IS WILLING TO SWEAR TO THEM. SEE *CHARLES E. BURKETT*

H. PRODUCE THE NOTE-SUMMARY JUDGMENT NOT PROPER WITHOUT THE ORIGINAL NOTE. *TELEPHONE UTILITY TERMINAL CO., INC. V. EMC INDUSTRIES, INC.*, 404 SO.2D 183 (FLA 5TH DCA 1981)

a. IN CASE OF NEGOTIABLE PROMISSORY NOTES, ANY HOLDER IN DUE COURSE IS ENTITLED TO PAYMENT THEREUNDER EVEN THOUGH THE PAYOR MAY CLAIM HE HAS DISCHARGED HIS OBLIGATION TO SOMEONE ELSE. THUS, PRODUCTION OF THE INSTRUMENT ENTITLES A HOLDER TO RECOVER ON UNLESS THE DEFENDANT ESTABLISHES A DEFENSE.

b. REQUIRING PRODUCTION OF THE INSTRUMENT PROTECTS THE PAYOR FROM BEING LIABLE LATER TO A HOLDER IN DUE COURSE WHERE THE ORIGINAL PAYEE FRAUDULENTLY OBTAINED PAYMENT IN AN ACTION USING A COPY OF THE NOTE.

I. OBJECTIONS TO FORECLOSURE SALE

a. FAILURE OF THE MORTGAGEE TO CONDUCT DILIGENT SEARCH AND INQUIRY TO DETERMINE THE MORTGAGOR'S WHEREABOUTS. *HUDSON V. PIONEER FED. SAV. & LOAN ASS'N*, 516 SO.2D 339 (FLA 1ST DCA 1987)

b. OBJECT TO SALE IN MASS VS. SALE IN PARCELS-*APPLEFIELD V. FIDELITY FEDERAL SAVINGS & LOAN ASSOC OF TAMPA*, 137 SO.2D 259, 262 (FLA 2D DCA 1962)

c. FAILURE TO RECEIVE NOTICE OF SALE-*BENNETT V. WARD*, 667 SO.2D 378 (FLA 1ST DCA 1995)

J. FORECLOSURE DEFENSE RESOURCES

a. MATTWEIDNERLAW.COM/BLOG

b. FORECLOSUREFRAUD.ORG

c. FORECLOSURES IN FLORIDA, KENDALL COFFEY (2ED. 2008)

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318 So.2d 175

Barbara ZITO, Appellant,
v.
WASHINGTON FEDERAL SAVINGS & LOAN ASSOCIATION OF MIAMI BEACH, a United States Corporation, Appellee.

No. 75--307.
District Court of Appeal of Florida, Third District.
July 29, 1975.
Rehearing Denied Sept. 15, 1975.

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Shalle Stephen Fine and Steven R. Brownstein, Miami, for appellant.

Pepper, Clements, Hopkins & Weaver, Miami Beach, for appellee.

Before HENDRY, HAVERFIELD and NATHAN, JJ.

PER CURIAM.

This is an interlocutory appeal to review an order striking defendants' affirmative defense with leave to amend.

Plaintiff, Washington Federal Savings and Loan Association of Miami Beach, appellee, filed a complaint to foreclose mortgage and named as defendants, Joseph and Barbara Zito. Defendants answered and alleged in their answer the following affirmative defense:

'AFFIRMATIVE DEFENSE

'1) The Plaintiff, having advanced the note, the Defendant affirmatively states that the note was not in default and the Plaintiff had ample funds of the Defendant's to apply to the note.'

Subsequently, plaintiff filed a motion for summary judgment and after a hearing, the trial judge entered the appealed order finding that the motion of plaintiff was premature in that defendants' affirmative defense, to which plaintiff had not responded, was not sufficiently definite in its terms for the plaintiff to file a response. Thereupon, the judge ordered that (1) the defendants shall have until February 24, 1975 in which to file an amended affirmative defense; (2) plaintiff shall have until March 3, 1975 to file a response thereto; and (3) the hearing on plaintiff's motion for summary judgment be deferred pending the filing of the above pleadings.

Appellants argue that the court erred in determining that the defendants' affirmative defense was not sufficiently definite in its terms.

First, that portion of the affirmative defense alleging that the note was not in default does not constitute an affirmative defense, but is merely a denial. See 25 Fla.Jur. Pleadings § 24 (1959) and cases cited therein.

We then considered the affirmative defense, as alleged by the appellants, that 'the Plaintiff had ample funds of the Defendants to apply to the note.'

As in plaintiff's statement of claim, the requirement of certainty will be insisted upon in the pleading of a defense; and the certainty required is that the pleader must set forth the facts in such a manner as to reasonably inform his adversary of what is proposed to be proved in order to provide the latter with a fair opportunity to meet it and prepare his evidence. See Citizens National Bank of Orlando v. Youngblood, Fla.App.1974, 296 So.2d 92;

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Walker v. Walker, Fla.App.1971, 254 So.2d 832; 25 Fla.Jur. Pleadings § 23 (1959) and 61 Am.Jur.2d Pleading § 136 (1972).

The affirmative defense pled by the defendant-appellants fails to meet the requisite degree of certainty and, therefore, we conclude that the trial judge did not err in entering the appealed order.

Affirmed.

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369 So.2d 432

Donna Mae HOWDESHELL, Lawrence M. Howdeshell, and Howdeshell Plumbing, Inc., Appellants,

v.

The FIRST NATIONAL BANK OF CLEARWATER et al., Appellees.

No. 78-1880.
District Court of Appeal of Florida, Second District.
April 6, 1979.

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Neil R. Covert, of Gormin, Geoghegan, Easley & Granese, P.A., Clearwater, for appellants.

J. Paul Raymond and Stephen O. Cole, of McMullen, Everett, Logan, Marquardt & Cline, P.A., Clearwater, for appellee First National Bank.

SCHEB, Judge.

Appellants challenge entry of a summary final judgment in favor of appellee bank, arguing that appellee's failure to controvert the affirmative defenses pled by appellants precludes summary judgment. We agree.

Appellee sued to foreclose a mortgage, and appellants responded by motion to dismiss. Before appellants filed an answer, appellee moved for summary judgment. With their subsequent answer, appellants asserted the affirmative defenses of extension of time for payment, estoppel, lack of consideration, laches and unconscionability. Appellee submitted nothing further, later arguing that the defenses asserted were insufficient. The trial court agreed with appellee and granted summary judgment.

In order for a plaintiff to obtain a summary judgment when the defendant asserts affirmative defenses, the plaintiff must either disprove those defenses by evidence or establish the legal insufficiency of the defenses. Stewart v. Gore, 314 So.2d 10 (Fla.2d DCA 1975). See Johnson & Kirby, Inc. v. Citizens National Bank of Fort Lauderdale, 338 So.2d 905 (Fla.3d DCA 1976); Pompano Paint Company v. Pompano Beach Bank & Trust Company, 208 So.2d 152 (Fla.4th DCA 1968). Appellee made no attempt to disprove the defenses. Its only affidavit was submitted before the affirmative defenses were filed, and, of course, did not address those defenses. Although in some instances such defenses as pled may merely raise "paper issues", and summary judgment may still be proper, Home Federal Savings & Loan Association of Hollywood v. Emile, 216 So.2d 443 (Fla.1968); Reflex, N.V. v. Umet Trust, 336 So.2d 473 (Fla.3d DCA 1976), the burden is on the moving party to show lack of any genuine issue of material fact. Without any evidentiary submission by appellee to refute the affirmative defenses, appellants had no duty to submit any evidence in support of its defenses. Skaf's Jewelry, Inc. v. Antwerp Import Corp., 150 So.2d 260 (Fla.2d DCA 1963). Thus we need not consider the sufficiency of appellants' affidavits.

Since the trial court's summary judgment was not bottomed on a factual refutation of appellants' affirmative defenses, we must determine whether the legal insufficiency of those defenses was demonstrated. While some of appellants' affirmative defenses were either improper defenses to foreclosure of a mortgage or were inadequately pled, we nevertheless find two of appellants' defenses legally sufficient.

Appellants' first affirmative defense stated:

Defendants allege that Plaintiff, through oral representation and past conduct, has agreed to extend the time of payment of

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the Notes and Mortgages sought to be foreclosed herein for valuable consideration.

Generally, an oral modification of a written contract is valid. Such an agreement to extend the time for payment when given for a valuable consideration may be a defense to foreclosure. American Securities Co. v. Goldsberry, 69 Fla. 104, 67 So. 862 (1915). Therefore, appellants' first defense sufficiently raises the affirmative defense of extension of time for payment.

Appellants' third affirmative defense alleged:

Defendants allege that the second Note and Mortgage dated August 14, 1975, sought to be foreclosed herein fail for want of consideration in that no consideration flowed either from or to the above-captioned Plaintiff or Defendants herein, and as a result thereof, said second Note and Mortgage dated August 14, 1975, are unenforceable.

Lack of consideration is a defense to a contract action and likewise to a suit to foreclose a mortgage. Gabel v. Drewry's Ltd., U.S.A., Inc., 68 So.2d 372 (Fla.1953). We note that one early Florida case found a simple statement of lack of consideration insufficient as an affirmative defense. Ahren v. Willis, 6 Fla. 359 (1855). Ahren, however, was based on outmoded pleading practices and is contrary to modern trends holding a general averment sufficient. See 61 Am.Jur.2d Pleading § 166(1972). We find a general averment of lack of consideration to be more consistent with the general rules of pleading contained in Fla.R.Civ.P. 1.110. So, appellants' third defense sufficiently raises the defense of lack of consideration.

As noted, appellee's motion for summary judgment and its supporting affidavit were filed before appellants filed their answer and affirmative defenses. The trial court, in its discretion, may grant appellee leave to file a new motion for summary judgment, or to supplement its prior motion with affidavits specifically directed to appellants' affirmative defenses.

We reverse the order granting summary judgment and remand this cause for further proceedings consistent with this opinion.

BOARDMAN, A. C. J., and OTT, J., concur.

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566 So.2d 52
15 Fla. L. Weekly D2146

BILL WILLIAMS AIR CONDITIONING & HEATING, INC., Appellant,
v.
HAYMARKET COOPERATIVE BANK, a Massachusetts banking corporation, Appellee.

No. 89-02898.
District Court of Appeal of Florida,
First District.
Aug. 24, 1990.

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John Paul Howard, Jacksonville, for appellant.

H. Mark Purdy of Watson, Clark & Purdy, Fort Lauderdale, for appellee.

BOOTH, Judge.

This cause is before us on appeal after entry of partial summary final judgment. Appellant Bill Williams Air Conditioning & Heating, Inc. (Bill Williams) argues that the trial court erred in granting partial summary final judgment for appellee Haymarket Cooperative Bank (Haymarket) in its mortgage foreclosure action. We agree and reverse.

On September 21, 1987, mortgagors Richard F. Bailey, as trustee, Richard F. Bailey, individually, and Glen W. Murphy executed and delivered to Haymarket promissory notes in the principal amounts of $2,450,000 and $550,000, both of which were secured by mortgages on a parcel of commercial real estate in Gainesville, Florida. Apparently, the mortgagors were financing the construction of a grocery store addition to an existing shopping center. During the course of construction, the general contractor failed, and Haymarket assumed responsibility for completion of the shopping center and disbursement of the remaining mortgage proceeds until these funds were expended. Haymarket had recorded its mortgages on September 27, 1987, in the official records of Alachua County, Florida.

Bill Williams is one of many subcontractors who filed claims of lien against the mortgaged property. All of these claims of lien were recorded after September 27, 1987. Bill Williams recorded its claim of lien on July 5, 1988.

Haymarket brought its action to foreclose both mortgages on July 21, 1988, naming the mortgagors, Bill Williams, and many other mechanic and judgment lienors as defendants. Bill Williams filed its initial answer on September 12, 1988. On January 23, 1989, Bill Williams filed its first amended answer, which included cross-claims to foreclose its mechanic's lien and for breach of contract. Haymarket then filed its motion for partial summary final judgment without prejudice to the rights of four mechanic's lienors who had asserted affirmative defenses. The day before the hearing on Haymarket's motion, Bill Williams moved to again amend its answer to assert certain affirmative defenses which were substantially identical to those asserted by the four defendants against whom Haymarket had not sought summary judgment.

At the hearing, the trial court granted Bill Williams' motion to amend its answer to assert the eight affirmative defenses. The trial court then stated that it was going to proceed with the motion for partial summary final judgment on the basis of the pleadings as amended. The affidavits filed in support of Haymarket's motion for partial summary final judgment did not controvert the allegations of the affirmative

defenses. Nonetheless, the trial court entered partial summary final judgment for Haymarket against Bill Williams, as well as against the other defendants who had not contested the motion or asserted affirmative defenses. As to Bill Williams, this was error.

While the trial court correctly allowed Bill Williams to amend its answer to assert the affirmative defenses, once it did so,

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Haymarket had the burden of establishing that the affirmative defenses were devoid of material issue of fact or legally insufficient. Howdeshell v. First National Bank of Clearwater, 369 So.2d 432, 433 (Fla. 2d DCA 1979); Johnson & Kirby, Inc. v. Citizens National Bank of Fort Lauderdale, 338 So.2d 905, 906 (Fla. 3d DCA 1976); Stewart v. Gore, 314 So.2d 10, 12 (Fla. 2d DCA 1975); Pompano Paint Company v. Pompano Beach Bank & Trust Company, 208 So.2d 152, 153 (Fla. 4th DCA 1968). Our review of the record, however, indicates that the burden was placed, erroneously, upon Bill Williams to demonstrate some record fact in support of its affirmative defenses. Accordingly, the partial summary final judgment is reversed as to Bill Williams, and this cause is remanded for further proceedings consistent with this opinion.

SMITH and ZEHMER, JJ., concur.

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515 So.2d 301
12 Fla. L. Weekly 2495
Carlos GOMEZ and Paulina Gomez, Appellants,
v.
AMERICAN SAVINGS AND LOAN ASSOCIATION, Appellee.
No. 4-86-2695.
District Court of Appeal of Florida,
Fourth District.
Oct. 28, 1987.
Rehearing Denied Dec. 1, 1987.

Appeal from the Circuit Court for Broward County; M. Daniel Futch, Jr., Judge.

Alec Ross, North Miami Beach, for appellants.

Ira R. Gordon of Broad and Cassel, Miami, for appellee.

PER CURIAM.

It was error to enter summary judgment in favor of plaintiff, American Savings and Loan Association, because there were disputed and unresolved questions of material fact which prevented entry of judgment as a matter of law. Fla.R.Civ.P. 1.510(c). For instance, there was an issue as to whether American gave written notice of appellants' breach of the mortgage agreement as provided in paragraph eighteen thereof, F.A. Chastain Construction, Inc. v. Pratt, 146 So.2d 910, 913 (Fla. 3d DCA 1962), and there were unresolved issues as concerns appellants' affirmative defenses. Pandol Brothers, Inc. v. NCNB National

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Bank of Florida, 450 So.2d 592, 594 (Fla. 4th DCA 1984).

REVERSED.

DOWNEY, DELL and WALDEN, JJ., concur.

Page 1

STELIAN LAZURAN, Appellant,

v.

CITIMORTGAGE, INC., DAVID STERN, P.A., UNKNOWN SPOUSE OF STELIAN LAZURAN, if any, ADRIANA ANCUTA LAZURAN a/k/a ADRIANA LAZURAN, UNKNOWN SPOUSE OF ADRIANA ANCUTA LAZURAN a/k/a ADRIANA LAZURAN, if any, ANY AND ALL UNKNOWN PARTIES CLAIMING BY, THROUGH, UNDER, AND AGAINST THE HEREIN NAMED INDIVIDUAL DEFENDANT(S) WHO ARE NOT KNOWN TO BE DEAD OR ALIVE, WHETHER SAID UNKNOWN PARTIES MAY CLAIM AN INTEREST AS SPOUSES, HEIRS, DEVISEES, GRANTEES OR OTHER CLAIMANTS, THE BOULEVARD FOREST LAKE MANAGEMENT ASSOCIATION, INC., CITIBANK, N.A. SUCCESSOR BY MERGER TO CITIBANK, FEDERAL SAVINGS BANK, JOHN DOE, and JANE DOE AS UNKNOWN TENANTS IN POSSESSION, Appellees.

No. 4D09-1340.

District Court of Appeal of Florida, Fourth District.

June 9, 2010.

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County, Ronald J. Rothschild, Judge, L.T. Case No. 08-45895 (08).

Mitchell Sens of Law Office of Mitchell Sens, P.A., Plantation, for appellant.

Jennifer E. Seipel of Butler & Hosch, P.A., Orlando, for appellee Citimortgage Inc.

No appearance for other appellees.

GERBER, J.

We reverse the circuit court's final summary judgment of foreclosure against Stelian Lazuran (the "defendant"). Citimortgage's complaint alleged that all conditions precedent to the mortgage note's acceleration had been fulfilled, and Citimortgage's affidavit in support of its motion for summary judgment stated "[t]hat each and every allegation in the Complaint is true." Such a conclusory allegation is insufficient to refute the defendant's affirmative defense that Citimortgage failed to provide him with notice of the acceleration pursuant to the procedures specified in paragraph 22 of the mortgage. Therefore, reversal is required. See Frost v. Regions Bank, 15 So. 3d 905, 906-07 (Fla. 4th DCA 2009) ("Because the bank did not meet its burden to refute the Frosts' lack of notice and opportunity to cure defense, the bank is not entitled to final final summary judgment of foreclosure.").

Reversed.

POLEN and LEVINE, JJ., concur.

Not final until disposition of timely filed motion for rehearing.

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360 So.2d 471

DUNCAN PROPERTIES, INC., a corporation, Appellant,
v.
KEY LARGO OCEAN VIEW, INC., a Florida Corporation, Appellee.

No. 77-686.
District Court of Appeal of Florida, Third District.
July 11, 1978.

Horton, Perse & Ginsberg and Mallory H. Horton, Miami, for appellant.

McCaughey, Knaust & Evans and Barry J. McCaughey, St. Petersburg, for appellee.

Before PEARSON and HENDRY, JJ., and CRAWFORD, GRADY, L. (Ret.) Associate Judge.

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HENDRY, Judge.

Appellant/plaintiff appeals from a final judgment rendered in favor of appellee/defendant. In sum, the final judgment dismissed with prejudice appellant's complaint to foreclose a certain mortgage executed by the parties and entered judgment on appellee's counterclaim for rescission of said mortgage.

Factually, this proceeding commenced upon appellant's filing of an action for the foreclosure of a purchase money mortgage (secured by a promissory note in the sum of $250,000.00) on real property located in Monroe County, Florida. Appellee answered the complaint by denying any default under the note and mortgage. In addition, appellee filed affirmative defenses which, Inter alia, alleged that as consideration for the payment at time of closing of some $50,000.00, appellant was to release to appellee two of the fourteen acres the latter had purchased from the lien of the mortgage. It was alleged that appellant had refused to do so, and that such refusal amounted to a failure of consideration, thus relieving appellee of its obligation to pay the note. Appellee also filed a counterclaim for rescission of the note and mortgage based upon the aforementioned failure of consideration.

After discovery and pretrial conference, the cause proceeded to a non-jury trial. At its conclusion, the chancellor entered a final judgment in which the court found (1) that upon closing, appellant was to release the two acres of property from the effect of the mortgage and that said release was an essential element of the consideration from the purchase of the property; (2) that as such, the release amounted to a dependent covenant to the agreement; (3) that appellee had failed to make any payments on the note; and (4) that no adequate remedy existed at law to rectify the situation.

Based upon the above findings, the chancellor ordered that the mortgage foreclosure action be dismissed with prejudice and that appellee be permitted to rescind and/or cancel the note and mortgage. In addition, as a corollary to the rescission, and in an attempt to restore the parties to the status quo, the chancellor awarded appellee $64,276.90 on its counterclaim which represented the return of the $50,000.00 down payment, as well as various closing costs and expenses. Petition for rehearing was filed and subsequently denied, and this appeal follows.

While four points have been raised on appeal, we believe that the gist of appellant's contentions can be stated as follows:

Whether the record will support appellee's counterclaim for rescission and/or cancellation of the note and mortgage.

Based upon our analysis of the record, together with the applicable case law, it is our opinion that the equitable remedies of rescission

and/or cancellation were not available to appellee. We explain.

Generally, in order to sustain an action for rescission, one must allege grounds amounting to fraud, misrepresentation, overreaching or undue influence. Richard Bertram & Co. v. Barrett, 155 So.2d 409 (Fla.1st DCA 1963). These allegations were absent from appellee's counterclaim. Rather, appellee sought rescission solely upon the basis of a want or failure of consideration. Generally, without the accompaniment of one of the aforementioned grounds, want or failure of consideration will not suffice to permit a cancellation or rescission of an instrument. Rennolds v. Rennolds, 312 So.2d 538 (Fla.2d DCA 1975); 5 Fla.Jur. Cancellation, Reformation, Etc. § 26. The usual remedy for failure of consideration, standing alone, is an action at law for damages. Richard Bertram & Co. v. Barrett, supra; Rennolds v. Rennolds, Supra.

Notwithstanding the above generalities, however, the chancellor found that, Sub judice, the failure of consideration (failure to release the two acres of land from the mortgage lien) also amounted to a breach of a dependent covenant. When a failure of consideration also amounts to a breach of a dependent covenant to an agreement, then said failure of consideration might give rise to the remedy rescission. Street v. Sugerman,

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307 So.2d 883 (Fla.3d DCA 1974). The determinative factor is whether or not a full and adequate remedy at law exists. Steak House, Inc. v. Barnett, 65 So.2d 736 (Fla.1953); Street v. Sugerman, supra.

While appellant strenuously argues that the covenant in question was independent, rather than dependent, the chancellor's findings have not been shown to be clearly erroneous. Mogee v. Haller, 222 So.2d 468 (Fla.1st DCA 1969). Rather the question of whether or not a particular covenant in a contract is dependent or independent usually is grounded upon the intent of the parties to the contract. Mease v. Warm Mineral Springs, Inc., 128 So.2d 174 (Fla.2d DCA 1961). Intent being factual in nature, we will not substitute our judgment for that of the chancellor's. Ates v. Yellow Pine Land Co., 310 So.2d 772 (Fla.1st DCA 1975). Therefore, for the purposes of this appeal, we must recognize the covenant as dependent and determine whether or not an adequate remedy exists at law for any damages occasioned by appellee from the covenant's breach.

Based upon our review of the record, in light of the briefs and aided by oral argument of counsel, it is our opinion that appellee possessed an adequate remedy at law for damages occasioned by appellant's breach of the dependent covenant. The rescission or cancellation of a deed and mortgage is a harsh remedy not generally favored by the courts. Rennolds v. Rennolds, supra. In the instant case, resort to such a remedy was unnecessary as damages, if any, were ascertainable.

Accordingly, the final judgment appealed from is hereby reversed and remanded with directions to reinstate the foreclosure proceedings and permit appellee to assert a counterclaim for damages in lieu of its claim for rescission.

Reversed and remanded with directions.

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97 So.2d 488

Alex MEYERSON and Muriel Meyerson, his wife, Appellants,
v.
Alice BOYCE, now known as Alice Boyce Morgan, and Guy Morgan, her husband, Appellees.

No. 57-145.
District Court of Appeal of Florida, Third District.
Oct. 15, 1957.

Miller & Jordan, Fort Lauderdale, and Walton, Lantaff, Schroeder, Atkins, Carson & Wahl, Miami, for appellants.

Carr & O'Quin and Marshall G. Curran, Jr., Miami, for appellees.

PEARSON, Judge.

