

24 So.3d 586, 34 Fla. L. Weekly D2055
(Cite as: 24 So.3d 586)

C


District Court of Appeal of Florida,
Fourth District.
Alvaro E. AZANZA and Maria A. Cedeno
Azanza, Petitioners,
v.
PRIVATE FUNDING GROUP, INC., a
Florida corporation, Respondent.
No. 4D09-3751.

Oct. 7, 2009.

Background: Foreclosure action was brought. The Seventeenth Judicial Circuit Court, Broward County, [John B. Bowman, J.](#), entered summary judgment of foreclosure, and denied property owners' motion to postpone the foreclosure sale and vacate the summary judgment. Owners filed petition for writ of certiorari.

Holding: The District Court of Appeal held that owners waived entitlement to 20 days' notice of summary judgment hearing. Petition denied.

West Headnotes


Judgment 228  **189**

[228](#) Judgment

[228V](#) On Motion or Summary Proceeding

[228k189](#) k. Defects and objections.

[Most Cited Cases](#)

Judgment 228  **380**

[228](#) Judgment

[228IX](#) Opening or Vacating

[228k380](#) k. Waiver of right to relief.

[Most Cited Cases](#)

Property owners waived entitlement to 20 days' notice of summary judgment hearing

and, thus, were not entitled to relief from summary judgment of foreclosure on the ground of insufficient notice, where owners did not object to the insufficiency of notice either before the hearing, at the hearing, or in a timely motion for rehearing, and there was no showing that owners lacked a sufficient opportunity to raise the issue. [West's F.S.A. RCP Rule 1.510\(c\)](#).

*[586](#) [Thomas A. Pila](#) of Pila Law Group, L.L.C., Miami, for petitioners.

No appearance for respondent.

PER CURIAM.

Petitioners, Alvaro E. Azanza and Maria A. Cedeno Azanza, petition this court for issuance of a writ of certiorari. In their petition, they request that this court quash the orders of the lower tribunal dated September 10, 2009, and February 4, 2009. The September 10, 2009 order, for which review is sought, denied the petitioners' motion to postpone the foreclosure sale of their home and to vacate the February 4, 2009, order. The February 4, 2009, order granted a summary judgment of foreclosure to respondent ten days after the motion for summary judgment was served on petitioners. We deny the petition, as the petitioners have not shown a departure from the essential requirements of law.

According to the petition, the underlying action was filed September 3, 2008. On January 20, 2009, respondent moved for summary judgment and served a notice of hearing. The hearing was held fifteen days later on February 4, 2009, and the court entered a final judgment of foreclosure. The petitioners did not timely appeal this judgment. Then, after retaining counsel,

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petitioners, a day before the scheduled foreclosure sale, filed a limited notice of appearance and an emergency motion to postpone the sale. As grounds, counsel argued the summary judgment of foreclosure was improper because it was granted in violation of the Florida Rules of Civil Procedure, as petitioners were not given twenty days notice prior to the summary judgment hearing. See Fla. R. Civ. P. 1.510(c) (stating that “[t]he movant shall *587 serve the motion at least 20 days before the time fixed for the hearing”). The motion alleged, without explanation, that the petitioners did not waive compliance with rule 1.510(c), they had defenses to raise, and the court had no discretion regarding the time requirements of rule 1.510(c). The trial court denied the motion. This petition followed.

This court has held that any error in failing to give twenty days notice prior to a summary judgment hearing is waived if the party does not object to insufficient notice either before a summary judgment hearing, at the summary judgment hearing, or in a motion for rehearing. *E & I, Inc. v. Excavators, Inc.*, 697 So.2d 545, 546 (Fla. 4th DCA 1997) (holding that “where, as in the present case, there was no objection to the insufficient notice prior to the [summary judgment] hearing, at the [summary judgment] hearing, nor in the