The appellants were plaintiffs in a bill of complaint brought to foreclose a mortgage, which they had received by assignment after the same was in default. The answer claimed fraud in the procurement of the mortgage. The Chancellor upon trial found that there was clear and convincing proof that the note and mortgage were originally procured by fraud, and that the plaintiffs-assigness of said note and mortgage had notice of these infirmities when purchasing them. He therefore, dismissed the cause with prejudice. There being sufficient evidence, before the Chancellor, upon which to base the finding, the decree is affirmed. The findings of the Chancellor were as follows:

'The uncontradicted testimony shows that the defendant, Guy Morgan, was an uneducated and illiterate colored man, and his wife, Alice Boyce Morgan, was an uneducated colored woman who lacked full possession of her faculties. The evidence shows that the Mortgage to Florida Stone and Marble Industries--Ribbonstone Sales, Inc., was executed under circumstances clearly showing fraud and therefore that

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the mortgage between the parties was void and subject to the defense of fraud in the procurement thereof.

'The testimony shows that a representative of Florida Stone and Marble Industries--Ribbonstone Sales, Inc., requested permission of the Morgans to make certain improvements on defendants' home property, representing to defendants that said work was done for advertising purposes and without any obligation on their part, and that the company would, instead, pay the defendants in order to get the benefit of advertising their home as a 'Model Home' on television. The defendants, thereafter, were induced to execute the mortgage and note, which were represented to defendants to be a contract allowing the Florida Stone and Marble Industries--Ribbonstone Sales, Inc., to make improvements for advertising purposes only, and to pay defendants for this privilege.

'The testimony shows that the plaintiffs in this cause, who are the assignees of the fraudulent mortgage, took the same at a time when the mortgage and note were approximately four months in default. The note was tainted with a usurious discount of approximately twenty percent, and the record shows on its face that this note and mortgage were overdue at the time the plaintiffs purchased them.'

Appellants admitted that they took the note and mortgage while in default and that they hold the same subject to all defenses available against the original mortgagee.

Error is urged only upon the ground that the Chancellor overlooked the proposition that, 'the uncorroborated testimony of mortgagors as to fraud in the procurement of the mortgage is not

legally sufficient to overcome or impeach the notary public's certificate of their acknowledgment.' In support of this statement the appellants have cited the following cases as the law governing this case. Hart v. Sanderson's Administrators, 18 Fla. 103; Shear v. Robinson, 18 Fla. 379; Herald v. Hardin, 95 Fla. 889, 116 So. 863; McEwen v. Schenck, 108 Fla. 119, 146 So. 839; Smith v. McEwen, 119 Fla. 588, 161 So. 68. Each of these cases concerned an attempt to impeach the legal sufficiency of an acknowledgment to a mortgage and thus of the mortgage itself. In the instant case the acknowledgment is not in question. The parties admit the signing and acknowledgment of the mortgage and they claim fraud in the procurement of their signatures upon the mortgage. Thus the cases cited do not support the proposition urged, nor do we find it to be a correct statement of the law.

It is true that proof of fraud must be by clear and convincing evidence. McGill v. Boulevard & Bay Land & Development Co., 100 Fla. 906, 130 So. 460; Buscher v. Mangan, Fla.1952, 59 So.2d 745; Biscayne Boulevard Properties, Inc. v. Graham, Fla.1953, 65 So.2d 858. The Chancellor found that the testimony before him, together with the circumstances surrounding the procurement of the mortgage were clear and convincing proof of fraud. A review of the record reveals that the Chancellor had sufficient evidence before him to support his finding. The appellants declined to offer evidence to repute the charge of fraud in the procurement of the mortgage, choosing to rely upon the position that the appellees could not prove such fraud. If the position of appellants was correct, it would mean that when the facts constituting fraud in the procurement of a mortgage were known only to the perpetrators and the victims, no relief could be granted because the mortgage was acknowledged.

Affirmed.

CARROLL, CHAS., C. J., and HORTON, J., concur.

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363 So.2d 344

FLAGLER CENTER BUILDING LOAN CORP., a Florida Corporation, Appellant,
v.
CHEMICAL REALTY CORPORATION, a New York Corporation, et al., Appellee.

Nos. 77-1659, 77-1825 and 77-1826.
District Court of Appeal of Florida, Third District.
June 13, 1978.
Rehearing Denied Nov. 3, 1978.

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Sibley, Giblin, Levenson & Glaser, Miami Beach, Joseph Pardo, Miami, for appellant.

Gunster, Yoakley, Criser, Stewart & Hersey and Leigh E. Dunston, Palm Beach, Leland E. Stansell, Jr., Miami, for appellee.

Before HAVERFIELD, C. J., and PEARSON and HENDRY, JJ.

PER CURIAM.

These appeals are from a final judgment foreclosing a construction loan mortgage and from two post-judgment orders. The principal issue presented on the appeal from the final judgment is whether the trial court properly found the mortgage in default. On the interlocutory appeals, the question is whether the trial court had jurisdiction to enter the orders after an appeal had been taken from the Final Judgment. Defendant Flagler Center Building Loan Corp. was the borrower and is the appellant here. Plaintiff Chemical Realty Corporation was the lender and is appellee here. Chemical Realty has filed cross-assignments contending that the amount of the debt found due and owing is less than the true amount and that a finding of waiver of the default for failure to meet the completion date for the building is not supported by the record. Other points presented on the appeal and by the cross-assignments must also be decided.

A construction loan and mortgage was entered into between the parties. In December, 1972, Chemical Realty agreed to provide cash for construction up to $6,000,000.00 to build the Flagler Center Building in downtown Miami. At the time the loan was made, Flagler Center had secured a commitment for long term, permanent financing from Barnett Winston Investment Trust for $6,000,000.00.

By the terms of the construction loan mortgage, the completion date was set for November 30, 1974, [1] and default would occur should this date not be met. The commitment for the long term mortgage required a completion date of December 31, 1974. [2] The building was not completed by November 30, 1974. Chemical Realty continued to make advancements of funds under the construction loan agreement during December of 1974. The building was not completed by December 31, 1974. On February 25, 1975, Chemical Realty funded a draw against the $6,000,000.00 construction loan fund. This last funding brought the total amount drawn by Flagler Center to $4,909,909.07. There was, therefore, a difference of $1,090,090.93 between the maximum amount agreed to be advanced for construction and the amount actually advanced by Chemical Realty.

Chemical Realty filed its complaint for foreclosure on May 6, 1975, and claimed defaults of the mortgage and note as follows: (a) that the principal balance together with interest was due by the terms thereof; (b) that Flagler Center had failed to complete the building on or before the November 30, 1974, completion date; (c) that Flagler Center had failed to keep the commitment of the long term lender in full

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force and effect as covenanted in the building loan agreement.

Thereafter, in July of 1975, the trial court appointed William L. Pallot as receiver for Flagler Center. After three days of trial, the court found that the bank had waived the default. [3] Nevertheless, the trial court found that the mortgage should be foreclosed and proceeded to "balance the equities" by providing for a remission of interest in the loan from February 25, 1975, to the date of the sale, postponement of the foreclosure sale for ninety days and, finally, made a provision for the further extension of the redemption period if Flagler Center could make definite arrangements for refinancing. [4]

Flagler Center filed its notice of appeal from the final judgment of foreclosure on July 27, 1977. On August 2, 1977, the trial court entered an amended final judgment of foreclosure. The following changes were made: (1) the foreclosure sale date was reset to September 22, 1977; (2) an award of $184,926.69 to the receiver and his attorneys as fees and costs was specified; (3) co-conservators for the property were appointed; (4) a special master for the determination of mechanic's and materialmen's liens was appointed; and (5) the sum of $225,000 for receiver's certificates and interest on these certificates was added to the mortgage debt and held to be necessary in order to protect the building. On August 5, 1977, the trial court entered a supplemental order "reflecting additional debt and new sale date" which specifically provided for the adding of the $225,000 for receiver's certificates to the mortgage debt. On August 22nd, Flagler Center filed a notice of appeal from the amended final judgment.

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On August 22nd, the defendant also filed its notices of interlocutory appeal from the last mentioned supplemental order. The appeals were consolidated for all appellate purposes.

The initial question presented by Flagler Center is whether a trial court can find a waiver of default and, at the same time, foreclose the mortgage as though there were a default. Chemical Realty responds in two ways. First, it urges that the finding of waiver applied only to the claimed default for failure to complete the building by November 30, 1974. Secondly, it urges that the evidence does not support the trial court's finding of a waiver of default in the mortgage. A waiver of a default requires action by the mortgagee which misleads the mortgagor so that the mortgagor acts in a way that he would not have acted if he had known that the mortgagee would require performance under the strict terms of the mortgage agreement. See Kreiss Potassium Phosphate Co. v. Knight, 98 Fla. 1004, 124 So. 751 (1929); New England Mutual Life Insurance Company v. Luxury Home Builders, Inc., 311 So.2d 160 (Fla. 3d DCA 1975); and Harrell v. Lombard, 122 So.2d 625 (Fla. 2d DCA 1960).

The trial judge's finding of fact that there was an estoppel by waiver of the default in the mortgage is a finding of fact which arrives in this court with a presumption of its correctness. Further, for this court to reverse such a finding of fact, there must be a lack of substantial evidence to support the finding. See Chakford v. Strum, 87 So.2d 419 (Fla.1956); Manchester Insurance & Indemnity Co. v. Novack, 284 So.2d 433 (Fla. 3d DCA 1973). This record reviewed in that light supports the finding of the trial judge in that it shows that in reliance upon the representations of Chemical Realty, the defendant, Flagler Center, critically changed its position by giving up the right and opportunity to complete the building by the deadline. From mid-October to mid-November when Chemical Realty knew that the building was not going to be completed on the due date and the permanent commitment was lost, Chemical Realty paid to the defendant $560,732.54, a sum that would reasonably lead the defendant to believe that the loan was continued in full force and effect.

The position of Chemical Realty that the waiver was void because there was no consideration for it, is not in accord with Florida law. In Gilman v. Butzloff, 155 Fla. 888, 22 So.2d 263 (1945), the Supreme Court of Florida found that a waiver without consideration was valid when based upon conduct and when acted upon by the defendant. Cf. New England Mutual Life Insurance Company v. Luxury Home Builders, Inc., 311 So.2d 160 (Fla. 3d DCA 1975).

We hold, therefore, that the court's finding of waiver of default in the mortgage is supported by the evidence and must be affirmed. With regard to the position of Chemical Realty that the waiver concerned only a single default in the completion date, we find nothing in the record to support this position. The waiver concerned the clear right to foreclose at that time, and the evidence supports Flagler Center's position that after having waived default, Chemical Realty sought to foreclose simply because it was unable to secure a modification of the terms of the loan.

Although not made a point on appeal, Flagler Center, as appellant, has urged that the trial judge should have required the mortgagee, Chemical Realty, to pay to the defendant an amount of money equaling the difference between the actual amount advanced and the maximum amount the lender agreed to advance for construction purposes. We find no basis in this record for such a contention inasmuch as the mortgage does not require the payment of the full $6,000,000.00 unless and except it is used in the construction of the building and the formal requirements of the funding of the draw for construction purposes are complied with. The fact that Flagler Center was able to construct the building for an amount of money less than it was estimated by the parties would be required, does not obligate the lender on a

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construction mortgage to advance monies not required for construction purposes. ([5])

Flagler Center's second point on appeal urges that it was error for the trial judge to add the commissioner's fees and costs and the commissioner's attorney's fees and costs to the amount required from the defendant to redeem the property, because the record contains a proper stipulation that the plaintiff would pay all costs of a commissioner. Upon the subject of the commissioner's fees and costs, the trial judge made extensive provisions ([6]) but nowhere in the judgment does he refer to a stipulation concerning commissioner's costs. The question of whether the plaintiff had stipulated to pay the costs of the commissioner was presented to the trial judge by defendant's Motion to Modify Order Appointing Court Commissioner and to Require Plaintiff to Post Bond for Payment of Cost, Fees, and Expenses of Court Commissioner and Court Commissioner's Attorneys. After several hearings, the result of the motion was an Order Reserving Judgment on Motion to Clarify. No further ruling appears thereon until the final judgment, above quoted in part, wherein the court held that the commissioner's costs and fees were chargeable against the property and added to the amount defendant must pay to redeem the property. We must conclude, therefore, that the court found, as a matter of fact, that there was no binding stipulation by the plaintiff to pay the fees and costs of the commissioner. We must then examine the record to determine whether the court's finding is supported in the record. Cf. Darling v. Rose, 301 So.2d 19 (Fla. 2d DCA 1974).

The hearing on the plaintiff's application for a receiver was long, and included the testimony of experts, numerous comments of counsel and argument. The defendant relies on the comments of plaintiff's counsel as an offer or stipulation by the plaintiff to pay the costs of a receivership should the plaintiff get the court to agree to appoint a receiver. ([7])

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The plaintiff did prevail and the costs have been added to the amount the defendant must pay to acquire the building. Perhaps we would have a closer question if the defendant had prevailed and the mortgage was not foreclosed. Here the language used by the attorneys in argument is not definite. If this was a proposal to the court or to the defendant in order to get a receiver, then there is no evidence that it was accepted by the court or the defendant. We think that the language of Fla.R.Civ.P. 1.030(d) ([8]) contemplates something more definite than that which appears in this record as argument of counsel. For although under this rule, " . . . parol Agreements may be made before the court if promptly made a part of the record or incorporated in the stenographic notes of the proceedings . . . ," the record in this cause does not show an "agreement" sufficient to meet the requirements of a stipulation.

The Final Judgment provides that " . . . the costs of the commissionership incurred, including the Commissioner's fees and costs and the Commissioner's attorneys' fees and costs and the Certificates of Indebtedness . . . shall be treated as liens against the property . . . " The judgment also provides that the " . . . Commissioner's fees and costs and the Commissioner's attorneys' fees and costs shall be added to the total amount required from the Defendant, FLAGLER CENTER BUILDING LOAN CORP., to redeem the property." The certificates of indebtedness covering the cost of the receivership, in addition to the receiver's fees and his attorneys' fees and costs, amounting in the original judgment to $1,275,260.58, and in the Amended Final Judgment to $1,507,157.44, were added to the mortgage debt required to be paid by the defendant in order to redeem. In addition, the Final Judgment and the Amended Final Judgment conditioned the right to redeem on the payment or the posting of security for the payment of all outstanding mechanics' liens and their attorneys' fees.

Receivers costs, in the absence of counter-prevailing equities, see Perry v. Beckerman, 97 So.2d 860 (Fla.1957), are proper as a charge against the mortgaged property and are a part of the expenses of foreclosure which are included in a final judgment and must be paid in order to redeem the mortgaged property. See the general rule in Deauville Corporation v. Blount, 160 Fla. 286, 34 So.2d 537 (1948), with regard to the large discretion vested in the trial court in such matters.

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The third point presented by Flagler Center urges that the final judgment improperly added amounts to the mortgage debt in adjudging the amount required for the defendant to redeem the property. The amounts objected to are:

1. The Final Judgment provides that " . . . the costs of the commissionership incurred, including the Commissioner's fees and costs and the Commissioner's attorneys' fees and the Certificates of Indebtedness . . . shall be treated as liens against the property . . . " and that " . . . the Commissioner's fees and costs and the Commissioner's attorneys' fees and costs shall be added to the total amount required from the Defendant, FLAGLER CENTER BUILDING LOAN CORP., to redeem the property."

2. The certificates of indebtedness covering the cost of the receivership, in addition to the receiver's fees and his attorneys' fees and costs amounting in the original judgment to $1,275,260.58, and in the Amended Final Judgment to $1,507,157.44 were added to the mortgage debt required to be paid by the defendant in order to redeem.

3. In the Final Judgment and the Amended Final Judgment, the court conditioned the right to redeem on the payment or the posting of security for the payment of all outstanding mechanics' liens and their attorneys' fees.

We have already dealt with the fact that it is ordinarily proper to include receivers fees and costs in the amount required to redeem mortgaged property. Nothing argued under this point shows error in such a holding.

That portion of the Final Judgment which conditioned the right to redeem upon the payment of mechanics liens was erroneous. See Blue Heron Land Co. v. Brown, 98 Fla. 1238, 125 So. 369 (1930). ([9]) The plaintiff argues that, if error, the ruling was harmless because a special master appointed to settle the lien claims found no valid liens outstanding; this, however, does not appear from the record. Therefore, we hold the provision of the Final Judgment which provided that lien claims must be paid by the defendant in order to redeem should be stricken from the Final Judgment.

The last point presented pertains to the post-judgment orders. The defendant argues that the trial court was without jurisdiction to adjudicate conservators fees and attorneys fees after final judgment. We hold that the trial court was not divested of jurisdiction by the notice of appeal to adjudicate those matters necessary for the conservation of the property or to amend the Final Judgment on matters not going to the validity and correctness of the Final Judgment on appeal. See Brown v. Marion Mortgage Co., 107 Fla. 727, 145 So. 413 (1932); and Yarborough v. Kilbee, 307 So.2d 223 (Fla. 4th DCA 1975).

The points presented by Chemical Realty in its cross-assignments of error are mainly defensive and have been considered above. The assignments otherwise do not present reversible error.

Having found the trial court in error upon its failure to carry into effect the waiver of default which it found upon the evidence, we conclude that the judgment must be reversed. We have considered the issues presented on the cross-appeal and the additional points presented by appellant for the expedition of the settlement of the controversy between the parties. Thereupon, the judgment is reversed and the cause remanded for dismissal of the action in accordance with the views herein expressed.

Reversed and remanded with directions.

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1 "11. Events of Default. If one or more of the following events (an Event of Default) shall occur and be continuing

"(d) The Improvement is not completed in accordance with the Plans and Specifications in the judgment of the Supervising Engineer on or before the Completion Date (as defined in Exhibit B);"

Exhibit B states:

"As used in this Agreement, the following terms shall have the following meanings:

"1. Completion Date November 30, 1974."

2 "It is understood that the buildings must be fully completed according to plans and specifications to be submitted to and approved by the Trust in writing, and disbursement made prior to December 31, 1974, otherwise, this commitment may be cancelled at the option of the trust without notice to the applicant and without liability of any kind upon the Trust."

3 * * *

"Pursuant to the disputed and unresolved understanding between them at the October 1974 meeting and subsequent communications and conduct, and in the face of the knowledge that BWIT would not agree to extend the date of its permanent mortgage commitment, the Defendant, FLAGLER CENTER BUILDING LOAN CORP., continued to work toward completion of the building without delay, in good faith, and the Plaintiff continued to fund the job beyond the deadline set in the Building Loan Agreement in good faith, and acknowledged that 'it was in the best interest of the parties' to complete the building. Neither the Plaintiff nor the Defendant, FLAGLER CENTER BUILDING LOAN CORP., had any knowledge or forewarning of the inability of BWIT to fund the permanent mortgage commitment if called upon to do so, or of the impending decline in market conditions, making it virtually impossible for Defendant, FLAGLER CENTER BUILDING LOAN CORP., to obtain permanent mortgage financing elsewhere.

"Without regard to the conduct of the principals of the Defendant corporation, which might not be considered laudatory or commendable; and although Plaintiff's conduct in funding the job beyond November 30, 1974, was done with noble, commendable motives, it nevertheless constituted a waiver.

"Plaintiff is entitled to be repaid but its refusal to fund the job until completion and the subsequent filing of this action prior to completion of the building was premature and unwarranted in light of the waiver, and to that extent the equities are with the Defendant."

4 "Since no evil motives were intended by either of the principal parties litigant, justice and fairness and a 'balancing of the equities' dictate that the Plaintiff's complaint and the Defendant, FLAGLER CENTER BUILDING LOAN CORP.'s Affirmative Defenses and Counterclaim be adjudicated as follows:

"It is ORDERED, ADJUDGED AND DECREED:

"1. That the Plaintiff shall not be permitted to collect any interest on its loan past February 25, 1975 the date of the last installment paid by the Plaintiff on the funding of the construction job under the Building Loan Agreement. The last installment so paid did not exhaust the funds which Chemical was obligated to advance under said Building Loan Agreement.

"2. That the Plaintiff shall not be permitted to have the property sold at judicial foreclosure sale prior to ninety (90) days (July 29, 1977) from the date of entry of this Final Judgment of Foreclosure.

"3. That if the Defendant, FLAGLER CENTER BUILDING LOAN CORP., has made definite arrangements for refinancing but cannot redeem the property within ninety (90) days (July 29, 1977), the Court will consider an application for an extension of the redemption period for a maximum of thirty (30) days (August 28, 1977), provided such application for extension be made no later than twenty (20) days (July 9, 1977) prior to the termination of the above described ninety (90) day period (July 29, 1977)."

5 The mortgage herein states:

"NOW, THEREFORE, in consideration of the sum of Six million and 00/100 Dollars ($6,000,000.00) and other valuable consideration paid by the Lender to the Borrower, Or as much thereof as may from time to time be advanced by the Lender to the Borrower, the Borrower, to better secure the payment of the principal sum set out in the Note, and interest thereon and premium, if any, has executed and delivered this Mortgage . . . " (emphasis added)

6 "4. That the costs of the commissionership incurred, including the Commissioner's fees and costs and the Commissioner's attorneys' fees and costs and the Certificates of Indebtedness issued to conserve and/or improve the property, shall be treated as liens against the property prior in dignity to the Plaintiff's mortgage and all other lien claims. That is to say, the commissionership costs, including Commissioner's fees and costs and the Commissioner's attorneys' fees and costs and the Certificates of Indebtedness shall be paid first by whomsoever recovers or acquires the property, either through redemption or as a result of the successful bid at judicial foreclosure sale.

"5. That the amount of any remaining fees and costs due the Commissioner and the Commissioner's attorneys' fees and costs shall be set by another judge of this Court pursuant to a stipulation of the parties and a previous Order of this Court based thereon. Said fees and costs should be determined as soon as possible and no later than July 1, 1977.

"6. That the Commissioner's fees and costs and the Commissioner's attorneys' fees and costs shall be added to the total amount required from the Defendant, FLAGLER CENTER BUILDING LOAN CORP., to redeem the property.

"7. That the Plaintiff has requested the Commissioner to remain in office until June 30, 1977, and has agreed to bear the expense of the Commissioner's fees and costs and the Commissioner's attorneys' fees and costs from the date of entry of this Final Judgment Of Foreclosure until June 30, 1977. Therefore the commissionership shall be dissolved on July 1, 1977, and thereafter the building manager, Roger Stake, shall operate and manage the building under Court supervision pending the sale or redemption of the property and shall furnish an appropriate bond to be set by the Court."

7 "MR. SIBLEY: It is going to cost them money. Let's save the bank money.

"THE COURT: What I am concerned with is the cost of the receivership, if he can be appointed and agreed upon, because they don't work cheap.

"MR. DUNSTON: Right, Judge. It's our costs; we're willing to bear the burden of that on this personally. It's all our money.

"THE COURT: What is going to happen if they prevail? Who is going to pay those costs?

"MR. PARDO: There is going to be a cost of the foreclosure proceedings or what, I don't know. Where will that fall? Go ahead. Excuse me.

"MR. DUNSTON: You are suggesting that if they prevail in the foreclosure proceeding

"THE COURT: Sure. Suppose that they prevail?

"MR. PARDO: Then a substantial bond should be posted and the attorney for the receiver the receiver appointed.

"MR. DUNSTON: There is no question that a receiver is an expensive proposition."

"MR. DUNSTON: If I might go on, however, Mr. Silverman has authorized me to say on behalf of the Plaintiff, because it is our money and we do believe that we will prevail in this matter, that we will bear the cost of the receivership if we don't prevail, and we will stipulate as to that, and in that light we would ask the Court then to please consider appointing a receiver that can move forward with the project as fast as possible, get the completed C.O.'d and rented up."

"I want the Court to keep in mind that Chemical Realty has upon itself the burden of saying, 'We believe that we will prevail and that the building will become ours; in that event we will bear the expense of the receivership, but we do not want Mr. Revitz to be the receiver.'

"THE COURT: All right, sir."

8 "(d) Stipulations. No private agreement or consent between parties or their attorneys shall be of any force unless the evidence thereof is in writing, subscribed by the party or his attorney against whom it is alleged; provided that parol agreements may be made before the court if promptly made a part of the record or incorporated in the stenographic notes of the proceedings and agreements made at depositions which are incorporated in the transcript thereof need not be signed when signing thereof is waived."

9 "A defendant in a mortgage foreclosure proceeding should not be required to pay any amount in excess of what complainant is entitled to recover, together with all costs of such proceeding, before being permitted to save his property from foreclosure sale."

"It is ordered that the final decree, in so far as it ordered defendants to pay taxes, not advanced or paid out by complainants, before being permitted to redeem . . . be and it is hereby reversed."

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403 So.2d 481

George W. LAMBERT, Jr., and Bill A. Corbin, Appellants,
v.
Theodore A. DRACOS, Appellee.

No. VV-77.
District Court of Appeal of Florida, First District.
Aug. 13, 1981.

Bill A. Corbin, Blountstown, for appellants.

Raymond L. Syfrett and Richard C. Trollope, Panama City, for appellee.

TILLMAN PEARSON, (Retired), Associate Judge.

The controlling question presented on this appeal is: May a mortgage foreclosure be maintained against one of two debtors who is a tenant in common with another without joining the second co-tenant who is also a co-obligor on the mortgage? We hold the co-tenants as co-obligors on the mortgage are indispensable parties and that it was prejudicial error to deny appellant/defendant's motion to dismiss on the ground of failure to join his co-tenant, co-obligor.

George and his wife, Clara Lambert, jointly executed a promissory note which was secured by a second mortgage on their jointly-held marital home. George and Clara were divorced and pursuant to the divorce decree, Clara was given the right to occupy the home with the children. The decree also required Clara to make payments on the first mortgage while it required George to make payments on the second mortgage. George experienced financial difficulties and the second mortgage came into default. He spoke with a bank officer of the bank that was the owner and holder of the second mortgage and was assured by the bank officer that he (the bank officer) would work with him insofar as his authority would permit. Thereafter Clara married Theodore A. Dracos. Because the bank was threatening foreclosure and in order to protect Clara's interest in

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the property, Mr. Dracos purchased the second mortgage from the bank by paying the balance due and taking an assignment of the note and mortgage. Dracos then brought the present mortgage foreclosure action. He named as defendants only George Lambert and one Bill A. Corbin. The complaint alleged that Mr. Corbin claimed some interest in the property and that his claim was subject to the second mortgage.

The defendants moved to dismiss the complaint on the grounds that plaintiff had failed to join an indispensable party, that is, Clara Lambert Dracos. The motion was denied. The cause came to issue upon defendant George Lambert's answer, which raised numerous affirmative defenses. After trial, George Lambert's interest in the mortgage property was sold at a judicial sale to Mr. Dracos for $100.00.

On this appeal, George Lambert and Bill A. Corbin present three points on appeal, only one of which we find has merit. First, George Lambert urges that the court committed error when it found that his affirmative defense of estoppel to declare an acceleration of the entire amount due was not proved. Our examination of the record convinces us that defendant, George Lambert, failed to prove an understanding or agreement with the bank, as owner and holder of the mortgage prior to assignment, not to accelerate or foreclose without further notice to him. The defense of estoppel to foreclose a mortgage requires a clear showing of action by the mortgagee which misleads the mortgagor so that he acts in a way that he would not have acted if he had known that the mortgagee would require performance under the strict terms of the mortgage agreement. See Flagler Center

Building Loan Corp. v. Chemical Realty Corp., 363 So.2d 344 (Fla. 3d DCA 1978), cert. denied, 372 So.2d 467 (Fla.1979). The record shows no such action by the bank. The argument that the foreclosure was an unequitable scheme to defraud George Lambert fails for a similar reason. It was George Lambert's responsibility to make the mortgage payments and upon his failure, the purchase and foreclosure of the mortgage was a reasonable business practice by Mr. Dracos. Lambert's second point claiming procedural irregularities in the foreclosure sale is also without merit. However, we find merit to appellants' argument that the motion to dismiss for failure to join an indispensable party, i. e., Clara Lambert Dracos, should have been granted.

There is extensive authority in this state for the proposition that the owner of mortgaged property is an indispensable party to an action to foreclose a mortgage on that property. E. g., Berlack v. Halle, et ux., 22 Fla. 236 (1886); Oakland Properties Corp. v. Hogan, 96 Fla. 40, 117 So. 846 (1928); Davanzo v. Resolute Ins. Co., 346 So.2d 1227 (Fla. 3d DCA 1977). However, this authority is not so immutable when the holding in each case is examined.

Berlack v. Halle, supra, was an appeal of a final judgment in ejectment. The court stated that the owner of legal title is a necessary party to a suit for foreclosure of a mortgage. But the holding is that because of the defective foreclosure, the rights of the owner of the legal title and his assigns are unaffected. Because the appeal was not from a final decree of foreclosure, the court did not rule upon the effect on the rights of defendants who were made parties to the foreclosure.

Oakland Properties Corp. v. Hogan, supra, was an appeal from an order dismissing a complaint to reform a deed. The court stated that one who holds the legal title to mortgaged property is not only necessary, but is an indispensable party defendant in a suit to foreclose a mortgage. But the holding was that the foreclosure decree was void only as to that portion of the land owned by Oakland Properties Corporation which was not made a party to the foreclosure action.

In Davanzo v. Resolute Ins. Co., supra, the legal title holder appealed a final judgment of foreclosure of four of six mortgages on a certain property. The court stated:

One who holds legal title to mortgaged property is an indispensable party defendant

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in a suit to foreclose a mortgage and a court cannot properly adjudicate the matters involved in this suit when it appears indispensable parties are not in some way actively or constructively before the court.

The court held that the owner of the legal title was made a defendant under the pleadings in all except one of the mortgages foreclosed. The judgment was reversed as to the one mortgage only.

None of these cases reach the question here presented of the right to maintain a foreclosure action in which one of two joint owners, who is a co-obligor on the mortgage, is not made a party to the action.

An annotation entitled "Right Under Mortgage by Co-Owners of Undivided Interest to Foreclose as Against Less Than All of Such Interests" appears at 82 A.L.R. 1347 (1933). The annotated case is Kruger v. Taylor, 27 S.W.2d 130 (Tex.Com.App.1930), modified 30 S.W.2d 300 (1930). There, Kruger and Jaffe had executed two promissory notes for which they were jointly and severally liable. To secure payment of the notes, Kruger and Jaffe executed a mortgage on lots which were jointly owned by them, each owning an undivided one-half interest. Subsequently, Jaffe died. Taylor brought suit to recover on the notes and to foreclose the mortgage lien against Kruger solely, without joining Jaffe's executor. Kruger set up the non-joinder as a defense to the suit. His defense was overruled and the judgment was

subsequently entered against Kruger for the amount due on the notes with foreclosure of the mortgage lien on Kruger's undivided half interest in the lots. The court stated the rule as follows:

Where tenants in common give a joint mortgage on the common property, the lien attaches to the moieties of the mortgagors in the property, as an entirety. As a general rule, the holder of any one of these constituent moieties is entitled, in a foreclosure suit brought against him alone, to demand that the other moiety holders be brought in as parties to the suit .... The reason for the rule is obvious. The sale of an undivided interest or moiety does not ordinarily bring as good a proportionate price as the sale of the entirety. By executing the mortgage, neither of the mortgagors assumes the risk of loss in this respect, and the mortgagee has no right, over timely objection made, to impose this risk on either of them.

In 1 Wiltsie, Mortgage Foreclosure, § 336 (5th Ed. 1939), it is noted:

Where tenants in common jointly, or jointly and severally, mortgage property, a foreclosure cannot be maintained against one of them separately to collect a moiety of the debt; the action must be against both and those claiming under them. Neither can either of them compel the mortgagee to receive half of the debt, and thereby relieve him, and to proceed against his co-tenant for the collection of the other half. The interest of tenants in common in such cases must always be sold together, no matter how numerous the owners may be.

See also 3 Jones, Law of Mortgages, § 1797 (8th Ed. 1928), which further states:

Therefore, in case the mortgage was made by tenants in common, he is entitled to a foreclosure of the whole estate, and cannot be compelled to receive the share of the debt due from one of them and foreclose against the other for his share. Such would also be the case when two estates have been mortgaged, together, and the equities have subsequently passed into different hands. Neither would he be allowed to foreclose against the owner of one estate, without making the owner of the other a party also, unless there were special equities in favor of the estate exempted.

Both of the above-quoted authors cite Frost v. Frost, 8 Sand. Ch. 188 (N.Y.1846). In that case, tenants in common executed a joint mortgage and one of them sought to compel the mortgagee to receive one-half of the debt and to compel the mortgagee to proceed against the other tenant's undivided interest for the other half. The court held that the action did not lie and, in so holding, reasoned that by joining in the

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mortgage the co-tenants intended to have a sale of the whole estate. It was also pointed out that the property would not sell as well in undivided moieties as the whole would together.

The Supreme Court of Florida cited Frost v. Frost, supra, in Walker v. Sarven, 41 Fla. 210, 25 So. 885 (Fla.1899). In Walker, the court reversed a decree of foreclosure which directed that the undivided one-half interest of one joint owner, who was a joint obligor on the mortgage, be sold first and then, if there was a deficiency, that the undivided interest of the remaining joint owner would be sold. In reversing, the court held:

In proceedings to foreclose this prior encumbrance upon the joint estate neither co-tenant was entitled to have the decree charge the other's interest with the entire debt, nor could either insist that the decree charge the interest of each with one-half, or any other particular part, of the debt, for the simple reason that the whole estate was equally liable, ...

We hold that the same reasoning applies to the case now before us and that, therefore, it was improper to allow a foreclosure against appellant's interest alone. The complaint should have been dismissed for failure to join the

indispensable party, i. e., the legal owner of the remaining interest of the estate foreclosed. Such a decision comports with the rights of an owner to have notice and an opportunity to defend in an action which affects the title to the property.

The judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED.

BOOTH and JOANOS, JJ., concur.

Select Year: 2009 Go

The 2009 Florida Statutes

Title VIII LIMITATIONS | Chapter 95 LIMITATIONS OF ACTIONS; ADVERSE POSSESSION | View Entire Chapter

95.11 Limitations other than for the recovery of real property.--Actions other than for recovery of real property shall be commenced as follows:

(1) WITHIN TWENTY YEARS.--An action on a judgment or decree of a court of record in this state.

(2) WITHIN FIVE YEARS.--

(a) An action on a judgment or decree of any court, not of record, of this state or any court of the United States, any other state or territory in the United States, or a foreign country.

(b) A legal or equitable action on a contract, obligation, or liability founded on a written instrument, except for an action to enforce a claim against a payment bond, which shall be governed by the applicable provisions of ss. 255.05(10) and 713.23(1)(e).

(c) An action to foreclose a mortgage.

(d) An action alleging a willful violation of s. 448.110.

(3) WITHIN FOUR YEARS.--

(a) An action founded on negligence.

(b) An action relating to the determination of paternity, with the time running from the date the child reaches the age of majority.

(c) An action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest; except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, the action must be commenced within 10 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.

(d) An action to recover public money or property held by a public officer or employee, or former public officer or employee, and obtained during, or as a result of, his or her public office or employment.

21 So.3d 883
QUALITY ROOF SERVICES, INC., Appellant,
v.
INTERVEST NATIONAL BANK, Appellee.
No. 4D08-3382.
District Court of Appeal of Florida, Fourth District.
October 28, 2009.
[21 So.3d 884]

Virginia Cassady, Clifford B. Shepard and Morgan G. Bourdat of Shepard, Smith & Cassady, P.A., Maitland, for appellant.

Diane Noller Wells of Devine Goodman Pallot Rasco & Wells, P.A., Coral Gables, Joshua Magidson and Nancy S. Paikoff of MacFarlane Ferguson & McMullen, Clearwater, for appellee.

PER CURIAM.

The appellant, Quality Roof Services, Inc. ("Quality Roof"), appeals the trial court's order denying Quality Roof's Amended Motion to Amend Answer to Plaintiff's Complaint and the resulting Order Granting Motion For Final Summary Judgment, For Entry of Final Judgment of Foreclosure of Apartment Complex and For Award of Attorneys' Fees and Costs, and the award of Partial Summary Judgment of Foreclosure of Apartment Complex. This court has jurisdiction. Fla. R.App. P. 9.030(b)(1)(A).

This appeal arises from a foreclosure action filed by Intervest against The Villas at Lauderhill, LLC, the owner of an uninhabitable, hurricane-damaged apartment complex ("the Villas"). Quality Roof is a roofing contractor that subcontracted to furnish materials, labor, and equipment for roofing, stucco, and other hurricane repairs for the Villas. Intervest is the lender which refinanced the Villas' pre-existing mortgage indebtedness. Intervest filed a first mortgage on the property and recorded on August 19, 2005. Quality Roof recorded a claim of lien against the Villas for unpaid invoices on July 25, 2007.

Intervest filed its foreclosure action on November 29, 2007. Quality Roof was joined as a defendant because of its recorded claim of lien. Quality Roof did not raise any affirmative defenses, nor did it cross-claim to enforce or foreclose its claim of lien. The Villas at Lauderhill, LLC, consented to final summary judgment and the sale of the property, and Intervest moved for final summary judgment on June 11, 2008. The hearing on the motion was scheduled for July 17, 2008. Quality Roof did not file any affidavits or other evidence in contravention of Intervest's summary judgment motion and supporting affidavits.

On July 3, 2008, Quality Roof moved to amend its answer and assert an affirmative defense of unclean hands against Intervest to prevent Intervest's foreclosure. Responding on July 14, 2008, Intervest claimed that the amendment would be futile and prejudicial. On July 16, 2008, the day before the hearing, Quality Roof served an amended motion to amend its answer, which elaborated its allegations of Intervest's unclean hands. In the amended motion to amend, Quality Roof alleged that Intervest failed to properly distribute insurance proceeds it had received from a hurricane damage insurance claim on the Villas; and but for Intervest's wrongful actions, the default would not have occurred and the property would not have been foreclosed upon.

On July 17, 2008, the trial court held a hearing on both Quality Roof's Motion to Amend and Intervest's motion for final summary judgment. In denying the Motion to Amend, the trial judge found that

[21 So.3d 885]

although allowing the amendment would not prejudice Intervest, the amendment would be futile in the context of the case as currently

postured. We agree that Intervest would not be prejudiced, but disagree that allowing the amendment would be futile. We therefore reverse and remand.

A trial court's denial of a motion to amend is reviewed for abuse of discretion. See Noble v. Martin Mem'l Hosp. Ass'n, 710 So.2d 567, 568 (Fla. 4th DCA 1997). Florida Rule of Civil Procedure 1.190(e) states that "[a]t any time in furtherance of justice, upon such terms as may be just, the court may permit any process, proceeding, pleading, or record to be amended or material supplemental matter to be set forth in an amended or supplemental pleading." A court "should be especially liberal when leave to amend is sought at or before a hearing on a motion for summary judgment." Thompson v. Bank of New York, 862 So.2d 768, 770 (Fla. 4th DCA 2003) (citation omitted); see also Montero v. Compugraphic Corp., 531 So.2d 1034, 1036 (Fla. 3d DCA 1988). In ruling on a motion for leave to amend, "all doubts should be resolved in favor of allowing an amendment, and the refusal to do so generally constitutes an abuse of discretion unless it clearly appears that allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile." Cason v. Fla. Parole Comm'n, 819 So.2d 1012, 1013 (Fla. 1st DCA 2002); see also Fields v. Klein, 946 So.2d 119, 121 (Fla. 4th DCA 2007); Thompson, 862 So.2d at 770. A proposed amendment is futile if it is insufficiently pled, id., or is "insufficient as a matter of law," Burger King Corp. v. Weaver, 169 F.3d 1310, 1320 (11th Cir.1999).

Although the unclean hands defense may be asserted in foreclosure cases when the parties are in privity, see, e.g., Knight Energy Servs., Inc. v. Amoco Oil Co., 660 So.2d 786, 789 (Fla. 4th DCA 1995); Lamb v. Pike, 659 So.2d 1385, 1387 (Fla. 3d DCA 1995), privity is not an essential element of the equitable defense. Unclean hands may be asserted by a defendant who claims that the plaintiff acted toward a third party with unclean hands with respect to the matter in litigation. See Yost v. Rieve Enters., Inc., 461 So.2d 178 (Fla. 1st DCA 1984) ("There is no bar to applying the doctrine of unclean hands to a case in which both the plaintiff and the defendant are parties to a fraudulent transaction perpetrated on a third party."); see also Hauer v. Thum, 67 So.2d 643, 645 (Fla.1953) ("It would matter not that the [defendants] were parties to the fraudulent transaction nor that the fraud was perpetrated upon a third party."); Marin v. Seven of Five Ltd., 921 So.2d 699, 700 (Fla. 4th DCA 2006) ("Generally, the conduct constituting the unclean hands must be connected with the matter in litigation.") (citation omitted).

Here, the trial court should have allowed Quality Roof to assert its affirmative defense of unclean hands. The affirmative defense was sufficiently pled and, as a matter of law, is sufficient to be able to prevent a foreclosure. Based on Quality Roof's allegations that the default and foreclosure would not have occurred but for Intervest's unclean hands, Quality Roof need not be in privity with Intervest to assert its affirmative defense. We note, however, that unclean hands may not be used in this case to subordinate Intervest's mortgage to Quality Roof's lien. Indeed, at oral argument, counsel for Quality Roof conceded that Quality Roof did not seek to have its lien become superior to Intervest's mortgage. Therefore, on remand, the trial

[21 So.3d 886]

court should allow Quality Roof to assert its affirmative defense of unclean hands.

Reversed and remanded.

POLEN, STEVENSON and GERBER, JJ., concur.

TRIBECA LENDING CORPORATION, a foreign corporation licensed to conduct business in Florida, Appellant,
v.
REAL ESTATE DEPOT, INC., a Florida corporation, HENRY THORNTON, ROCHELLE THORNTON, NORWEST BANK MINNESOTA, NATIONAL ASSOCIATION, as trustee, and DEBRA DIXON, Appellees.
No. 4D09-885
Case No. 06-880

District Court Of Appeal Of The State Of Florida
Fourth District
July 14, 2010

Carlos D. Lerman of Smoler Lerman Bente & Whitebook, P.A., Hollywood, for appellant.

Michael C. Klasfeld, Pompano Beach, for appellee.

Warner, J.

Tribeca Lending Corporation timely appeals a Final Judgment of Foreclosure of an Equitable Lien, claiming that there are certain defects in the final judgment which need to be corrected. Real Estate Depot cross-appeals the final judgment, arguing primarily that the trial court erred in entering summary judgment in Tribeca's favor and conceding that some defects appear in the summary final judgment. We agree that summary judgment was properly entered. We reverse only to correct the defects in the final summary judgment regarding the parties whose interests are being foreclosed, as well as the court's retention of jurisdiction over the sale proceeds.

In 2004 and 2005, Henry and Rochelle Thornton were facing financial difficulties and were in default under their existing first mortgage on their home. The first mortgagee of the property, Colonial Mortgage Company, brought a foreclosure action against the Thorntons, which ultimately resulted in the entry of an agreed final judgment of foreclosure.

The foreclosure sale relative to the Colonial Mortgage was scheduled to occur on September 29, 2005. However, on the day before the foreclosure sale, Henry Thornton contacted Real Estate Depot and entered into a sale and leaseback on the property in an effort to save the home from foreclosure. It is sufficient for the purposes of this appeal to

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note that the Thorntons executed a Special Warranty Deed conveying title to their home to Real Estate Depot. Real Estate Depot paid the Thorntons a total of $2,500 at the time of the transaction.

The next day at the foreclosure sale an individual successfully bid on the property on behalf of Real Estate Depot. However, rather than actually paying the entire amount to purchase the property at the foreclosure sale, Real Estate Depot's plan was to simply forfeit the deposit on its bid. This tactic had the effect of preventing a foreclosure sale, at least temporarily. The forfeited deposit was then applied to the Colonial Mortgage.[1]

After Real Estate Depot effectively prevented the property from being sold at the foreclosure sale, Henry Thornton learned that the property was still in foreclosure and that a new foreclosure sale date had been set. Believing that Real Estate Depot did not comply with their agreement, Mr. Thornton sent Real Estate Depot a facsimile in which he attempted to rescind the agreement. Although Mr. Thornton stated that he was rescinding the agreement, he did not return any money to Real Estate Depot.

Subsequently, a quit-claim deed was recorded in the Broward County public records.

The quit-claim deed purported to convey the property from Real Estate Depot back to Henry and Rochelle Thornton. The deed showed that Alan Klasfeld, the principal of Real Estate Depot executed the deed. After learning about the deed, Real Estate Depot recorded an Affidavit of Fraudulent Deed in the public records, in which Alan Klasfeld attested that he did not sign the quit-claim deed and stated that his signature on the deed was a forgery. Around the time the deed was recorded, Mrs. Thornton also declared bankruptcy.

After Mr. Thornton attempted to rescind his agreement with Real Estate Depot, he sought to refinance the property through Tribeca Lending Corporation. Mr. Thornton testified that he did not advise Tribeca that there was any challenge to his ownership of the property, nor did he discuss with Tribeca the events that occurred between him and Real Estate Depot or about the deeds involving Real Estate Depot. Ultimately, the Thorntons executed a note and mortgage in the amount of $321,300 in favor of Tribeca. The proceeds of the Tribeca Mortgage were used to satisfy the $265,942.00 balance due under the Colonial Mortgage.

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In 2006, Real Estate Depot brought suit against multiple defendants, including the Thorntons and Tribeca, in an action for declaratory relief, damages, and to quiet title to the property. In its amended complaint, Real Estate Depot sought to quiet title against all defendants who may claim an interest in the property. It sought damages against only the Thorntons, for slander of title, and the notary on the quit-claim deed, for violating statutory requirements regarding notarization.

Tribeca answered and filed an Amended Cross-claim and Counterclaim, seeking either to foreclose on its mortgage or, alternatively, to obtain an equitable lien on the property. Real Estate Depot answered Tribeca's counterclaim and raised affirmative defenses of unclean hands and equitable estoppel, claiming that Tribeca "had real or effective notice of the fraud being perpetuated [sic] by the forged deed of Defendants, Henry Thornton and Rochelle Thornton due to numerous irregularities in the closing.... "

Tribeca moved for summary judgment as to its counterclaim for the imposition and foreclosure of an equitable lien on the property. It claimed that it was entitled to an equitable lien against the property to the extent that its loan proceeds were used to satisfy the preexisting Colonial Mortgage, a fact which was undisputed. Further, Tribeca asserted that Real Estate Depot's affirmative defenses failed to allege the type of behavior which would amount to unclean hands, arguing that the "unclean hands" defenses raised in the answer were actually in the nature of allegations of negligence. Real Estate Depot filed a response in opposition to the motion for summary judgment, arguing that there were genuine issues of material fact remaining.

After a hearing on Tribeca's summary judgment motion, the trial court entered a Final Judgment of Foreclosure of an Equitable Lien. The final judgment awarded Tribeca an equitable lien against the property in the amount of $265,942, the amount of the Tribeca loan used to satisfy the Colonial Mortgage. The final judgment stated that upon the filing of the Certificate of Sale, the defendants would be foreclosed of all estate or claim in the property. This language had the effect of foreclosing the interest of all *defendants,* including Tribeca, without foreclosing the interest of Real Estate Depot. In addition the final judgment awarded post-judgment interest to Tribeca, but did not award pre-judgment interest. Finally, the final judgment provided that "[jurisdiction of this action is retained to enter further orders..., including, without limitation, determination of conflicting claims to the proceeds, Plaintiff's damages claims against Defendant, Tribeca Lending Corporation,

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deficiency judgment, etc., as may be appropriate." This appeal and cross-appeal follow.

Considering first the merits of the final summary judgment, Real Estate Depot argues that genuine issues of material fact exist which preclude summary judgment. In particular, Real Estate Depot argues that 1) there are outstanding claims of "dirty hands" that were not refuted; and 2) equitable subrogation is improper where Tribeca knowingly accepted a mortgage in violation of an automatic stay in bankruptcy. Tribeca contends that those defenses were legally insufficient to negate foreclosure of the equitable lien for the amount of the original first mortgage which it had satisfied.

Because its own mortgage was tainted by the forged deed, Tribeca sought foreclosure only on the basis of an equitable lien. "[A]n equitable lien 'is a right granted by a court of equity, arising by reason of the conduct of the parties affected which would entitle one party as a matter of equity to proceed against' certain property." *Epstein v. Epstein,* 915 So. 2d 1272, 1274-75 (Fla. 4th DCA 2005) (quoting *Gables Racing Ass'n v. Persky,* 148 Fla. 627, 6 So. 2d 257, 263 (1942)). Equitable liens may be based upon considerations of estoppel or to prevent unjust enrichment. *Plotch v. Gregory,* 463 So. 2d 432, 436 n.1 (Fla. 4th DCA 1985). Similarly, the doctrine of equitable subrogation, a twin remedy to the equitable lien, is designed to apply where the claimant satisfied an obligation of another and then stands in the shoes of the satisfied creditor. *See Radison Props., Inc. v. Flamingo Groves, Inc.,* 767 So. 2d 587, 591 (Fla. 4th DCA 2000). Equitable subrogation will be granted to prevent unjust enrichment even though the party seeking it was negligent, as long as there is no prejudice. *Suntrust Bank v. Riverside Nat'l Bank of Fla.,* 792 So. 2d 1222, 1227 n.3 (Fla. 4th DCA 2001). Furthermore, we have recognized that a refinancing lender is equitably subrogated to the priority of the first mortgage even where it has actual knowledge of an intervening lien. *Id.* at 1225.

As it is an equitable remedy, a party seeking such a lien must do so with clean hands. *Epstein,* 915 So. 2d at 1275. The clean hands doctrine "applies not only to fraudulent and illegal transactions, but to any unrighteous, unconscientious, or oppressive conduct by one seeking equitable interference in his own behalf." *Dale v. Jennings,* 90 Fla. 234, 107 So. 175, 180 (1925). Nonetheless, a party asserting unclean hands "must prove that he was injured in order for the unclean hands doctrine to apply." *McCollem v. Chidnese,* 832 So. 2d 194, 196 (Fla. 4th DCA2002).

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The foregoing principles are illustrated in *Palm Beach Savings & Loan Ass'n, F.S.A. v. Fishbein,* 619 So. 2d 267 (Fla. 1993), which allowed the imposition of an equitable lien against homestead property in favor of a lender, where the debtor husband fraudulently obtained a loan and used the loan to satisfy three preexisting mortgages on the homestead property without the knowledge of the wife. Mr. Fishbein borrowed $1,200, 000 from Palm Beach Savings & Loan Association and secured the debt with a mortgage on the house. Despite its knowledge that Mr. and Mrs. Fishbein were then engaged in dissolution proceedings, the bank permitted Mr. Fishbein to obtain his wife's signature on the mortgage without requiring her to sign the document in the bank's presence. Unknown to either Mrs. Fishbein or the bank, Mr. Fishbein forged his wife's signature to the mortgage. Mr. Fishbein then satisfied the existing mortgages on the property and used the remaining sum for other purposes. After Mr. Fishbein failed to comply with a dissolution agreement, Mrs. Fishbein moved back into the home. In the meantime, the mortgage went into default and the bank initiated foreclosure proceedings.

Because Mrs. Fishbein never signed the mortgage, the bank did not take the position that its mortgage could be foreclosed against the home. However, the question presented to our supreme court in *Fishbein* was whether an equitable lien could be imposed on homestead

real property where Mrs. Fishbein was innocent of wrongdoing. Our supreme court held than even though Mrs. Fishbein was not a party to the fraud, an equitable lien could be imposed to prevent unjust enrichment:

> Of course, Mrs. Fishbein should not be made to suffer because the bank was not more careful in ensuring that her signature on the mortgage was genuine. This is why the bank can make no claim against the property for the $270,000 not used to benefit the homestead. On the other hand, Mrs. Fishbein is not entitled to a $930,000 windfall.

Id. at 271.

Similar to *Fishbein,* Real Estate Depot is not entitled to a windfall by having the Colonial Mortgage paid off with Tribeca's funds. It was undisputed that the proceeds of the Tribeca loan were used to satisfy the preexisting Colonial Mortgage. An equitable lien is necessary to prevent Real Estate Depot from being unjustly enriched by virtue of Tribeca's loan to the Thorntons.

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The record also conclusively refutes the affirmative defense of Real Estate Depot that Tribeca had unclean hands. At most, the affirmative defense alleges negligence on the part of Tribeca in failing to discover the recorded affidavit from Mr. Klasfeld regarding the forged quit-claim deed. Mr. Thornton testified that he did not tell Tribeca about the Real Estate Depot transaction. The pleadings and record facts do not show any trickery, fraud, or oppressive conduct by Tribeca which would bar Tribeca from obtaining an equitable lien.

Even assuming Tribeca had actual knowledge that Real Estate Depot was claiming the deed was a forgery, the unclean hands defense still fails as a matter of law on this record. By analogy, in *Suntrust,* we explained that a refinancing lender is still entitled to be equitably subrogated to the priority of the mortgage it satisfied even where it had knowledge of the intervening lien. Similarly, Real Estate Depot's interest in the property was subordinate to the mortgage of Colonial. When Tribeca satisfied that lien, it was entitled to step into the shoes, so to speak, of Colonial's priority over Real Estate Depot's interest. Regardless of what Tribeca knew, Tribeca's conduct did not harm Real Estate Depot to that extent. In fact, Mr. Klasfeld admitted in his deposition that Tribeca's satisfaction of the Colonial Mortgage would result in a windfall to Real Estate Depot if Tribeca did not receive an equitable lien.

Alternatively, Real Estate Depot alleged that the Tribeca mortgage on the Thornton home was a nullity because of the automatic stay provision of Mrs. Thornton's pending bankruptcy. The automatic stay under bankruptcy law operates as a stay of "any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4). However, the Thorntons' homestead in this case was property that was exempt from the bankruptcy estate. *See* 11 U.S.C. § 522(b)(3)(A). Real Estate Depot has not shown that there was any violation of the automatic stay.

Thus, the court correctly entered summary judgment for Tribeca on foreclosure of its equitable lien based upon the Colonial Bank mortgage. The final judgment contains a defect, however, which the trial court should correct on remand. It included boilerplate language stating that upon the filing of the Certificate of Sale, the *defendants* would be foreclosed of all estate or claim in the property. As Real Estate Depot agrees, this is inaccurate. Because Tribeca was itself a defendant in Real Estate Depot's declaratory judgment action, the language could be construed to foreclose its own interest in the property. In addition, because Real Estate Depot was a plaintiff and counter-defendant, it was not included in the foreclosed interests.

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We reject Tribeca's claim that the court erred in failing to award prejudgment interest on the equitable lien amount, because the claim was never raised and thus was waived. Tribeca never filed a motion for rehearing or a motion to address the prejudgment interest issue. In fact, there is no indication in the record that Tribeca ever even raised the issue of its entitlement to prejudgment interest prior to this appeal. *See Hi-Shear Tech. Corp. v. United Space Alliance, LLC,* 1 So. 3d 195, 204 (Fla. 5th DCA 2008) (holding that where the trial court's failure to award pre-judgment interest was not raised until after the time had expired for filing a motion for rehearing pursuant to Rule 1.530(b), the issue was waived).

Finally, Tribeca claims that the court erred by requiring that the proceeds of any judicial sale be retained pending the resolution of the "conflicting claims" to them. To the extent that the court's order may be interpreted as withholding from Tribeca that portion of the sale proceeds which would satisfy the equitable lien being foreclosed, we agree that the court erred. It had already determined that Tribeca was entitled to an equitable lien and that Real Estate Depot's affirmative defenses to that lien were conclusively refuted. Therefore, Tribeca's right was superior to any other claimant, and it was entitled to the proceeds of sale to the extent that they satisfied that lien. Further, Real Estate Depot does not have any pending claims against Tribeca for damages. Even if it did, the court could not retain the proceeds in advance of any determination of damages. *See, e.g., Konover Realty Assocs., Ltd. v. Mladen,* 511 So. 2d 705, 706 (Fla. 3d DCA 1987).

Based on the court's imposition of the equitable lien, Tribeca has first priority as to the proceeds of the judicial sale, regardless of any conflicting claims to any remaining proceeds. Therefore, the court's final judgment has the practical effect of restraining proceeds to which Tribeca is entitled. This was error as to the application of the sale proceeds to the equitable lien. To the extent that the sale proceeds exceed the amount of the lien plus interest, those proceeds may lawfully be held pending further orders of the court.

We affirm the final summary judgment except as to the correction of the parties foreclosed and the retention of jurisdiction over the sale proceeds to the extent that they satisfy Tribeca's equitable lien. We reverse on those two issues.

Affirmed in part; reversed in part and remanded for correction of judgment.

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Taylor and May, JJ., concur.

* * *

Appeal and cross-appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Jack Tuter, Judge; L.T.

Notes:

[1] See § 45.031(3), Fla. Stat.

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360 So.2d 73

Hortensio DELGADO and Nellie Geraldine Delgado, his wife, Petitioners,
v.
Robert R. STRONG and Julie Y. Strong, his wife, Respondents.

No. 52304.
Supreme Court of Florida.
June 8, 1978.
Rehearing Denied July 25, 1978.

Kenneth G. Stevens of Dale & Stevens, Fort Lauderdale, for petitioners.

James W. Knight, Jr. of Huebner, Shaw & Bunnell, and Nancy Little Hoffmann, Fort Lauderdale, for respondents.

SUNDBERG, Justice.

This cause is before us on petition for writ of certiorari to review a decision of the District Court of Appeal, Fourth District, reported at 348 So.2d 56, which is alleged to be in conflict with Westerman v. Shell's City, Inc., 265 So.2d 43 (Fla.1972), the latter case setting forth the rule that an appellate court may not substitute its judgment for that of a trial court by reevaluating the evidence. Jurisdiction vests in this Court pursuant to Article V, Section 3(b)(3), Florida Constitution.

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For the reasons hereinafter enunciated we quash the decision of the District Court of Appeal, Fourth District.

The facts of this case are reflected in the trial judge's recitation of the evidence introduced at a hearing on petitioners' complaint to foreclose a mortgage against respondents:

This cause raised the issue as to the rights of a mortgagee (petitioners) to accelerate a mortgage by reason of the failure of the mortgagor (respondents) to obtain insurance, deliver the policy to the mortgagee, and/or communicate to the mortgagee the status of mortgagor's efforts in obtaining and delivery of insurance. The facts, as revealed by the testimony and exhibits introduced, show that the mortgagors purchased a parcel of industrial property from the mortgagees in August, 1973, and that thereafter said premises were not insured as required by the terms of the mortgage until March 14, 1974. The evidence discloses that the mortgagors were unaware of their duty to insure or the fact it was not insured until approximately March 8, 1974, when plaintiffs' attorney advised the mortgagors that they were in default and that they did not have insurance currently in force. At this time mortgagors obtained the first policy of insurance, effective March 14, 1974. In the early part of May, 1974, the mortgagors and the mortgagees both received a Notice of Cancellation of the March 14, 1974 policy, which notice of cancellation became effective at noon on May 30, 1974. In early May, Mortgagors consulted the Coral Ridge Insurance Agency and requested such agency to write a new policy on the subject property. An application and letter requesting insurance were prepared and forwarded to the insurance carrier, which application requested the insurance effected May 31, 1974. The mortgagors offered testimony that an "oral binder" was issued effective May 30, 1974. On June 7, 1974, the plaintiff mortgagees consulted with their attorney and as a result caused this suit to be filed on June 13, 1974, alleging that a breach of the mortgage had occurred by reason of the defendants failing to provide insurance in accordance with the mortgage agreement and accelerating the balance of the mortgage. On June 14, 1974, the plaintiffs, not being aware of the alleged "oral binder" from Coral Ridge Insurance Agency, obtained their own insurance at a net cost of $200.00 (after credit for return of

the premium after cancellation of the foregoing policy). On July 12, 1974, the Coral Ridge Insurance Agency was advised by telephone that Aetna Insurance Company, to whom the application had been made, would not write the policy because the application did not cover and the defendants did not wish to insure the personalty on the subject property. This telephone conversation was subsequently confirmed by letter from Aetna Insurance to Coral Ridge Insurance Agency dated July 15, 1974.

Service of process on the defendants was obtained in this cause by an elisor on August 7, 1974. On August 7, 1974, the Coral Ridge Insurance Agency wrote a letter to the plaintiffs advising that they were covered by a binder and that Aetna Insurance Company would issue the policy of insurance "very shortly," notwithstanding the fact that Aetna by its letter of July 15, 1974, had already declined to write the coverage and considered the matter a "closed issue." On August 23, 1974, Coral Ridge Insurance Agency requested coverage by New York Central Mutual Fire Insurance Company, as a result of which an insurance policy was delivered to the plaintiffs on November 14, 1974, with coverage commencing May 31, 1974, at noon Standard Time.

Based upon the foregoing, the trial court made the following findings:

1. A technical default occurred by the failure of the defendants (respondents) to insure the subject property from noon May 30, 1974 to noon May 31, 1974.

2. It was the duty and burden of the defendants to obtain insurance and to deliver some written evidence of such insurance, in the form of a binder or policy

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to the plaintiffs (petitioners) as of May 30, or at least within a reasonable time thereafter.

3. The evidence is undisputed that between May 30, 1974 and June 13, 1974 (the date on which suit was filed), the defendants failed to communicate the existence of the alleged "oral binder" to the plaintiffs, nor was a copy of same ever reduced to writing by Coral Ridge Insurance Agency. Such failure constitutes a breach of the defendants' obligation under the mortgage to furnish a policy of insurance "to be held by, and payable to, said mortgagee(s)."

4. It is extremely doubtful from the evidence and the Court, therefore, cannot find that the subject property was covered by insurance from July 15, 1974, to August 23, 1974.

5. The plaintiffs were justified in believing that the security for their mortgage was in jeopardy, and they were justified in accelerating the balance due on the mortgage and in obtaining their own insurance. The plaintiffs were also justified in consulting their attorneys and filing suit to protect their mortgage security.

6. The Court finds that the delivery of the New York Central Mutual Fire Insurance Company policy on November 14, 1974, did not constitute delivery within a reasonable time.

7. The Court also notes that there was a total lack of communication between the parties and that the defendants individually and their agents failed to notify the plaintiffs that insurance was being sought or otherwise to keep them informed of their progress in obtaining insurance.

8. The Court further finds that it was the duty and burden of the defendants to take the affirmative action to obtain insurance, to deliver the insurance policy to the plaintiffs, and to communicate their efforts and progress in accomplishing such ends.

Accordingly, the trial judge entered a final judgment of foreclosure in favor of petitioners.

It is well-established that courts of equity may refuse to foreclose a mortgage when an acceleration of the due date would render the acceleration unconscionable and the result

would be inequitable and unjust. Clark v. Lachenmeier, 237 So.2d 583 (Fla.2d DCA 1970); Campbell v. Werner, 232 So.2d 252 (Fla. 3d DCA 1970); Schechtman v. Grobbel, 226 So.2d 1 (Fla. 2d DCA 1969). Consistent with this principle, courts have denied foreclosure of a mortgage where breach of the mortgage was merely a technical one and such breach did not place the security in jeopardy. See Martin v. McGee, 82 So.2d 736 (Fla.1955); Schechtman v. Grobbel, supra. However, the presumption of correctness which surrounds a final judgment on review, Cohen v. Mohawk, Inc., 137 So.2d 222 (Fla.1962); Williams v. Williams, 85 So.2d 225 (Fla.1955); Staton v. Staton, 231 So.2d 531 (Fla. 1st DCA 1970); American Fidelity Fire Insurance Co. v. Clark, 174 So.2d 106 (Fla. 3d DCA 1965), compels the conclusion that the trial judge in the case sub judice properly applied this principle in determining the propriety of a judgment of foreclosure in favor of petitioners. Our conclusion is buttressed by the foregoing findings of the trial judge: Although he determined that "(a) technical default occurred by failure of the (respondents) to insure the subject property," he further found that petitioners "were justified in believing that the security for their mortgage was in jeopardy, and they were justified in accelerating the balance due on the mortgage. . . ." The effect of these findings of fact, coupled with entry of final judgment of foreclosure in favor of petitioners, is a determination that despite the technical nature of respondents' default, the security was in fact placed in jeopardy and, accordingly, foreclosure was proper. In short, the chancellor exercised his discretion based on his assessment of the testimony and evidence and based on an application of the correct rule of law.

On appeal, however, the District Court of Appeal, Fourth District, reversed the final

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judgment and remanded the cause. An obvious reevaluation of the evidence in a de novo consideration thereof, contrary to the rule of Westerman v. Shell's City, Inc., supra, is apparent in the district court's holding that "the trial judge erred in entering final judgment of foreclosure of a mortgage on a harmless technical breach for it would be inequitable and unjust." This holding necessarily involves a finding, in clear contradiction of that of the trial court, that the security was not in fact placed in jeopardy as a result of respondents' breach. There being no express or apparent finding of an abuse of discretion by the trial court, the action of the appellate court is not justified.

Accordingly, the petition for writ of certiorari is granted, the decision of the District Court of Appeal, Fourth District, is quashed, and this cause is remanded to that court with instructions to reinstate the judgment of the trial court.

It is so ordered.

OVERTON, C. J., and ADKINS, BOYD and HATCHETT, JJ., concur.

Page 1218
396 So.2d 1218
Laura D. DUKE, a/k/a Laura Manuel et al., Appellant,
v.
Lela B. REED, Appellee.
No. 80-2382.
District Court of Appeal of Florida, Third District.
April 21, 1981.

Page 1219

Richard N. Friedman, Miami, for appellants.

Manners, Amoon, Whatley & Tucker and Kenneth J. Duckworth, Miami, for appellee.

Before HUBBART, C. J., and BASKIN and FERGUSON, JJ.

PER CURIAM.

By this interlocutory appeal, we are asked to review a non-final trial court order which: (a) grants summary judgment as to liability only for the plaintiff on a mortgage foreclosure count in a multi-count complaint; and (b) makes various other interlocutory rulings. We have jurisdiction to review the grant of summary judgment to the plaintiff, but have no jurisdiction to review the other rulings made by the court below. Art. V. § 4(b)(1), Fla.Const.; Fla.R.App.P. 9.130(a)(3)(C)(iv).

The trial court's order granting summary judgment on the mortgage foreclosure count in this case is reversed and the cause is remanded for further proceedings as, in our view, the record reveals two genuine issues of material fact as to: (a) whether the defendants were in default of the subject mortgage or had, in fact, properly tendered the overdue mortgage payment herein to the plaintiff at a place which the parties had implicitly agreed upon within the thirty (30) day grace period allowed by the mortgage note; and (b) if not, whether the defendants were given proper notice that the plaintiff intended to exercise her option to declare the entire amount of the subject note due prior to the defendants' tender of the above overdue mortgage payment. See e. g., Holl v. Talcott, 191 So.2d 40, 43-44 (Fla.1966); River Holding Co. v. Nickel, 62 So.2d 702 (Fla.1953). The appeal from the balance of the rulings made by the trial court in the order under review is dismissed for lack of jurisdiction.

Reversed in part; dismissed in part.

Select Year: 2009 Go

The 2009 Florida Statutes

Title XXXIX	Chapter 687	View Entire
COMMERCIAL RELATIONS	INTEREST AND USURY; LENDING PRACTICES	Chapter

687.02 "Usurious contracts" defined.--

(1) All contracts for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 18 percent per annum simple interest are hereby declared usurious. However, if such loan, advance of money, line of credit, forbearance to enforce the collection of a debt, or obligation exceeds $500,000 in amount or value, then no contract to pay interest thereon is usurious unless the rate of interest exceeds the rate prescribed in s. 687.071.

(2) As amended by chapter 79-592, Laws of Florida, chapter 79-274, Laws of Florida, which amended subsection (1):

(a) Shall apply only to loans, advances of credit, or lines of credit made on or subsequent to July 1, 1979, and to loans, advances of credit, or lines of credit made prior to that date if the lender has the legal right to require full payment or to adjust or modify the interest rate, by renewal, assumption, reaffirmation, contract, or otherwise; and

(b) Shall not be construed as diminishing the force and effect of any laws applying to loans, advances of credit, or lines of credit, other than to those mentioned in paragraph (a), completed prior to July 1, 1979.

History.--s. 1, ch. 4022, 1891; GS 3104; s. 1, ch. 5960, 1909; RGS 4850; CGL 6937; s. 1, ch. 29705, 1955; s. 1, ch. 73-298; ss. 12, 15, ch. 79-274; s. 1, ch. 79-592; s. 1, ch. 80-310.

965 So.2d 151

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant,

v.

George AZIZE; Unknown Spouse of George Azize; John Doe, Jane Doe as Unknown Tenant(s) In Possession of the Subject Property # 1; John Doe, Jane Doe as Unknown Tenant(s) In Possession of the Subject Property # 2, Appellees.

No. 2D05-4544.

District Court of Appeal of Florida, Second District.

February 21, 2007.

Robert M. Brochin of Morgan, Lewis & Bockius LLP, Miami, for Appellant.

No appearance for Appellees.

John R. Hamilton of Foley & Lardner, LLP, Orlando, for Amicus Curiae Federal National Mortgage Association.

Elliot H. Scherker of Greenberg Traurig, P.A., Miami, for Amicus Curiae Chase Home Finance LLC.

[965 So.2d 152]

William P. Heller of Akerman Senterfitt, Fort Lauderdale, for Amicus Curiae Countrywide Home Loans, Inc.

Michael Ray Gordon and Kenton W. Hambrick, McLean, VA, for Amicus Curiae Federal Home Loan Mortgage Corporation.

W. Bard Brockman of Powell Goldstein, LLP, Atlanta, GA, for Amicus Curiae Mortgage Bankers Association.

April Carrie Charney, Jacksonville, for Amicus Curiae Jacksonville Area Legal Aid, Inc.

DAVIS, Judge.

Mortgage Electronic Registration Services, Inc. (MERS), appeals the trial court's dismissal with prejudice of its complaint seeking reestablishment of a lost note and the foreclosure of a mortgage. The trial court determined that MERS was not a proper party to bring the action and dismissed the complaint with prejudice for failure to state a cause of action. We reverse.

On May 27, 2004, George Azize executed and delivered a promissory note and a mortgage as part of the closing in the purchase of real property in Pinellas County. The note listed Aegis Lending Corporation as payee. However, the mortgage given to secure the note identified MERS as the mortgagee. The mortgage further specified that in this capacity MERS was serving as the nominee for the lender, which was identified as Aegis. The mortgage included the following language:

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

The mortgage also specified, "MERS is the mortgagee under this Security Instrument."

In February 2005, MERS filed a complaint seeking to reestablish a promissory note and to foreclose a mortgage. The complaint identified the plaintiff as "Mortgage Electronic Registration Systems, Inc. as nominee for Aegis Lending Corporation." The complaint alleged that Azize was in default of the note and mortgage for failing to make the payment due on September 1, 2004, and all payments due subsequent to that date. In count one of the two-count complaint, MERS alleged that it was the owner of the note and that the note had been lost or destroyed after MERS acquired it.

Specifically, MERS alleged that because the note was in its possession when it was lost, MERS was entitled to enforce the note. The complaint also explained that the loss of the note was not due to a transfer by MERS or a lawful seizure. The complaint did not allege the circumstances by which MERS came into possession of the note, specifying only that MERS was the owner and holder of the note. MERS asked the trial court to reestablish the lost note.

In count two, MERS sought foreclosure of the mortgage based on the default by Azize. MERS alleged that it owned the note and mortgage and that the note was secured by the mortgage.

No answer or responsive pleading was filed by Azize. The trial court, however, sua sponte issued an order to show cause why complaint should not be dismissed for lack of proper plaintiff. In this order, the trial court noted that multiple cases were pending in which MERS was seeking foreclosure

[965 So.2d 153]

of mortgages and that, in each case, the plaintiff was either MERS, individually, or MERS acting as nominee for another plaintiff.[1] Because the trial court questioned how MERS could file as plaintiff in the capacity of nominee of another corporation, the order set a show cause hearing to allow MERS to demonstrate that it was a proper party to bring the action.

Although counsel for MERS filed a memorandum of law addressing the general issue raised by the trial court's order and appeared at the hearing, neither Azize nor anyone on his behalf was present at the hearing. Following the hearing, the trial court dismissed all of the pending cases in which MERS sought mortgage foreclosures, entering a specific order in this case that referred to a much longer general order that addressed the common issue of all the cases. Although many issues were discussed at the hearing and in the general order, this court need not address all of those issues as the case sub judice is limited to the issues presented by the pleadings and addressed by the trial court, which present the question of whether MERS is the owner of the note.

This court reviews a trial court's decision to dismiss a complaint de novo. *Trotter v. Ford Motor Credit Corp.*, 868 So.2d 593 (Fla. 2d DCA 2004). Similarly, this court reviews findings regarding standing de novo. *Fox v. Prof'l Wrecker Operators of Fla., Inc.*, 801 So.2d 175 (Fla. 5th DCA 2001). In most circumstances, the trial court's dismissal of a complaint for failure to state a cause of action should be without prejudice to the plaintiff's amendment of the complaint to cure the deficiencies. *See Wittington Condo. Apartments v. Braemar Corp.*, 313 So.2d 463, 466 (Fla. 4th DCA 1975) (stating that a pleading's failure to allege the proper representation is not a basis for a final dismissal until an opportunity to amend has been granted).

The trial court's decision, as reflected in its general order, is based on its finding that MERS could never, under any circumstances, be the proper plaintiff to bring the foreclosure action. Specifically, the trial court found that because MERS was not the owner of the beneficial interest in the note, even if the lost note was reestablished and MERS proved that it was the owner and holder of the note, MERS could not properly bring the foreclosure action.

We disagree. The holder of a note has standing to seek enforcement of the note. *See Troupe v. Redner*, 652 So.2d 394 (Fla. 2d DCA 1995); *see also Philogene v. ABN Amro Mortgage Group, Inc.*, 948 So.2d 45, 45 (Fla. 4th DCA 2006) ("[W]e conclude that ABN had standing to bring and maintain a mortgage foreclosure action since it demonstrated that it held the note and mortgage in question."). Furthermore, standing is broader than just actual ownership of the beneficial interest in the note. "The Florida real party in interest rule, Fla. R. Civ. P. 1.210(a), permits an action to be prosecuted in the name of someone other than, but acting for, the real party in interest." *Kumar*

Corp. v. Nopal Lines, Ltd., 462 So.2d 1178, 1183 (Fla. 3d DCA 1985).

Here, MERS's counsel explained to the trial judge at the hearing that, in these transactions, the notes are frequently transferred to MERS for the purpose of foreclosure without MERS actually obtaining the beneficial interest in the note. Although

[965 So.2d 154]

the complaint does not allege how or why MERS came to be the owner and holder of the note, the trial court's dismissal was not based on this deficit.[2] Rather, the trial court found that even if MERS was the holder of the note based on a transfer by the lender or a servicing agent, MERS could never be a proper plaintiff because it did not own the beneficial interest in the note.[3] This was an erroneous conclusion.

MERS alleged that it is the owner and holder of the note and mortgage, and that allegation has not been contested by responsive pleading. Assuming that the complaint properly states a cause of action to reestablish the note and that MERS can show prima facie proof of such allegations, MERS would have standing as the owner and holder of the note and mortgage to proceed with the foreclosure. We also note that the trial court's conclusion that MERS further lacked standing because one corporation cannot serve as the agent for another corporation is incorrect. *See* 2 Fla. Jur.2d *Agency and Employment* § 3 (2005). Although the trial judge was particularly concerned about MERS's status as nominee of Aegis, in light of the allegations of the complaint, the language contained in the note and mortgage, and Azize's failure to contest the allegations, the issue of MERS's ownership and holding of the note and mortgage was not properly before the trial court for resolution at this stage of the proceedings. Accordingly, we reverse the dismissal and remand for further consideration.

Reversed and remanded.

NORTHCUTT and SILBERMAN, JJ., Concur.

Notes:

1. The same trial court order of dismissal was filed in twenty separate mortgage foreclosure actions.

2. Since the trial court did not base its ruling on this issue, we offer no opinion as to whether the complaint fails to properly plead a cause of action without this information being alleged.

3. MERS's counsel explained to the trial court at the hearing that notes such as the one executed in this case are frequently sold on the secondary mortgage market and then often sold again to investors, such as insurance companies or mutual funds. As such, technically, there may be several owners of the beneficial interest in a note. Additionally, to facilitate the handling of these transactions, the owners contract with a servicing agent to collect the payments and distribute the proceeds to the owners. MERS's counsel advised the court that such collection agents have been determined to have standing to seek enforcement of such notes for the benefit of the owners. *See Greer v. O'Dell*, 305 F.3d 1297 (11th Cir.2002).

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28 So.3d 976
David VERIZZO, Appellant,
v.
The BANK OF NEW YORK, as Successor Trustee Under Novastar Mortgage Funding Trust, Series 2006-3, Appellee.
No. 2D08-4647.
District Court of Appeal of Florida, Second District.
March 3, 2010.

David Verizzo, pro se.

[28 So.3d 977]

Patricia A. Arango of Law Offices of Marshall C. Watson, P.A., Fort Lauderdale, for Appellee.

SILBERMAN, Judge.

David Verizzo, pro se, appeals a final judgment of foreclosure entered after the trial court granted the motion for summary judgment filed by the Bank of New York, as successor trustee under Novastar Mortgage Funding Trust, Series 2006-3 (the Bank). Because the Bank's summary judgment evidence was not timely served and filed and because a genuine issue of material fact remains, we reverse and remand for further proceedings.

The Bank filed a two-count complaint against Verizzo seeking to reestablish a lost promissory note and to foreclose a mortgage on real property. Included in the attachments to the complaint was a copy of the mortgage. The mortgage indicated that the lender was Novastar Mortgage, Inc., a Virginia corporation (Novastar), and that the mortgagee was Mortgage Electronic Registration Systems, Inc. (MERS), acting as a nominee for Novastar. The attachments to the complaint did not include copies of the note or any assignment of the note and mortgage to the Bank. Verizzo filed a motion for enlargement of time to respond to the complaint. The Bank agreed to the entry of an order allowing Verizzo to file a response within 20 days from the date of entry of the order.

On August 5, 2008, before Verizzo had responded to the complaint, the Bank served its motion for summary final judgment of foreclosure. The summary judgment hearing was scheduled for August 29, 2008. On August 18, 2008, the Bank served by mail a notice of filing the original promissory note, the original recorded mortgage, and the original recorded assignment of mortgage. The assignment reflects that MERS assigned the note and mortgage to the Bank of New York. However, the note bears an endorsement, without recourse, signed by Novastar stating, "Pay to the Order of: JPMorgan Chase Bank, as Trustee."

On the date of the summary judgment hearing, Verizzo filed a memorandum in opposition to the Bank's motion. He argued, among other things, that his response to the complaint was not yet due in accordance with the agreement for enlargement of time, that the Bank did not timely file the documents on which it relied in support of its motion for summary judgment, and that the documents were insufficient to establish that the Bank was the owner and holder of the note and mortgage.

On August 29, 2008, the trial court granted the motion for summary judgment and entered a final judgment of foreclosure. We review the summary judgment by a de novo standard. Estate of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Care Ctr., Inc., 928 So.2d 1272, 1274 (Fla. 2d DCA 2006). "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.'" Id. (quoting Fla. R. Civ. P. 1.510(c)). If a plaintiff files a motion for summary judgment before the defendant answers the complaint, "the plaintiff

must conclusively show that the defendant cannot plead a genuine issue of material fact." E.J. Assocs., Inc. v. John E. & Aliese Price Found., Inc., 515 So.2d 763, 764 (Fla. 2d DCA 1987).

Rule 1.510(c) requires that the movant "serve the motion at least 20 days

[28 So.3d 978]

before the time fixed for the hearing[] and shall also serve at that time copies of any summary judgment evidence on which the movant relies that has not already been filed with the court." Further, cases have interpreted the rule to require that the movant also file the motion and documents with the court at least twenty days before the hearing on the motion. See Mack v. Commercial Indus. Park, Inc., 541 So.2d 800, 800 (Fla. 4th DCA 1989); Marlar v. Quincy State Bank, 463 So.2d 1233, 1233 (Fla. 1st DCA 1985); Coastal Caribbean Corp. v. Rawlings, 361 So.2d 719, 721 (Fla. 4th DCA 1978). The promissory note and assignment constituted a portion of the evidence that the Bank relied on in support of its motion for summary judgment, and it is undisputed that the Bank did not attach those documents to the complaint or serve them at least twenty days before the hearing date. In fact, although the Bank's notice of filing bears a certificate of service indicating that the notice was served on August 18, 2008, the notice and the documents were not actually filed with the court until August 29, 2008, the day of the summary judgment hearing.

In addition to the procedural error of the late service and filing of the summary judgment evidence, those documents reflect that at least one genuine issue of material fact exists. The promissory note shows that Novastar endorsed the note to "JPMorgan Chase Bank, as Trustee." Nothing in the record reflects assignment or endorsement of the note by JPMorgan Chase Bank to the Bank of New York or MERS. Thus, there is a genuine issue of material fact as to whether the Bank of New York owns and holds the note and has standing to foreclose the mortgage. See Mortgage Electronic Registration Sys., Inc. v. Azize, 965 So.2d 151, 153 (Fla. 2d DCA 2007) (recognizing that the owner and holder of a note and mortgage has standing to proceed with a mortgage foreclosure action); Philogene v. ABN Amro Mortgage Group, Inc., 948 So.2d 45, 46 (Fla. 4th DCA 2006) (determining that the plaintiff "had standing to bring and maintain a mortgage foreclosure action since it demonstrated that it held the note and mortgage in question").

Therefore, based on the late service and filing of the summary judgment evidence and the existence of a genuine issue of material fact, we reverse the final summary judgment and remand for further proceedings.

Reversed and remanded.

WHATLEY and MORRIS, JJ., Concur.

Page 1
JERRY A. RIGGS, SR., Appellant,
v.
AURORA LOAN SERVICES, LLC, Appellee.
No. 4D08-4635.
District Court of Appeal of Florida, Fourth District.
April 21, 2010.

reversed

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County, Thomas M. Lynch, IV, Judge, L.T. Case No. CACE 07-17670 (14).

Jerry A. Riggs, Sr., Cooper City, pro se.

Diana B. Matson and Roy A. Diaz of Smith, Hiatt & Diaz, P.A., Fort Lauderdale, for appellee.

STEVENSON, J.

Aurora Loan Services, LLC, filed a mortgage foreclosure action against Jerry Riggs, Sr., alleging that it was the "owner and holder" of the underlying promissory note. Aurora filed a copy of the mortgage and a copy of the promissory note, which named Riggs as the mortgagor and First Mangus Financial Corporation as the mortgagee. The promissory note reflected an "endorsement in blank," which is a stamp with a blank line where the name of the assignee could be filled in above a pre-printed line naming First Mangus. Aurora moved for summary judgment, and, at the hearing, produced the original mortgage and promissory note reflecting the original endorsement in blank. The trial court granted summary judgment in favor of Aurora over Riggs' objections that Aurora's status as lawful "owner and holder" of the note was not conclusively established by the record evidence. We agree with Riggs and reverse the summary judgment.

The Second District confronted a similar situation in BAC Funding Consortium, Inc. ISAOA/ATIMA v. Jean-Jacques, 28 So. 3d 936 (Fla. 2d DCA 2010), when the trial court granted alleged assignee U.S. Bank's motion for summary judgment. In order to establish its standing to foreclose, U.S. Bank filed an assignment of mortgage, which, as described, is comparable to the endorsement in blank in the instant case. Id. at 937. That court reversed because, inter alia, "[t]he incomplete, unsigned, and unauthenticated assignment attached as an exhibit to U.S. Bank's response to BAC's motion to dismiss did not constitute admissible evidence establishing U.S. Bank's standing to foreclose the note and mortgage." Id. at 939. The court in BAC Funding

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Consortium, properly noted that U.S. Bank was "required to prove that it validly held the note and mortgage it sought to foreclose." Id.

In the instant case, the endorsement in blank is unsigned and unauthenticated, creating a genuine issue of material fact as to whether Aurora is the lawful owner and holder of the note and/or mortgage. As in BAC Funding Consortium, there are no supporting affidavits or deposition testimony in the record to establish that Aurora validly owns and holds the note and mortgage, no evidence of an assignment to Aurora, no proof of purchase of the debt nor any other evidence of an effective transfer. Thus, we reverse the summary judgment and remand for further proceedings. We find no merit in any of the other arguments raised on appeal.

Reversed and remanded.

GROSS, C.J., and POLEN, J., concur.

Not final until disposition of timely filed motion for rehearing.

Page 1
JERRY A. RIGGS, SR., Appellant,
v.
AURORA LOAN SERVICES, LLC, Appellee.
No. 4D08-4635.
District Court of Appeal of Florida, Fourth District.
June 16, 2010.

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County, Thomas M. Lynch, IV, Judge, L.T. Case No. CACE 07-17670 (14).

Jerry A. Riggs, Sr., Cooper City, pro se.

Diana B. Matson and Roy A. Diaz of Smith, Hiatt & Diaz, P.A., Fort Lauderdale, for appellee.

ON MOTION FOR REHEARING

PER CURIAM.

We grant appellee Aurora Loan Service, LLC's motion for rehearing, withdraw our previous opinion of April 21, 2010, and replace it with the following.

Aurora filed a mortgage foreclosure action against Jerry Riggs, Sr., alleging that it was the "owner and holder" of the underlying promissory note. With the complaint, Aurora filed copies of the mortgage and promissory note, which named Riggs as the mortgagor and First Mangus Financial Corporation as the mortgagee. Aurora asserted that the original note was in its possession.

Aurora moved for summary judgment. In support of the motion, it filed two affidavits attesting that it owned and held the note and mortgage. At the hearing on the motion, Aurora produced the original mortgage and promissory note. The note had an indorsement in blank with the hand printed signature of Humberto Alday, an agent of the indorser, First Mangus. The circuit court granted summary judgment in favor of Aurora over Riggs's objections that Aurora's status as lawful "owner and holder" of the note was not conclusively established by the record evidence.

We agree with the circuit court that Aurora sufficiently established that it was the holder of the note.

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Aurora's possession of the original note, indorsed in blank, was sufficient under Florida's Uniform Commercial Code to establish that it was the lawful holder of the note, entitled to enforce its terms. The note was a negotiable instrument subject to the provisions of Chapter 673, Florida Statutes (2008). An indorsement requires a "signature." § 673.2041(1), Fla. Stat. (2008). As an agent of First Magnus, Alday's hand printed signature was an effective signature under the Code. See §§ 673.4011(2)(b), 673.4021, Fla. Stat. (2008). The indorsement in this case was not a "special indorsement," because it did not "identif[y] a person to whom" it made the note payable. § 673.2051(1), Fla. Stat. (2008). Because it was not a special indorsement, the indorsement was a "blank indorsement," which made the note "payable to bearer" and allowed the note to be "negotiated by transfer of possession alone." § 673.2051(2), Fla. Stat. (2008). The negotiation of the note by its transfer of possession with a blank indorsement made Aurora Loan the "holder" of the note entitled to enforce it. §§ 673.2011(1), 673.3011(1), Fla. Stat. (2008).

There is no issue of authentication. The borrower did not contest that the note at issue was the one he executed in the underlying mortgage transaction. With respect to the authenticity of the indorsement, the note was self authenticating. Subsection 90.902(8), Florida Statutes (2008), provides that "[c]ommercial papers and signatures thereon and documents relating to them [are self authenticating], to the extent provided in the

Uniform Commercial Code." Subsection 673.3081(1), Florida Statutes (2008), provides that "[i]n an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings." Nothing in the pleadings placed the authenticity of Alday's signature at issue.

We distinguish BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques, 28 So. 3d 936 (Fla. 2d DCA 2010), on its facts. In that case, the second district reversed a summary judgment of foreclosure where the plaintiff seeking foreclosure filed no supporting affidavits and the original note did not identify the plaintiff as its holder. Id. at 938-39. The court explained its holding by pointing out that the plaintiff had failed to offer "evidence of a valid assignment, proof of purchase of the debt, or evidence of an effective transfer." Id. at 939. Unlike the plaintiff in BAC Funding, Aurora offered both affidavits and the original note with a blank endorsement that supported its claim that it was the proper holder of the note and mortgage.

Affirmed.

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GROSS, C.J., and POLEN and STEVENSON, JJ., concur.

28 So.3d 936

BAC FUNDING CONSORTIUM INC. ISAOA/ATIMA, Appellant,

v.

Ginelle JEAN-JACQUES, Serge Jean-Jacques, Jr., and U.S. Bank National Association, as Trustee for the C-Bass Mortgage Loan Asset Backed Certificates, Series 2006-CB5, Appellees.

No. 2D08-3553.

District Court of Appeal of Florida, Second District.

February 12, 2010.

F. Malcolm Cunningham, Jr., and Amy Fisher of The Cunningham Law Firm, P.A., West Palm Beach, for Appellant.

[28 So.3d 937]

Cindy L. Runyan of Florida Default Law Group, LP, Tampa, for Appellee U.S. Bank National Association.

No appearance for Appellees Ginelle M. Jean-Jacques and Serge Jean-Jacques, Jr.

VILLANTI, Judge.

BAC Funding Consortium Inc. ISAOA/ATIMA (BAC) appeals the final summary judgment of foreclosure entered in favor of U.S. Bank National Association, as Trustee for the C-Bass Mortgage Loan Asset Backed Certificates, Series 2006-CB5 (U.S. Bank). Because summary judgment was prematurely entered, we reverse and remand for further proceedings.

On December 14, 2007, U.S. Bank filed an unverified mortgage foreclosure complaint naming the Jean-Jacqueses and BAC as defendants. The complaint included one count for foreclosure of the mortgage and a second count for reestablishment of a lost note. U.S. Bank attached a copy of the mortgage it sought to foreclose to the complaint; however, this document identified Fremont Investment and Loan as the "lender" and Mortgage Electronic Registrations Systems, Inc., as the "mortgagee." U.S. Bank also attached an "Adjustable Rate Rider" to the complaint, which also identified Fremont as the "lender."

Rather than answering the complaint, BAC responded by filing a motion to dismiss based on U.S. Bank's lack of standing. BAC argued that none of the attachments to the complaint showed that U.S. Bank actually held the note or mortgage, thus giving rise to a question as to whether U.S. Bank actually had standing to foreclose on the mortgage. BAC argued that the complaint should be dismissed based on this lack of standing.

U.S. Bank filed a written response to BAC's motion to dismiss. Attached as Exhibit A to this response was an "Assignment of Mortgage." However, the space for the name of the assignee on this "assignment" was blank, and the "assignment" was neither signed nor notarized. Further, U.S. Bank did not attach or file any document that would authenticate this "assignment" or otherwise render it admissible into evidence.

For reasons not apparent from the record, BAC did not set its motion to dismiss for hearing. Subsequently, U.S. Bank filed a motion for summary judgment. At the same time, U.S. Bank voluntarily dismissed its count for reestablishment of a lost note, and it filed the "Original Mortgage and Note" with the court. However, neither of these documents identified U.S. Bank as the holder of the note or mortgage in any manner. U.S. Bank did not file the original of the purported "assignment" or any other document to establish that it had standing to foreclose on the note or mortgage.

Despite the lack of any admissible evidence that U.S. Bank validly held the note and mortgage, the trial court granted summary judgment of foreclosure in favor of U.S. Bank. BAC now appeals, contending that the summary judgment was improper because U.S. Bank never established its standing to foreclose.

The summary judgment standard is well-established. "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., Inc., 928 So.2d 1272, 1274 (Fla. 2d DCA 2006) (quoting Fla. R. Civ. P. 1.510(c)). When a plaintiff moves for summary

[28 So.3d 938]

judgment before the defendant has filed an answer, "the burden is upon the plaintiff to make it appear to a certainty that no answer which the defendant might properly serve could present a genuine issue of fact." Settecasi v. Bd. of Pub. Instruction of Pinellas County, 156 So.2d 652, 654 (Fla. 2d DCA 1963); see also W. Fla. Cmty. Builders, Inc. v. Mitchell, 528 So.2d 979, 980 (Fla. 2d DCA 1988) (holding that when plaintiffs move for summary judgment before the defendant files an answer, "it [is] incumbent upon them to establish that no answer that [the defendant] could properly serve or affirmative defense it might raise" could present an issue of material fact); E.J. Assocs., Inc. v. John E. & Aliese Price Found., Inc., 515 So.2d 763, 764 (Fla. 2d DCA 1987) (holding that when a plaintiff moves for summary judgment before the defendant files an answer, "the plaintiff must conclusively show that the defendant cannot plead a genuine issue of material fact"). As these cases show, a plaintiff moving for summary judgment before an answer is filed must not only establish that no genuine issue of material fact is present in the record as it stands, but also that the defendant could not raise any genuine issues of material fact if the defendant were permitted to answer the complaint.

In this case, U.S. Bank failed to meet this burden because the record before the trial court reflected a genuine issue of material fact as to U.S. Bank's standing to foreclose the mortgage at issue. The proper party with standing to foreclose a note and/or mortgage is the holder of the note and mortgage or the holder's representative. See Mortgage Elec. Registration Sys., Inc. v. Azize, 965 So.2d 151, 153 (Fla. 2d DCA 2007); Troupe v. Redner, 652 So.2d 394, 395-96 (Fla. 2d DCA 1995); see also Philogene v. ABN Amro Mortgage Group, Inc., 948 So.2d 45, 46 (Fla. 4th DCA 2006) ("[W]e conclude that ABN had standing to bring and maintain a mortgage foreclosure action since it demonstrated that it held the note and mortgage in question."). While U.S. Bank alleged in its unverified complaint that it was the holder of the note and mortgage, the copy of the mortgage attached to the complaint lists "Fremont Investment & Loan" as the "lender" and "MERS" as the "mortgagee." When exhibits are attached to a complaint, the contents of the exhibits control over the allegations of the complaint. See, e.g., Hunt Ridge at Tall Pines, Inc. v. Hall, 766 So.2d 399, 401 (Fla. 2d DCA 2000) ("Where complaint allegations are contradicted by exhibits attached to the complaint, the plain meaning of the exhibits control[s] and may be the basis for a motion to dismiss."); Blue Supply Corp. v. Novos Electro Mech., Inc., 990 So.2d 1157, 1159 (Fla. 3d DCA 2008); Harry Pepper & Assocs., Inc. v. Lasseter, 247 So.2d 736, 736-37 (Fla. 3d DCA 1971) (holding that when there is an inconsistency between the allegations of material fact in a complaint and attachments to the complaint, the differing allegations "have the effect of neutralizing each allegation as against the other, thus rendering the pleading objectionable"). Because the exhibit to U.S. Bank's complaint conflicts with its allegations concerning standing and the exhibit does not show that U.S. Bank has standing to foreclose the mortgage, U.S. Bank did not establish its entitlement to foreclose the mortgage as a matter of law.

Moreover, while U.S. Bank subsequently filed the original note, the note did not identify U.S. Bank as the lender or holder. U.S. Bank also did not attach an assignment or any other evidence to establish that it had purchased the note and mortgage. Further, it did not file any

supporting affidavits or deposition testimony to establish that it owns and holds the note

[28 So.3d 939]

and mortgage. Accordingly, the documents before the trial court at the summary judgment hearing did not establish U.S. Bank's standing to foreclose the note and mortgage, and thus, at this point, U.S. Bank was not entitled to summary judgment in its favor.

In this appeal, U.S. Bank contends that it was not required to file an assignment of the note or mortgage or otherwise prove that it validly held them in order to be entitled to summary judgment in its favor. We disagree for two reasons. First, because BAC had not yet answered the complaint, it was incumbent on U.S. Bank to establish that no answer that BAC could properly serve or affirmative defense that it might allege could raise an issue of material fact. Given the facial conflict between the allegations of the complaint and the contents of the exhibit to the complaint and other filings, U.S. Bank failed to meet this burden.

Second, regardless of whether BAC answered the complaint, U.S. Bank was required to establish, through admissible evidence, that it held the note and mortgage and so had standing to foreclose the mortgage before it would be entitled to summary judgment in its favor. Whether U.S. Bank did so through evidence of a valid assignment, proof of purchase of the debt, or evidence of an effective transfer, it was nevertheless required to prove that it validly held the note and mortgage it sought to foreclose. See Booker v. Sarasota, Inc., 707 So.2d 886, 889 (Fla. 1st DCA 1998) (holding that the trial court, when considering a motion for summary judgment in an action on a promissory note, was not permitted to simply assume that the plaintiff was the holder of the note in the absence of record evidence of such). The incomplete, unsigned, and unauthenticated assignment attached as an exhibit to U.S. Bank's response to BAC's motion to dismiss did not constitute admissible evidence establishing U.S. Bank's standing to foreclose the note and mortgage, and U.S. Bank submitted no other evidence to establish that it was the proper holder of the note and/or mortgage.

Essentially, U.S. Bank's argument in favor of affirmance rests on two assumptions: a) that a valid assignment or transfer of the note and mortgage exists, and b) that a valid defense to this action does not. However, summary judgment is appropriate only upon record proof—not assumptions. Given the vastly increased number of foreclosure filings in Florida's courts over the past two years, which volume has taxed both litigants and the judicial system and increased the risk of paperwork errors, it is especially important that trial courts abide by the proper standards and apply the proper burdens of proof when considering a summary judgment motion in a foreclosure proceeding.

Accordingly, because U.S. Bank failed to establish its status as legal owner and holder of the note and mortgage, the trial court acted prematurely in entering final summary judgment of foreclosure in favor of U.S. Bank. We therefore reverse the final summary judgment of foreclosure and remand for further proceedings.

Reversed and remanded for further proceedings.

ALTENBERND and SILBERMAN, JJ., Concur.

GREGORY TAYLOR, Appellant,
v.
DEUTSCHE BANK NATIONAL TRUST COMPANY, ETC., Appellee.
Case No. 5D09-4035

District Court Of Appeal Of The State Of Florida
Fifth District
JULY TERM 2010
August 6, 2010

George M. Gingo, Mims, Gregory D. Clark, Clearwater, and Matthew D. Weidner, St. Petersburg, for Appellant.

William Nussbaum and Thomasina F. Moore, of Butler & Hosch, P.A., Orlando, for Appellee.

Appeal from the Circuit Court for Brevard County, David E. Silverman, Judge.

MONACO, C.J.

The appellant, Gregory Taylor, appeals from a summary final judgment of foreclosure in favor of the appellee, Deutsche Bank National Trust Company, as Trustee. This is yet another in the nationwide series of cases dealing with the processing of mortgages, such as the one given by Mr. Taylor on his residential real property, by use of the system operated by a corporation known as Mortgage Electronic Registration Systems, Inc. ("MERS"). We affirm the final judgment in which the trial

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court concluded that the assignee of MERS had standing to foreclose Mr. Taylor's mortgage.

The MERS system was developed in 1993 by Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, the Government National Mortgage Association, the Mortgage Bankers Association of America, and several other major participants in the real estate mortgage field in order to track ownership interests in residential mortgages electronically. Under this program MERS members subscribe to the system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages. The participants agree to appoint MERS to act as their common agent on all mortgages registered by them in the MERS system, thus simplifying the packaging and transfer of mortgages on individual parcels. *See MERSCORP, Inc. v. Romaine,* 8 N.Y. 3d 90, 101, N.E. 2d 81, 83 (N.Y. 2006). As the third district has pointed out, it is the rub between the expanding use of electronic technology to track real estate transactions and our familiar and venerable real property laws that has generated the heat that led to this appeal and to countless others nationally. *See Mortgage Elec.Registration Sys., Inc., v. Revoredo,* 955 So. 2d 33, 34 (Fla. 3d DCA 2007).

In our case Deutsche Bank brought suit to foreclose a mortgage on real estate owned by Mr. Taylor. The complaint alleged that Mr. Taylor executed and delivered a mortgage and promissory note in favor of the assignor of Deutsche Bank, in the original principal amount of $168,000. The complaint further alleged that Deutsche Bank was the present owner and constructive holder of the promissory note and mortgage. Both the mortgage and an adjustable rate note were attached to the complaint.

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The note, which identified the initial lender as First Franklin, a division of National City Bank of Indiana, contained the following language:

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder'.

The note identifies the mortgage that is dated the same date as the note, and instructs the borrower to the effect that the mortgage protects the "Note Holder" from possible losses in the event of non-payment. The note also describes the remedies that may be invoked by the lender if the borrower fails to pay the amounts due under the note and mortgage.

The mortgage defines "Lender" as First Franklin, and MERS as a separate corporation acting solely as a nominee for Lender and Lender's successors and assigns. MERS is specifically described (in bold print) as the "mortgagee under the Security Instrument." The mortgage indicates that it "secures to Lender (I) the repayment of the Loan, and all renewals, extensions and modifications of the Note, and (II) the performance of Borrower's covenants and agreements under this Security Instrument and the Note." The mortgage then specifies that the borrower, Mr. Taylor, "does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) *and to the successors and assigns of MERS,* the following described property...." Finally, the mortgage expressly provides that:

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) *has the right to exercise any and all of those interests, including, but not limited to, the right to foreclose and sell the Property, and to take any action required of*

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Lender including, but not limited to, releasing and canceling the Security Instrument.

(Emphasis added).

One other document is critical to an understanding of this case. Attached to the complaint was an assignment of mortgage that indicated that MERS, as nominee for First Franklin, assigned the mortgage to Deutsche Bank, the appellee. The assignment indicated that the mortgage executed by Mr. Taylor on the property in question assigned to Deutsche Bank the "full benefit of all the powers and all the covenants and Provisions therein contained, and the said Assignor hereby grants and conveys Unto the said Assignee, the Assignor's beneficial interest under the Mortgage...[t]o Have and to Hold the said Mortgage and Note, and also the said property unto the said Assignee forever, subject to the terms contained in said Mortgage and Note."

Mr. Taylor initially answered the complaint and admitted that the note and mortgage had been assigned to Deutsche Bank. There does not appear to be an issue regarding the fact that the mortgage loan was in payment default. Thereafter Deutsche Bank moved for summary judgment and filed the original note, mortgage and assignment with the trial court. The motion recited that the loan was in default; that Deutsche Bank owned and held the note and mortgage; and that it was entitled to recover its principal, interest, late charges, costs, attorney's fees and other expenses.

Mr. Taylor, however, then changed attorneys and filed an amended answer and affirmative defenses, among other documents.[1] The amended answer denied that the note was assigned by MERS to Deutsche Bank and denied that the mortgage was

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properly assigned to it. The affirmative defenses, among other things, alleged that Deutsche Bank did not have standing to enforce the note because the exhibits attached to the complaint were insufficient to demonstrate standing and inconsistent with Deutsche Bank's assertion that it owned the note and mortgage.

When Deutsche Bank filed an amended motion for summary judgment, the trial court after conducting a duly noticed hearing entered final summary judgment of foreclosure in favor of Deutsche Bank. There is no transcript of the hearing. No motion for rehearing was filed. On

the same day that the summary judgment was entered, Mr. Taylor filed an opposition to the motion for summary final judgment. The opposition asserted that there was disputed evidence regarding whether Deutsche Bank was entitled to enforce the Note.

Mr. Taylor argued before the trial court, as he does before this court, that because the note was not indorsed and contained neither an allonge[2] nor a specific assignment, it was payable only to First Franklin, and that Deutsche Bank, therefore, had no standing to attempt to enforce it. Mr. Taylor points out that section 673.2011, Florida Statutes (2009), requires, "[e]xcept for negotiation by remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone." He argues that the note in the present case carries no indorsement and is not a bearer instrument. Under the theory of his defense, therefore,

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only the "holder," in this case First Franklin or arguably MERS, could seek foreclosure of his mortgage. He also cites section 673.2031(3), Florida Statutes (2009), entitled "Transfer of instrument, rights acquired by transfer," which states that:

Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

Finally, Mr. Taylor argues that according to the MERS website, MERS is not a beneficial owner of the mortgage loan and it, therefore, cannot transfer any interest.

We begin our consideration of this case with section 673.3011, Florida Statutes (2009). That statute, which defines the persons entitled to enforce a negotiable instrument, reads as follows:

The term "person entitled to enforce" an instrument means:

(1) The holder of the instrument;

(2) A nonholder in possession of the instrument who has the rights of a holder; or

(3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to s. 673.3091 or s. 673.4181(4).

A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

Because a promissory note is a negotiable instrument, and because a mortgage provides the security for the repayment of the note, this statute leads to the conclusion that the person having standing to foreclose a note secured by a mortgage may be either the holder of the note or a nonholder in possession of the note who has the rights of a holder. *BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques,* 28 So. 3d

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936, 938 (Fla. 2d DCA 2010). Thus, Mr. Taylor's foundational argument--that only a holder in due course can enforce the note by foreclosing the mortgage--is flawed in a significant way. The statute allows a nonholder with certain specific characteristics to foreclose as well.

In the present case MERS is identified in the mortgage as a corporation that "is acting solely as a nominee for Lender," and as "the mortgagee under this Security Agreement." The mortgage also contains the following provision:

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument,

but if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the *right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property,* and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

(Emphasis added). It appears, consequently, that the mortgage document, reciting the explicit agreement of Mr. Taylor, grants to MERS the status of a nonholder in possession as that position is defined by section 673.3011.

MERS, however, is not the party that foreclosed the subject note and mortgage. Rather, Deutsche Bank is. As a general proposition, evidence of a valid assignment, proof of purchase of the debt, or evidence of an effective transfer, is required to prove that a party validly holds the note and mortgage it seeks to foreclose. *See Booker v. Sarasota, Inc.,* 707 So. 2d 886, 889 (Fla. 1st DCA 1998); *BAC Funding Consortium, Inc. ISAOA/ATIMIA.* The written assignment filed as part of the summary judgment documents in the case before us specifically recites that MERS assigned to the appellee, Deutsche Bank, "the Mortgage *and Note,* and also the said property unto the

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said Assignee forever, subject to the terms contained in the Mortgage *and Note."* (Emphasis supplied). More importantly, as a nonholder in possession of the instrument who had the rights of a holder, MERS assigned to Deutsche Bank its explicit power, granted by the mortgage, to enforce the note by foreclosing the mortgage on the subject property. We conclude, accordingly, that the written assignment of the note and mortgage from MERS to Deutsche Bank properly transferred the note and mortgage to Deutsche Bank. The transfer, moreover, was not defective by reason of the fact that MERS lacked a beneficial ownership interest in the note at the time of the assignment, because MERS was lawfully acting in the place of the holder and was given explicit and agreed upon authority to make just such an assignment. *See US Bank, N.A. v. Flynn,* 897 N.Y.S.2d 855 (Sup.Ct. Suffolk County, March 12, 2010).

Our sister court in the second district came to a congruent conclusion after considering very similar documents. In *Mortgage Electronic Registration Systems, Inc. v. Azize,* 965 So. 2d 151 (Fla. 2d DCA 2007) (citing *Troupe v. Redner,* 652 So. 2d 394 (Fla. 2d DCA 1995)), it likewise held that MERS was not required to have a beneficial interest in the note in order to have standing in a foreclosure proceeding. It observed that while the holder of the note has standing to seek enforcement of the note, standing in the context of the presently considered documents is broader than just actual ownership of the beneficial interest in the note. It noted further, for example, that "[t]he Florida real party in interest rule, Fla. R. Civ. P. 1.210(a), permits an action to be prosecuted in the name of someone other than, but acting for, the real party in interest." *Azize,* 965 So. 2d at 153 (quoting *Kumar Corp. v. Nopal Lines, Ltd.,* 462 So. 2d 1178,

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1183 (Fla. 3d DCA 1985)); *see also Revoredo. cf. Riggs v. Aurora Loan Servs., LLC.,* 36 So. 3d 932 (Fla. 4th DCA 2010).

Thus, we agree with the trial court that under the documents in play in this case, Deutsche Bank had standing to foreclose the mortgage. The final judgment is, accordingly, affirmed in all respects.

AFFIRMED.

LAWSON, J., and EDWARDS-STEPHENS, S., Associate Judge, concur.

Notes:

[1] Although Mr. Taylor failed to move for leave to file the amended answer, it appears that Deutsche Bank likewise failed to move to strike the new pleadings.

[2] "An allonge is a piece of paper annexed to a negotiable instrument or promissory note, on which to write endorsements for which there is no room on the instrument itself. Such must be so firmly affixed thereto as to become a part thereof." *See Booker v. Sarasota, Inc.*, 707 So. 2d 886, 887 (Fla. 1st DCA 1998), quoting Black's Law Dictionary 76 (6th ed. 1990); *see also Chase Home Fin., LLC v. Fequiere*, 989 A.2d 606 (Conn. App. Ct. 2010).

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539 So.2d 549
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ADAM SMITH ENTERPRISES, INC., Appellant,
v.
W. Kenneth BARNES, Jr., and Jane L. Barnes, Appellees.

No. 88-1957.
District Court of Appeal of Florida,
Second District.
March 8, 1989.

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Julia Sullivan Waters of Holland & Knight, Tampa, for appellant.

L. Geoffrey Young of Robbins, Gaynor & Bronstein, P.A., St. Petersburg, for appellees.

SCHEB, Acting Chief Judge.

Appellant, Adam Smith Enterprises, Inc., appeals a final summary judgment foreclosing a second mortgage in favor of Appellees, W. Kenneth Barnes, Jr. and Jane L. Barnes. We agree with Adam Smith's contention that the Barnes did not conclusively establish the absence of a genuine issue of material fact. Therefore, we reverse.

We begin by summarizing the relevant facts in this somewhat complex mortgage foreclosure action. Preferred Properties, Inc., a Florida general partnership, owned property in Pasco County. The partnership was experiencing financial difficulties. In an effort to remain economically viable, Preferred gave a note for $250,000 secured by a mortgage to one of its general partners, W. Kenneth Barnes, and his wife, Jane L. Barnes, on September 28, 1984. Nevertheless, Preferred filed a petition for bankruptcy the next year. On February 24, 1986, during the course of the bankruptcy proceeding, the bankruptcy court allowed Preferred to execute a mortgage to Barnett Bank in return for receiving a $1,700,000 loan. The court gave the Barnett Bank mortgage super-priority status over the Barnes mortgage and required that Preferred pay $50,000 of the loan proceeds to reduce the principal obligation to the Barnes.

The court also allowed Preferred to grant Adam Smith an option to purchase the land. Preferred, Adam Smith, and Barnett executed an option agreement dated March 31, 1986. The agreement provided that Adam Smith could acquire Preferred's property if Preferred defaulted on the Barnett mortgage. Under the agreement, Adam Smith would pay off the Barnett mortgage. Before approving the agreement, the bankruptcy court added that in the event Adam Smith exercised the option, it would pay off the Barnes mortgage as well as the Barnett mortgage.

Preferred defaulted on the Barnett mortgage, and on October 2, 1987, Barnett made demand on Dr. Gills, the personal guarantor of the Barnett mortgage. Dr. Gills was also the president of Adam Smith. On October 12, 1987, Adam Smith's counsel wrote a letter to Raymond G. Savignac, the agent/manager of Preferred, stating that it was exercising its option.

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Alleging that Preferred did not honor the exercise of its option, Adam Smith sought specific performance in the bankruptcy court. [1] The Barnes then filed the instant foreclosure action against Preferred in circuit court. In January 1988, Adam Smith was added as a party when the Barnes filed their second amended complaint.

The Barnes alleged that their mortgage was superior to Adam Smith's option rights. Adam Smith filed a general denial and interposed an affirmative defense of unclean hands. Although Adam Smith did not dispute the fact that the Barnes mortgage debt remained unpaid, it contended that Mr. Barnes, in his capacity as a general partner of Preferred, attempted to eradicate Adam Smith's option by refusing to agree on the amount of money needed to pay off the Barnes mortgage.

On April 22, 1988, the Barnes moved for a summary judgment against Adam Smith after first obtaining a summary judgment against Preferred. The Barnes attached Mr. Barnes' affidavit in which he stated that they had taken no action to preclude Adam Smith's exercise of its option and that, to the contrary, they "support and encourage the exercise of such right." The Barnes also filed the affidavit of Ronald E. Taylor, a Barnett Bank officer, the substance of which is irrelevant to the issue at hand. Adam Smith filed the counter-affidavit of Lew Friedland, one of its officers, stating that Adam Smith undertook negotiations to pay Barnett and the Barnes the amounts due on their mortgages. Friedland's affidavit further stated that neither Barnes, Preferred Properties, nor Barnett agreed to accept Adam Smith's offer to exercise its option.

The trial judge, having reviewed affidavits in support of the Barnes' motion and the counter-affidavit filed by Adam Smith, found that there was no genuine issue of material fact. Accordingly, on June 1, 1988, the court entered a summary judgment of foreclosure in favor of the Barnes and against Adam Smith and several other parties. The judgment awarded the Barnes $279,594.48 for principal, interest, costs, and attorney's fees in connection with their mortgage. It is this order which Adam Smith appeals.

We first reject the Barnes' contention that Adam Smith cannot prevail on this appeal because it failed to exercise its redemptive rights. Second, we believe that Adam Smith's counsel's letter of October 12, 1987, to Preferred's agent/manager was a clear and timely exercise of the option. We have examined the option agreement, the letter, and considering the attendant circumstances, we conclude that there is no merit in the Barnes' argument that Adam Smith was required to tender money to them in order to exercise its option.

We now turn to the dispute which is the crux of this appeal, namely Adam Smith's affirmative defense of unclean hands. Adam Smith alleged that the Barnes would not indicate the amount it was required to pay them in order to fulfill its obligations under the exercised option. For the Barnes to obtain a summary judgment, it was necessary for them either to refute the affirmative defense or prove that it was legally insufficient. Stewart v. Gore, 314 So.2d 10 (Fla. 2d DCA 1975). We think they have done neither.

In his affidavit, Mr. Barnes stated that he and his wife took no action to preclude Adam Smith's exercise of its option and that, to the contrary, the Barnes "support and encourage the exercise of such right." The affidavit of Lew Friedland, an officer of Adam Smith, attested to Adam Smith's letter of October 12, 1987, exercising its option. Friedland stated that negotiations had been ongoing since that time and Adam Smith "has made every reasonable effort to exercise its Option Agreement and pay to Barnes and Barnett the amounts due under their respective mortgages." Friedland further said that "[i]n each and every instance, the parties have attempted to drive up the price for exercising

the option and have failed to comply with the terms of the Option Agreement."

We cannot say from the record furnished us that the Barnes conclusively established that there was no genuine issue of material fact. In his affidavit, Mr. Barnes merely stated that he encouraged the exercise of the option, and that

Adam Smith's inability to exercise it was due either to its own failings or to Preferred's trustee in bankruptcy. This, without more, does not conclusively negate the allegations in Adam Smith's defense of unclean hands.

We simply do not have sufficient record or briefing to evaluate the parties' contentions regarding Mr. Barnes' use of his connection with Preferred to affect Adam Smith's option. There is a paucity of documentation of the parties' dealings after the letter that Adam Smith's counsel wrote to Preferred. We note that the affidavits submitted both in support and in opposition to the motion for summary judgment are largely conclusory and lack specific details on the issue before us. For instance, Friedland's affidavit indicates that there were ongoing negotiations concerning the amount of money due on the Barnes mortgage, but that the Barnes were uncooperative in settling on the amount. The record, however, does not indicate the specifics of these negotiations nor does it reveal any written request from Adam Smith to the Barnes requesting a final figure. The Barnes' contention that they encouraged the exercise of the option is similarly unsupported.

Although summary judgment practice is especially applicable to mortgage foreclosure proceedings, any doubt as to the existence of a genuine issue of a material fact must be resolved against the movants whose burden it is to establish the absence of such an issue. See, e.g., Holl v. Talcott, 191 So.2d 40 (Fla.1966); Snyder v. Cheezem Dev. Corp., 373 So.2d 719 (Fla. 2d DCA 1979). Accordingly, we cannot say that the Barnes have met their burden of proving that they were entitled, as a matter of law, to a judgment foreclosing Adam Smith's option rights.

As noted, the Barnes either had to disprove Adam Smith's defense of unclean hands or establish its legal insufficiency. Howdeshell v. First Nat'l Bank, 369 So.2d 432 (Fla. 2d DCA 1979). The sparse support the Barnes offered to bolster their motion for summary judgment was clearly insufficient to negate the defense. While the Barnes argue that Adam Smith's defense is merely a paper issue and is thus legally unacceptable, we cannot determine the merit of this contention based on the evidence before us. Thus, because neither party has adequately supported its contentions, we find it prudent to reverse so as to permit the true facts to be developed. See, e.g., Frazier v. Schenck, 503 So.2d 444 (Fla. 2d DCA 1987); Buckel Corp. v. Fidelity & Deposit Co., 370 So.2d 824 (Fla. 2d DCA 1979).

REVERSED AND REMANDED.

FRANK and THREADGILL, JJ., concur.

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1 A suggestion of the pendency of bankruptcy proceedings filed by counsel for Preferred below as well as Adam Smith's brief indicate that the bankruptcy action is in abeyance pending resolution of this appeal.

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461 So.2d 1017
10 Fla. L. Weekly 87

SWIFT INDEPENDENT PACKING COMPANY, Appellant,
v.
BASIC FOOD INTERNATIONAL, INC., a Florida corporation, Appellee.

No. 84-1308.
District Court of Appeal of Florida,
Fourth District.
Dec. 28, 1984.
Rehearing Denied Jan. 11, 1985.

Steven E. Siff of McDermott, Will & Emery, Miami, for appellant.

Arthur M. Wolff of Wolff & Gora, P.A., Fort Lauderdale, for appellee.

BARKETT, Judge.

Appellant challenges the propriety of an adverse summary judgment. The issue argued before the trial court at the hearing on the motion was whether the independent broker who negotiated with the parties for the sale of beef from the prospective seller, Swift, to the prospective buyer, Basic, was Swift's agent, capable of binding Swift. The trial court determined that an agency

relationship had not been established precluding Swift's recovery and granted appellee/defendant Basic's motion for summary judgment.

The record reflects that prior to this hearing, the issue of agency had never been raised by the parties. In the pleadings both parties treated the broker as Swift's agent. Basic's motion for summary judgment not only failed to allege the failure of the agency relationship, but described the broker as Swift's agent.

Rule 1.510(c), Florida Rules of Civil Procedure, provides in part:

> The motion [for summary judgment] shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall be served at least twenty days before the time fixed for the hearing. The adverse party may serve opposing affidavits prior to the day of hearing.

Basic's motion for summary judgment was based on allegations that no genuine issue existed "with respect to the underlying verbal contract being devoid of any agreement as to the terms of credit ...." At the hearing on the motion, however, Basic's counsel argued that the broker was not Swift's agent. He conceded that he had described the broker in his motion and in prior pleadings as Swift's agent, but had decided to change his position. The court granted Basic's motion for summary judgment. Swift, unprepared for the issue of agency at the hearing, subsequently attempted to provide an affidavit to the court on the agency issue by way of a motion for rehearing. This motion was denied. Such an ambush is exactly what Rule 1.510(c), Florida Rules of Civil Procedure, was designed to prevent. Cf. Spinner v. Wainer, 430 So.2d 595 (Fla. 4th DCA 1983). Moreover, granting Basic's motion for summary judgment on these facts not only violated Rule 1.510(c), but also the principle that when considering such a motion, the court should take a strict reading of the papers filed by the moving party and a liberal reading and construction of the paper filed by the opposing party. See, e.g., Holl v. Talcott, 191 So.2d 40, 46 (Fla.1966); National Properties, Inc. v. Ballenger Corporation, 277 So.2d 29, 30 (Fla. 3d DCA 1973); Fernandez v.

Cunningham, 268 So.2d 166, 169 (Fla. 3d DCA 1972).

Furthermore, it is not clear from the record in this case that Basic negated the existence of genuine issues of material fact. See Landers v. Milton, 370 So.2d 368 (Fla.1979); McCabe v. Walt Disney World Co., 350 So.2d 814 (Fla. 4th DCA 1977).

The summary judgment is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

HERSEY and HURLEY, JJ., concur.

Page 521
462 So.2d 521
10 Fla. L. Weekly 130

Joseph M. WINTERS, Ann Winters and J. & L. Leasing Corporation, Appellants,
v.
David SAMI, Appellee.

No. 83-1458.
District Court of Appeal of Florida,
Fourth District.
Jan. 4, 1985.
Rehearing Denied Feb. 14, 1985.

Robert C. Meacham, Gillespie, McCormick, McFall, Gilbert & McGee, Pompano Beach, for appellants.

Samuel L. Heller, Fort Lauderdale, for appellee.

DELL, Judge.

Appellants, mortgagors of certain real property, appeal from a final summary judgment of foreclosure.

In 1975, David Sami and Nissam Begas, who was later withdrawn from the suit, entered into an agreement to sell Superior Sanitation, Inc., to appellants. As partial consideration for the sale, appellants executed a note and mortgage in the amount of $165,000 in favor of Sami and Begas. The note provided for equal monthly payments according to a specified amortization schedule. Shortly after the transaction closed, appellants became dissatisfied with the income which the business produced and also with certain equipment they purchased. They complained through the years 1976 and 1977, and then withheld the monthly mortgage payments in April and May of 1977. Shortly thereafter, Sami and Begas executed and delivered the following memorandum to appellants:

TO THE CONCERNED PARTIES:

RE: SUPERIOR CONTRACT

In sympathy of the fact that Joseph Winters and Louis LaPietra have lost a considerable amount of accounts, David Sami and Nissim Begas have agreed to omit the 68th, 67th, 66th, 65th, 64th, part of 63rd monthly Amortization payments. The aggregate total not to exceed $11,000.00.

It is understood that these accounts were not guaranteed in any way and we were not obligated in any way to do this.

It is a good will jesture [sic] from Mr. Begas and Mr. Sami, and in no way is it to be considered a modification of their contract as a whole. (Emphasis added.)

When appellants received the memorandum they resumed making monthly mortgage payments and continued to make all payments as they came due through and including the sixty-second monthly payment. Appellants then notified Sami and Begas that they would omit payments sixty-three through sixty-eight. Subsequently appellants remitted an additional $506.74 which remained due under the sixty-third monthly

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amortization payment. Appellants made no further payments. Begas and Sami filed suit to foreclose under the mortgage. In their reply to appellants' affirmative defenses and in deposition they alleged that they executed the memorandum to induce appellants to resume making monthly mortgage payments and to avoid appellants' continued complaints. The trial court rejected appellants' defense of accord and satisfaction and entered summary judgment in favor of appellee.

Appellants contend that the document executed by Begas and Sami constituted a valid release of their obligation to make the final installments numbered sixty-three through sixty-eight and they had therefore discharged their obligation under the note and mortgage.

Appellee asserts here as he did in the trial court that he and Begas executed the document while under duress, without consideration, and that it only constituted a promise to renounce the right to payment at some time in the future. The trial court held that the document did not constitute a cancellation or renunciation under Section 673.605(1)(b), Florida Statutes (1983) and found:

Defendants' Motion for Judgment on the Pleadings is denied. Section 673.605(1)(b), Florida Statutes, is not applicable to the $11,000 memorandum of credit (Exhibit "A" to said Defendants' Motion) because Plaintiffs neither "renounced their rights by a writing signed and delivered" nor was there a "surrender of the instrument (being the subject promissory note) to the party to be discharged." A mere declaration or memorandum by the creditor to the effect that he gives or intends to give the debt to the debtor or that he does not desire or intend that the debt shall be paid or collected at a future date is ineffectual for such purpose, 63 A.L.R.2d 277 (Section 7).

Support for the trial judge's conclusion can be found in Gorham v. John F. Kennedy College, Inc., 191 Neb. 790, 217 N.W.2d 919 (1974) wherein the court held that:

By renunciation is meant the abandonment of a right. See Black's Law Dictionary (Deluxe 4th Ed.), p. 1462. The words "I will" in the sense here used connote future action. See Webster's Third New International Dictionary. The language used does not indicate an outright renunciation of the payee's rights under the notes as of the time the instrument was executed. Rather, it appears to have reference to the second clause of section 3-605(1)(b), U.C.C., regarding discharge by surrender of the notes. Viewed in this light the instrument is simply a promise, made without consideration, to surrender the notes at some time in the future. The promise is not enforceable and without an actual surrender of the notes they have not been discharged.

Id. at 791, 217 N.W.2d at 920.

We find the language used in the document sub judice distinguishable from Gorham. Here the agreement clearly stated that "David Sami and Nissim Begas have agreed to omit the 68th, 67th, 66th, 65th, 64th, part of 63rd monthly Amortization payments." We construe the words "have agreed to omit" as a present renunciation of the right to receive payments numbered sixty-three through sixty-eight, and not merely a promise of future action. A dispute existed as to the underlying agreement. When Sami and Begas agreed to omit payments sixty-three through sixty-eight they reduced the balance due on the note and effectively reduced the agreed purchase price. In return appellants fulfilled their modified obligation under the agreement. The language used brings the document within Section 673.605(1)(b), Florida Statutes (1983) which provides:

(1) The holder of an instrument may even without consideration discharge any party:

....

(b) By renouncing his rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged.

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Begas and appellee Sami signed a written agreement which evidences a present renunciation of a future right and delivered it to appellants. Since appellants made all the payments except those omitted under the agreement, the trial court erred when it determined that appellants had failed to fully satisfy their obligation under the note and mortgage.

Accordingly, we reverse the judgment of foreclosure.

REVERSED.

ANSTEAD, C.J., concurs.

WALDEN, J., dissents (without opinion).

Page 1190
546 So.2d 1190
14 Fla. L. Weekly 1839

CHARLES E. BURKETT & ASSOCIATES, INC., Appellant/Cross-Appellee,
v.
Edward H. VICK, et al., Appellees/Cross-Appellants.

No. 88-421.
District Court of Appeal of Florida,
Fifth District.
Aug. 3, 1989.

Joseph G. Will, Daytona Beach, for appellant/cross-appellee.

George E. Hovis, Clermont, for appellees/cross-appellants.

ON MOTION FOR REHEARING

ORFINGER, Judge.

We withdraw the opinion originally issued herein, and substitute the following corrected opinion in its place.

Charles E. Burkett & Associates, Inc. (Burkett) appeals from an amended final summary judgment of foreclosure which awarded it $5,367.50 as owed on the mortgage note, and which denied it an award of attorney's fees and costs. [1] The trial court acted within its discretion in refusing to consider affidavits filed by Burkett on the day of the summary judgment hearing, [2] but even without those affidavits, the pleadings and other affidavits on file clearly demonstrated the existence of a genuine issue of material fact as to the amount of the debt, so that entry of a summary judgment was improper.

Burkett filed an action to foreclose a mortgage, alleging that it held a $30,000 note secured by the mortgage, executed in

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its favor by the Vicks and that the note was due and unpaid. Burkett then filed a motion for summary judgment, accompanied by a separate affidavit of its vice president which stated, among other things, that the unpaid balance on the note was $30,000, plus accrued interest.

In their answer, and later in their affidavits supporting their motion for summary judgment, the Vicks did not contest the validity of the note and mortgage, but asserted that the note represented an agreement to pay for future engineering services in an amount up to $30,000, but that they had been billed for only $4,600, which was the only amount owed, and which they were prepared to pay. In the file is also an affidavit of Vick's attorney in which he states that Burkett had claimed to have done additional work and was now owed $8,868.41. The pleadings and the affidavits present a sharp dispute as to how much is due on the note. These affidavits were properly in the court file at the time the judge considered the Vick's motion for summary judgment, and presented a conflict as to how much was owed ($30,000 or $8,868.41 or $4,600) and for what services, and the court should not have attempted to resolve that conflict in a summary judgment proceeding.

Although Burkett withdrew its motion for summary judgment from consideration, this did not withdraw it from the court file, nor its accompanying affidavit which stated under oath that $30,000 was the amount owed. The conflicting affidavits were "on file" at the time of the hearing, created a genuine issue of material fact and a summary judgment should not have been entered. See Fla.R.Civ.P. 1.510(c).

The summary judgment is reversed and the cause is remanded for further proceedings consistent herewith.

REVERSED and REMANDED.

DANIEL, C.J., and SHARP, J., concur.

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1 In our original opinion we noted error in the failure of the trial court to award Burkett attorney's fees and costs, in light of the contractual provision for payment of such fees and costs and because Burkett had recovered on the note, albeit not in the full amount requested. However, as appellee correctly points out on motion for rehearing, this observation was premature in light of the reversal for trial, and must await disposition of this cause on the merits.

2 Fla.R.Civ.P. 1.510(c); Von Zamft v. South Florida Water Management District, 489 So.2d 779 (Fla. 2d DCA), review denied, 494 So.2d 1153 (Fla.1986).

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404 So.2d 183

TELEPHONE UTILITY TERMINAL COMPANY, INC., a Florida Corporation, F. Lee Hinebaugh and Robert S. Larsen, Appellants,

v.

EMC INDUSTRIES, INC., a Delaware Corporation, Appellee.

No. 80-906.
District Court of Appeal of Florida, Fifth District.
Sept. 30, 1981.

David E. Terry of Baker & Hostetler, Orlando, for appellants.

Del G. Potter of Del G. Potter, P.A., Mount Dora, for appellee.

FRANK D. UPCHURCH, Jr., Judge.

Appellants, defendants below, appeal from a summary final judgment. Counts I-IX of the complaint sought recovery on nine promissory notes from Telephone Utilities Terminal Company (TUTCO) as maker and Larsen and Hinebaugh as guarantors. Counts X-XV covered loans to TUTCO not

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evidenced by promissory notes, each count representing a loan made on a different day. Count XVI sought recovery from all defendants for the monies loaned to TUTCO delineated by counts X-XV on the basis that the defendants breached their agreement to execute notes and guaranties concerning these monies. EMC dismissed without prejudice appellants Larsen and Hinebaugh as to counts X-XVI.

EMC moved for summary judgment concerning the notes and guaranties and served this motion only to the attorney for defendants Hinebaugh and Larsen. The trial court granted judgment against defendants on all of the counts.

The first question presented was whether summary judgment as to counts I-IX was error where EMC failed to produce the original notes or account for their absence.

In the case of a negotiable promissory note, any holder in due course is entitled to payment thereunder even though the payor may claim he has discharged his obligation to someone else. § 673.305, Fla.Stat. (Supp.1980); International Center of the Americas v. Chemical Bank, 384 So.2d 725 (Fla.3d DCA 1980). Thus, "production of the instrument entitles a holder to recover on it unless the defendant establishes a defense." § 673.307(2), Fla.Stat. (Supp.1980).

In Ferris v. Nichols, 245 So.2d 660, 662 (Fla. 4th DCA 1971), the fourth district stated that:

Except in the unusual case where the suit is on a lost or destroyed note, the instrument sued on should be produced in order to entitle the holder to recovery.

Requiring production of the instrument protects the payor from being later liable to a holder in due course where the original payee fraudulently obtained payment in an action using a copy of the note. [1]

EMC cites Coquina Ridge Properties v. East West Company, 255 So.2d 279 (Fla. 4th DCA 1971) as authority for its position that the original copy of the note is not necessary. An examination of the case reflects that the court stated simply that unless the issue is raised in the trial court, it cannot be raised on appeal. The question of how a plaintiff can prove he is a holder in due course without the original note was not addressed. We hold that it was error for the trial court to enter judgment on counts I-IX without production of the original notes.

The next question raised is whether summary judgment as to counts X-XVI was

proper as to TUTCO. TUTCO was not served with the motion for summary judgment or notice of hearing. The record reflects that the motion was sent only to the attorney for defendants Larsen and Hinebaugh; and fails to show that the motion was sent to defendant TUTCO. This means that the plaintiff did not meet the requirements of Florida Rule of Civil Procedure 1.510(c).

EMC contends that Larsen and Hinebaugh were officers of the defendant corporation and that their attorney had been served with a copy of the motion. The record reveals, however, that the attorney had appeared for defendants Larsen and Hinebaugh in their individual capacity only. Knowledge acquired by corporate officers while acting for themselves and not for the capacity of the corporation cannot be imputed. C & H Contractors, Inc. v. McKee, 177 So.2d 851 (Fla.2d DCA 1965). Without service of the motion on TUTCO, the trial court could not render summary judgment against it.

Appellants question whether the court erred in allowing EMC to recover on the notes and guaranties when the notes did not show that documentary stamps had been paid.

The copies of the notes attached to the complaint did not show the documentary stamps. Appellants first raised the question of the stamps after entry of summary judgment by filing a motion to dismiss and

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a motion for rehearing. At the hearing on the motion, the point was not argued and no ruling directed to this point is part of the record. Appellants cannot raise the point for the first time on appeal. See Jones v. Neibergall, 47 So.2d 605 (Fla.1950). However, because this matter is being reversed on other grounds, appellants may raise the point by appropriate pleadings in the trial court.

REVERSED and REMANDED to the trial court for proceedings consistent with this opinion.

DAUKSCH, C. J., and ORFINGER, J., concur.

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1 If a payor pays on a copy of a note pursuant to a judgment and later a holder in due course presents the original note, the payor could not claim satisfaction. § 673.305. See also Liles v. Myers, 38 N.C.App. 525, 248 S.E.2d 385 (1978).

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516 So.2d 339
12 Fla. L. Weekly 2877

Elmer J. HUDSON, Appellant,

v.

PIONEER FEDERAL SAVINGS & LOAN ASSOCIATION, etc., Appellee.

No. BQ-34.
District Court of Appeal of Florida,
First District.
Dec. 15, 1987.
Rehearing Denied Jan. 7, 1988.

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John R. Grass, Pensacola, for appellant.

Paul R. Green, of Johnson, Green & Locklin, Milton, for appellee.

W. Christopher Hart and Michael A. Perkins, Clark, Partington, Hart, Larry, Bond and Stackhouse, for appellee Intervenor, Safeco Title Ins. Co.

THOMPSON, Judge.

Hudson appeals an order denying his motion to vacate a final judgment of foreclosure and to vacate the judicial sale of his property. He contends that the trial judge erred in finding that Pioneer Federal Savings & Loan Association's attorney made a diligent search and inquiry regarding his whereabouts, and thus erred in upholding the constructive service of process on him. He further contends that the inadequacy of the price received for his property at the judicial sale necessitates vacating the sale. We affirm.

There was conflict in the evidence on both issues, and based on the evidence the trial judge could have ruled in favor of Hudson. However, he ruled in favor of appellee and on review it is not our function, as appellate judges, to substitute our judgment for his. Our duty in this case is to determine whether there was competent substantial evidence to support the decision of the trial judge, and we find that there was.

AFFIRMED.

BARFIELD, J., concurs.

ZEHMER, J., dissents with written opinion.

ZEHMER, Judge (dissenting).

One of the issues on appeal is whether the trial court erred in concluding that Paul Green, attorney for appellee Pioneer Federal Savings & Loan Association, made a "diligent search and inquiry in a good faith effort to obtain and identify the residence of the appellant, Elmer J. Hudson, to no avail." I believe the record before the trial court fails as a matter of law to establish that Green did so. The second issue on appeal is whether the inadequacy of the price received for appellant's property at judicial sale necessitates vacating the sale. I believe that it does.

The facts in the case are as follows. In 1973, J.J. Hudson and Mary Bell Hudson (the father and step-mother of appellant) mortgaged their Santa Rosa County home to a savings and loan association, which has since been taken over by Pioneer Savings, one of the appellees. In 1974, J.J. and Mary Bell Hudson conveyed their home to appellant by warranty deed which provided that appellant was to assume the mortgage and make the payments thereon. The deed, which was duly recorded, gave appellant's address as Route 7, Box 121, Milton, which is the address of the property involved. Neither the savings and loan nor the casualty insurer were notified of the conveyance, so the records of the savings and loan continued to show J.J. and Mary Bell Hudson as the owners.

The mortgage payments were made until J.J. Hudson's death in 1982, after which the mortgage went into default. In June 1984, Pioneer filed a foreclosure suit against Mary Bell Hudson wherein it alleged a total indebtedness on the mortgage of $3,622. A title search thereafter conducted by Pioneer revealed appellant's interest in the property, so Pioneer filed an amended complaint for foreclosure naming appellant and others as additional parties defendant. The amended complaint and a summons showing appellant's address to be Route 7, Box 121, Milton, were filed on February 13, 1985, and promptly delivered to the Santa Rosa County sheriff for service. The sheriff's return, dated February 20, 1985, indicated that appellant could not

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be found at the given address and included the notation: "Subject no longer at this address. Lives in Pensacola." During the next four weeks Pioneer's attorney, Paul Green, conducted an investigation as to appellant's whereabouts for the purpose of obtaining an address for appellant so that personal service of process could be effected. On March 19, 1985, after failing to locate and personally serve appellant, Green filed his affidavit of constructive service and notice of action. On April 19, 1985, he filed an affidavit of publication of notice of action, and thereafter filed a motion for default. A default and final judgment of foreclosure were entered, and in September 1985 the property was sold at judicial sale to appellee Jaquish for $6,400, the total amount claimed by the bank for the indebtedness and all costs, attorneys' fees, post-judgment interest, and so forth.

Although appellant discovered in November 1985 that the property had been sold at judicial sale, his motion to set aside the default and final judgment was not filed until June 1986. His motion alleged, among other things, that appellant had been making the mortgage payments to Pioneer for several years and on numerous occasions furnished Pioneer with his residence address in Pensacola, and that he did not learn of the foreclosure action until immediately prior to filing his motion. In an attached affidavit he additionally alleged (1) that he had lived in Pensacola all of his adult life and operated a construction business there; (2) that he had lived at his present address since 1983 and had his full name and address listed in the phone book since that time; (3) that the Santa Rosa County tax collector had been sending the tax bills on the subject property to his correct Pensacola address since 1983; and (4) that he had served as personal representative of J.J. Hudson's estate and that his address had been on most of the pleadings in that probate file.

At the hearing on appellant's motion, Hudson testified generally to the openness of his living circumstances in Pensacola and to the fact that both his business and home phones were listed. Further, he testified that in 1984 he had run for sheriff of Escambia County and in the course of the campaign had maintained a very high profile including appearances on television and radio. He testified that the property involved was worth approximately $50,000 and that even the tax assessor had valued it at over $41,000. He explained that he had not made any mortgage payments after his father's death because he thought that his father had credit life insurance to cover the note. He acknowledged that he had discovered the fact of the litigation and judicial sale in November 1985 when he drove by the property and found appellee Jaquish putting a new roof on the house.

Paul Green testified concerning his efforts to locate and serve appellant after receiving the sheriff's return. He indicated that he had checked Pioneer's mortgage records, had checked the Pensacola city directory, and had requested Mary Bell Hudson to ask other relatives about appellant's whereabouts, all to no avail. He further testified that after checking the Pensacola telephone book and finding a listing for "E.J. Hudson," he had personally called the number listed and had been told by the person answering that Elmer J. Hudson did not live there. His testimony in substance was to the same effect as the statements in his affidavit of search.

The trial court's conclusion that Pioneer's attorney had made a diligent search in a good faith effort to learn Hudson's address, rested primarily on the evidence as recited in its order, that Paul Green obtained a telephone listing for one Elmer J. Hudson at a certain address in Pensacola, called the listed number, "inquired whether the person answering was answering to the residence of Elmer J. Hudson and informed by such person answering the telephone 'no.' " A search of the record fails to show, however, that Paul Green ever inquired of the person who answered whether he, Green, had in fact reached the listed number, nor did Green determine the identity of the person answering, or otherwise verify that such person in fact lived at the address listed for Hudson in the telephone directory. In proving the negative of a fact, the party

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bearing the burden of proof must lay a proper predicate sufficient to support the desired negative inference. I do not believe appellee laid a legally sufficient predicate in this case to establish that he had determined that Hudson did not live at the indicated address. Moreover, Paul Green did not contact the sheriff of Escambia County and request service on Hudson; yet Hudson had been a candidate for election to the office of sheriff about that time. Green did not pursue obvious avenues readily available for determining appellant's address, but decided instead to resort to publication of notice. Had Green checked the records on the foreclosed property in the office of the tax assessor of Santa Rosa County (the county in which the property was located), he would have found Hudson's correct Pensacola address.

A party is required to make a diligent search to locate the defendant before resorting to constructive service. Section 49.011, Florida Statutes (1983). The standard of diligence requires an honest, conscientious effort to locate the party through reference to readily available sources likely to provide such information. See, e.g., Gmaz v. King, 238 So.2d 511 (Fla. 2d DCA 1970); Naples Park-Vanderbilt Beach Water District v. Downing, 244 So.2d 464 (Fla. 2d DCA 1970), cert. denied, 245 So.2d 257 (Fla.1971); McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926). I would hold that the record is legally insufficient to support the trial court's finding that attorney Green exercised the required due diligence in his efforts to locate and have appellant served with the foreclosure complaint. It follows that the court erred in failing to set aside the default judgment.

In regards to the second issue on appeal, whether the inadequacy of the price received for appellant's property at judicial sale necessitates vacating the sale, the record contained evidence that the value of the foreclosed property was $50,000, and that the tax assessor placed its 1984 valuation at more than $41,000. The property was bid in for only $6,400, the total amount claimed by Pioneer. Appellant contends that this amount, coupled with the lack of service of the complaint and notice of the sale, required the court to set aside the sale, citing Fincham v. Fincham, 443 So.2d 312 (Fla. 4th DCA 1983), and Corbitt v. Burkette, 399 So.2d 514 (Fla. 4th DCA 1981). Appellee contends that the tax assessor's valuation referred to was made in 1984, and since there was no evidence of its value in 1985 other than appellant's self-serving testimony of $50,000, there is no basis to find an abuse of discretion in the trial court's ruling.

Because I would reverse on the first point, there is no need to reach the second issue. But in view of the majority's affirmance on point one, I also dissent from their affirmance on this point. There is simply no record basis for the trial court to conclude that the value of this house and property was not substantially in excess of the $6,400 bid. Approving a sale in that amount in the face of competent substantial evidence that the property was worth between $41,000 and $50,000 constitutes an abuse of discretion.

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137 So.2d 259

David APPLEFIELD, Appellant,
v.
FIDELITY FEDERAL SAVINGS & LOAN ASSOCIATION OF TAMPA et al., Appellees.

No. 2339.
District Court of Appeal of Florida, Second District.
Jan. 26, 1962.
Rehearing Denied Feb. 21, 1962.

Page S. Jackson, of Saltsman & Jackson, St. Petersburg, for appellant.

S. E. Simmons, of Bussey, Simmons & Owen, St. Petersburg, for appellees.

SMITH, Judge.

Barger was the owner of real property, and he leased the same to Jicha and Hayes for a term of ninety-nine years. The lease granted an option to the lessees to buy the reversion interest of the fee owner for $45,000.00. The lease permitted, but did not require, the construction of improvements on the property. In order to obtain funds with which to construct a motel on the property, the lessees applied to Fidelity Federal Savings & Loan Association of Tampa, (appellees here) the plaintiffs in the trial court, for a loan in the amount of $75,000.00. The lessees executed their note and mortgage, describing the real property in a form as though they were the sole owners, as security for the loan. The Association then received the following agreement from Barger:

'THIS AGREEMENT, made and entered into this 2nd day of January, A.D., 1958, by and between ERNEST A. BARGER and LESA S. BARGER, his wife, parties of the first part, and FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF TAMPA, FLORIDA, Party of the Second Part,

'WITNESSETH

'WHEREAS, Ernest A. Barger and Lesa A. Barger, his wife, are the owners in fee of certain premises, to-wit:

'Lots 26 and 27, Madeira Beach Vista, Tract 2, according to the plat thereof

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recorded in Plat Book 16, Page 104, Public Records of Pinellas County, Florida,

and

Lots 134, 135, 136 and 137, North Madeira Shores, according to plat thereof recorded in Plat Book 23, Page 68, Public Records of Pinellas County, Florida.

'WHEREAS, the parties of the first part have let and leased the abovedescribed premises for a period of ninety-nine (99) years to JAMES JICHA, JR. and D. ALBERTA JICHA, his wife, and MILLARD C. HAYES and LOUISE G. HAYES, his wife, the sum of SEVENTY-FIVE THOUSAND AND NO/100 DOLLARS ($75,000.00) upon the note of James Jicha, Jr. and D. Alberta Jicha, his wife, and Millard C. Hayes and Louise G. Hayes, his wife, secured by a mortgage on the premises above described, it being understood and agreed that the Mortgagee shall withhold an amount of at least twenty-five (25%) percent as and for a final payment and drawal to insure that all bills for labor and materials have been paid, and

'WHEREAS, as the inducement to the Party of the Second Part for making the loan, the Parties of the First Part have heretofore agreed and consented to subordinate their interest in the premises as aforesaid to the lien of the mortgage which shall be made to James Jicha, Jr., and D. Alberta Jicha, his wife, and Millard C. Hayes

and Louise G. Hayes, his wife, by the Party of the Second Part.

'NOW, THEREFORE, the Parties of the First Part in pursuance of this Agreement and in consideration of the sum of ONE DOLLAR ($1.00) and other good and valuable consideration to them in hand paid by the party of the second part, do, for themselves, their personal representatives and assigns, hereby covenant, conset and agree to and with the Party of the Second Part, its successors and assigns, that their ownership of the property hereinbefore described and all of their interest in and to said premises is, shall be and shall continue to be subject and subordinate in lien to the lien of the mortgage to be made to the Party of the Second Part as aforesaid.'

The above agreement was duly executed by the parties with two witnesses and properly acknowledged. The mortgage and this agreement were recorded in the Public Records of the County. Subsequently, the lessees obtained an additional loan in the amount of $25,000.00 from the Association and executed their note and mortgage describing the property as though they were the sole owners. There was no agreement between Barger and the Association on the $25,000.00 loan. Barger conveyed his reversionary fee title to the property to David Applefield (appellant here), one of the defendants below. Then the lessees conveyed their leasehold interest to Holiday Isles Motel Corporation. The taxes on the property became delinquent and no payments were made on the two mortgages to the Association after March, 1960. The Association filed its complaint for foreclosure of its two mortgages against all of the defendants, alleging a prior and superior lien against all of the interests of all of the defendants. The defendant, David Applefield, answered in which he took the following positions:

That the agreement of January 2, 1958, between Barger and the Association, did not subject Applefield's fee estate to the lien of the first mortgage, but to the contrary, the agreement had the effect only of reversing the priority of Applefield's lessor's lien for rent and the Association's mortgage lien; and,

That if the above contention was not correct, then Applefield's fee estate in reversion was only secondarily liable.

After hearing, the Court entered a final decree finding:

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That Applefield purchased Barger's reversion with actual and constructive notice and is thereby bound by the terms of the agreement;

That the agreement of January 2, 1958, waived Applefield's right to collect the rents provided by the lease;

Applefield's position is not that of a surety;

That the first mortgage held by the Association was a valid first lien upon both the fee and leasehold estates in the real property and that the total sum due thereon included interest, attorneys fees, plus sums advanced by the mortgage holder for taxes, insurance, title search, receivers expenses, and payments of rent to Applefield; and,

That the second mortgage was a valid second lien upon the leasehold interest in the real property and that it adjudicated the amounts due thereon, including interest and attorneys fees.

The decree then ordered the payment of the aggregate sums adjudged to be due on both of the mortgages; and in default, directed sale of both the fee and leasehold estates in the property with directions that after payment of the costs the proceeds be distributed to first pay the amounts due under the first mortgage and then to pay the amounts due under the second mortgage, with the balance, if any, to be held pending the further order of the Court.

As to the interest of Applefield, the decree directed that he may, at his election, redeem his reversion from the lien of the Association's first mortgage upon payment to the Association of the aggregate of the sums due under that mortgage, provided that the same be paid at any time up to the commencement of the sale; and that in the event of such redemption, the sale shall be limited to a sale of the leasehold interest for the purpose of satisfying the Association's second mortgage.

Applefield first contends that the intent, purpose and effect of the agreement of January 2nd was only to make the lessors' prior right to collect rent and to terminate the lease in event of default or breach subordinate to the lien of the Association's first mortgage. Such a contention would require the Court to disregard the recital in the agreement that Barger is the owner in fee of certain premises, to-wit: the real property there described and that in order to induce the Association to make the loan, Barger agreed and consented to subordinate his interest in the premises as aforesaid to the lien of the mortgage. In addition, the agreement then, after establishing these premises, concludes to the effect that Barger agrees with the Association that Barger's ownership of the property described and all of his interest in and to said premises is, shall be, and shall continue to be subject and subordinate in lien to the lien of the mortgage. No effort was made to modify the agreement, nor to offer extensive evidence to establish the intent of the parties. The Chancellor correctly construed the agreement in holding that it subjected the reversionary interest of the lessors to the lien of the first mortgage, together with the leasehold interest, which, when combined, constitute all of the estate and interest in the real property.

It is the rule in Florida that a sale in parcels is preferred over a sale en masse where the former is practical and equitable to all parties. 22 Fla.Jur., Mortgages, § 355; Swann v. L. Maxcy, Inc., 1935, 120 Fla. 283, 162 So. 696; and Browning v. Bank of Lake Alfred, Fla.App.1958, 101 So.2d 898.

We find it is not necessary for this Court to determine whether or not Applefield's position was that of a surety so as to entitle him to have the property of the lessees first sold and the proceeds of the sale applied in satisfaction of their debt as set forth in 50 Am.Jur., Suretyship, § 258. Even though Applefield was not one of the debtors, we arrive at this conclusion by mentally charting the course required by such a conclusion under the unusual circumstances that are

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present here. Bearing in mind the holding that the first mortgage encumbers all of the interest in all of the property, then even if you establish Applefield's reversionary title as secondarily liable, you would find it necessary to sell the leasehold interest to satisfy the first mortgage; and if insufficient, to again sell the leashold interest to satisfy the rents due to Applefield; and if insufficient, to again sell the leasehold interest to satisfy the second mortgage; and if insufficient, to then sell the reversionary fee title of Applefield, and since his fee title is security only for the first mortgage, the intervening sales would be cancelled out, thereby making a circle and returning to the point of beginning.

The provision in the final decree permitting Applefield to redeem his interest from the lien of the first mortgage brings the decree within the provisions of the general rule that mortgage sales will be controlled by the Court so that no injustice will be done to either party; the sale may be of the entire property or of such part as will best conduce to that end, and the circumstances of each particular case must be considered in determining in what manner the sale should be made. 37 Am.Jur., Mortgages, § 618. This determination is committed to the discretion of the Court, 59 C.J.S. Mortgages § 729. No abuse of this discretion has been demonstrated.

The decree propated the attorneys fees between the two mortgages, but added to the

first mortgage that amount advanced for taxes, insurance, title search, receivers expenses, and payments of rent. The agreement subordinated Applefield's rights to collect rents to the lien of the first mortgage. By the terms of the first mortgage, the Association had the right to pay all of said advances; and when so paid, they became an amount due and a part of the superior lien of the first mortgage, and the Chancellor was not required to prorate these payments between the two mortgages. We are cognizant of the rule established in Swann v. L. Maxcy, Inc., supra, that in for foreclosure of two mortgages, one encumbering one parcel and another encumbering the first parcel and an additional parcel, that the costs should be apportioned so that the expenses thereof would fall on the property embraced on each mortgage. In this instance, however, we note that all of these costs were for advances respecting the leasehold interest and the reversionary interest and all these costs would have been required in these same amounts in foreclosure only of the first mortgage, and there is no factor which could be applied to apportion them.

The Court has carefully considered the unusual circumstances of this cause as reflected in the record, the briefs, the arguments of counsel, and the other points raised by the appellant.

The decree is affirmed.

ALLEN, Acting C. J., and KANNER, J., concur.

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667 So.2d 378
20 Fla. L. Weekly D2672
Virgel BENNETT, Appellant,
v.
Lucy WARD, First Union National Bank of Florida, and United States of America, Internal Revenue Service, Appellees.
No. 95-1333.
District Court of Appeal of Florida,
First District.
Dec. 4, 1995.

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An appeal from the Circuit Court for Taylor County. James Roy Bean, Judge.

Cary A. Hardee, Madison, for Appellant.

Robert J. Schramm, Perry, for Appellee Lucy Ward.

BENTON, Judge.

Virgel Bennett appeals the circuit court's denial of his motion for relief from judgment. Proceeding under Florida Rule of Civil Procedure 1.540, he seeks to set aside a judgment of foreclosure and argues that the subsequent judicial sale of real estate he had encumbered with two mortgages should be rescinded, because he was not served with notice of trial or with any copy of the final judgment of foreclosure, the notice of sale, the certificate of sale, the certificate of title, or the certificate of disbursements. We reverse in part and remand.

Mr. Bennett executed a promissory note in the amount of $37,000 in favor of Lucy Ward and her late husband Donald Ward and executed a mortgage on certain real property in Taylor County as security on February 1, 1982. On July 25, 1989, Mr. Bennett executed a second mortgage on the same parcel in favor of Southeast Bank, securing indebtedness to the bank in the amount of $96,715.38.

After Mr. Bennett stopped making mortgage payments, the Wards filed a complaint to foreclose the first mortgage, naming Southeast Bank and the Internal Revenue Service along with Mr. Bennett as defendants. The IRS and Southeast Bank's successor in interest, First Union National Bank of Florida (First Union), filed answers, and First Union filed a crossclaim for foreclosure. Mr. Bennett never filed any pleading or paper, but no default was ever entered against him, as far as the record reveals.

Rule 1.440 Noncompliance

The record on appeal is also devoid of any order setting trial, but, on February 13, 1992, the Wards' counsel filed a notice of hearing dated February 10, 1992, setting "Plaintiffs' Complaint to Foreclose a Mortgage" for hearing on March 10, 1992. No motion for summary judgment was ever filed. A hearing took place on March 10, 1992, which Mr. Bennett attended pro se. [1] Attorney's fees affidavits were filed that day, but the record contains no transcript of proceedings on March 10, 1992. On April 20, 1992, the circuit court entered a final judgment of foreclosure, [2] retaining jurisdiction to take further action, including entry of deficiency judgments.

Mr. Bennett argues that, without any pending motion for summary judgment or any motion for default, the trial court's failure to set the matter for trial in accordance with Florida Rule of Civil Procedure 1.440, requires reversal. Under the rule, once the trial "court finds the action ready to be set for trial, it shall enter an

order fixing a date for trial." Fla.R.Civ.P. 1.440(c). Here, as in Lauxmont Farms, Inc. v. Flavin, 514 So.2d 1133 (Fla. 5th DCA 1987), the "notice was defective because [it] ... was sent by the opposing attorney rather than the court and

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did not give the requisite thirty-days notice of trial." Id. at 1134.

Strict compliance with Florida Rule of Civil Procedure 1.440 is required and failure to do so is reversible error. Ramos v. Menks, 509 So.2d 1123 (Fla. 1st DCA 1986); Bennett v. Continental Chemicals, Inc., 492 So.2d 724 (Fla. 1st DCA 1984); see also Broussard v. Broussard, 506 So.2d 463 (Fla. 2d DCA 1987).

Id. Even when a default has been entered, Florida Rule of Civil Procedure 1.440(c) requires service of an order setting any trial at which the amount of unliquidated damages is to be determined. Gulf Maintenance & Supply, Inc. v. Barnett Bank of Tallahassee, 543 So.2d 813 (Fla. 1st DCA 1989); Buffington v. Torcise, 504 So.2d 490 (Fla. 3d DCA 1987). Attorney's fees, which were awarded here, have been held to comprise unliquidated damages. Asian Imports, Inc. v. Pepe, 633 So.2d 551 (Fla. 1st DCA 1994); Bowman v. Kingsland Dev., Inc., 432 So.2d 660, 663 (Fla. 5th DCA 1983). Contra West v. West, 534 So.2d 893 (Fla. 5th DCA 1988).

For purposes of decision, we assume noncompliance with Florida Rule of Civil Procedure 1.440 can be raised, in an appropriate case, by motion pursuant to Florida Rule of Civil Procedure 1.540. [3] But, if noncompliance with Rule 1.440 was waived in the main proceeding, the question cannot be open on motion under Rule 1.540. On this record, Mr. Bennett may have waived objection not only to notice of trial but, more fundamentally, to the apparent omission altogether of any bench trial or evidentiary hearing testing the mortgagees' allegations.

Unrepresented by counsel, Mr. Bennett did not (understandably) explicitly invoke Florida Rule of Civil Procedure 1.440 on March 10, 1992. On the other hand, no version of the events of March 10, 1992, includes any account of proof or fact finding of any kind. Both versions suggest that those present agreed that no evidentiary hearing or trial was needed, not that fact finding should proceed despite defective notice. Cf. Charter Review Comm'n of Orange County v. Scott, 627 So.2d 520, 522 (Fla. 5th DCA 1993), quashed on other grounds, 647 So.2d 835 (Fla.1994) (holding that because appellants "voluntarily proceeded with the hearing and fully participated without raising any objection under Rule 1.440," they "waived any error pursuant to Rule 1.440 and [we]re precluded from raising th[at] objection for the first time on appeal").

Even if the issue was preserved below, we conclude that it has been waived on appeal. Mr. Bennett does not dispute, on this appeal, either mortgage holder's entitlement to foreclosure. He does not suggest that his failure to file answers was anything other than a considered decision to concede the accuracy of allegations in the complaint (and crossclaim), perhaps in an effort to keep attorneys' fees down. Nothing indicates that the failure to comply with Rule 1.440 in any way prejudiced Mr. Bennett, who does not complain about the lack of a trial. In the circumstances, we are unwilling to disturb the order under review insofar as it declines to reopen the question of entitlement to foreclosure.

No Notice of Judicial Sale

Mr. Bennett was not present when the Wards purchased the property at judicial sale on May 12, 1992, for $100, and was never served with copies of the certificate of sale, the certificate of title, or the certificate of disbursements. The final judgment of foreclosure, which scheduled judicial sale for May 12, 1992, contains a certificate of service of

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copies on all parties except Mr. Bennett. A subsequent notice of sale was not certified to have been served on any of the parties, and Mr. Bennett's assertion that he never received it, either, was uncontroverted. Notice of sale was published in a newspaper in Taylor County, but not in Madison County where Mr. Bennett resided.

Some three months after the judicial sale, on August 12, 1992, Mr. Bennett filed through counsel a motion for relief from judgment, arguing not only that the judgment should be set aside but also that the judicial sale should be rescinded. While it is true here as in Cull v. Hurth, 384 So.2d 295, 297 (Fla. 4th DCA 1980) that a "basic foundation issue appears to be the validity of the final judgment upon which all further proceedings depend," Mr. Bennett also argues for rescission of the judicial sale on grounds that are independent of the validity of the final judgment of foreclosure.

We conclude that Mr. Bennett filed reasonably promptly in the circumstances. See Franklin v. Franklin, 573 So.2d 401 (Fla. 3d DCA 1991). For reasons not apparent from the record, no hearing on the motion took place until March 3, 1995. The record contains no transcript of the hearing on the motion for relief from judgment. On March 8, 1995, the circuit court entered the order denying Mr. Bennett's motion now appealed.

Equitable principles govern on the question whether to set aside a judicial sale. The "failure of the judgment debtor to receive ... notice" does not automatically require that a judicial sale be set aside. Subsaro v. Van Heusden, 191 So.2d 569, 570 (Fla. 3d DCA 1966) (because lack of notice coupled with inadequacy of sales price outweighed purchaser's equities, judicial sale was set aside). "[M]ere inadequacy of price is not sufficient to set aside a judicial sale, but 'where such inadequacy is connected with, or shown to result from, any mistake, accident, surprise, misconduct, fraud or irregularity, the sale will generally be set aside.' " Ruff v. Guaranty Title & Trust Co., 99 Fla. 197, 126 So. 383, 384 (1930) (citation omitted). Accord Ohio Realty Inv. Corp. v. Southern Bank of West Palm Beach, 300 So.2d 679, 681 (Fla.1974); Arlt v. Buchanan, 190 So.2d 575 (Fla.1966).

The general rule is, of course, that standing alone mere inadequacy of price is not a ground for setting aside a judicial sale. But where the inadequacy is gross and is shown to result from any mistake, accident, surprise, fraud, misconduct or irregularity upon the part of either the purchaser or other person connected with the sale, with resulting injustice to the complaining party, equity will act to prevent the wrong result. Lawyers' Co-operative Pub. Co. v. Bennett, 1894, 34 Fla. 302, 16 So. 185; City of Sanford v. Ashton, 1938, 131 Fla. 759, 179 So. 765; Eristavi-Tchitcherine v. Miami Beach Federal Savings & Loan Ass'n, 1944, 154 Fla. 100, 16 So.2d 730; and Washington Sec. Co. v. Tracy's Plumbing & Pumps, Inc., Fla.App.1964, 166 So.2d 680. Also see 33 C.J.S. Executions § 234.

Arlt, 190 So.2d at 577. See also White v. Loschiavo, 597 So.2d 373, 374 (Fla. 4th DCA 1992) (reversing order refusing to vacate third judicial sale that took place without notice to appellant who bid substantially more at the first two (noticed but later rescinded) judicial sales than the property brought at the third); Fincham v. Fincham, 443 So.2d 312, 313 (Fla. 4th DCA 1983) (reversing order denying wife's motion to vacate judicial sale of marital domicile where notice of sale prepared by husband's counsel was not served on wife).

Outlining the procedure to be followed in a judicial sale, section 45.031(1), Florida Statutes (1991) recognized a right of redemption "at any time before the sale." " 'Before the sale' as [then] used in the statute has been interpreted to mean at any time before the issuance of the certificate of title." [4] CCC Properties, Inc. v. Kane, 582

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So.2d 159, 161 (Fla. 4th DCA 1991). "A mortgagor need not obtain the court's permission in order to exercise his right of redemption," id., but the right "is extinguished if not exercised prior to the issuance of the certificate of title." Id.

The failure to give adequate notice of a judicial sale may effectively deprive the mortgagor of the right to redeem the property. A mortgagor against whom a foreclosure judgment has been entered has the right, even when a default has been entered, to be served with a copy of the judgment. Fla.R.Civ.P. 1.080(h). A mortgagor unable financially to redeem still has an interest in seeing that prospective purchasers are at the judicial sale. Sale proceeds may reduce the mortgagor's indebtedness and the size of deficiency judgments, if any.

Here Mrs. Ward argues against setting aside the judicial sale because of the passage of time, improvements the Wards allegedly made to the property and the fact that Mr. Ward, who handled the couple's business affairs, passed away in 1993. But Mr. Ward died long after the motion for relief from judgment was filed, and the record does not reveal whether any improvements were made prior to the filing of Mr. Bennett's motion for relief from judgment. It may, indeed, be inferred from appellee's brief that, despite "extensive argument" at the hearing on the motion for relief from judgment, there was no "testimony or evidence as to the costs of the improvements made." On this record, we believe the trial court erred in deciding against setting aside the judicial sale, in light of the relative equities.

We therefore reverse and remand with directions that the trial court set aside the judicial sale. Without otherwise disturbing the final judgment of foreclosure, another judicial sale should be set with proper notice, including service of notice on all parties entitled thereto.

WOLF and LAWRENCE, JJ., concur.

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1 Mrs. Ward asserts in her answer brief that the court announced at the hearing its intention to enter a final judgment for the Wards and that Mr. Bennett did not object. Mr. Bennett states in the initial brief that he left the hearing on March 10, 1992, believing that the second mortgage holder, First Union (the successor in interest to the Federal Deposit Insurance Corporation as Receiver of Southeast Bank, N.A.), was going to pay the Wards everything that was owed on the first mortgage.

2 A handwritten message on a small, square, yellow piece of adhesive paper, still attached to (but readily removable from) the final judgment reads:

Dear Judge Agner--

Southeast Bank did not pay off Mr. Ward + Mike Smith [attorney for First Union] agrees that the Final Judgment should be entered--[illegible] Bob Schramm [attorney for the Wards.]

3 Although the finality of the judgment of foreclosure is not directly affected by the trial court's failure to serve a copy of the judgment on Mr. Bennett, Fla.R.Civ.P. 1.080(h)(3), it may be an abuse of discretion for a trial court to refuse to vacate, on timely application, an order or judgment that was not properly transmitted pursuant to Rule 1.080(h), if, as a consequence, a party is precluded from taking a viable direct appeal because time for filing has elapsed. Gibson v. Buice, 381 So.2d 349 (Fla. 5th DCA 1980); Spanish Oaks Condominium Ass'n, Inc. v. Compson of Florida, Inc., 453 So.2d 838, 840 (Fla. 4th DCA 1984) (reversing and remanding where "the 'proposed' final order did not satisfy the requirement of notice which Rule 1.080(h)(1) was re-designed to insure[,]" and no notice was received until more than thirty days had elapsed). See also Gulf Maintenance & Supply, Inc. v. Barnett Bank of Tallahassee, 543 So.2d 813 (Fla. 1st DCA 1989); Cole v. Blackwell, Walker, Gray, Powers, Flick & Hoehl, 523 So.2d 725 (Fla. 3d DCA 1988); Bowman v. Kingsland Dev., Inc., 432 So.2d 660, 663 (Fla. 5th DCA 1983).

4 Section 45.0315, Florida Statutes (1993), effective October 1, 1993, ch. 93-250, § 2, at 2467-68, Laws of Fla., (after the judicial sale in the present case) "explicitly empowers a court in the final judgment of foreclosure to fix the time in which the mortgagor may redeem. Where the judgment is silent in that regard, redemptive rights are lost upon the clerk's filing of a certificate of sale." Emanuel v. Bankers Trust Co., N.A., 655 So.2d 247, 249 (Fla. 3d DCA 1995), review denied, 663 So.2d 629 (Fla.1995).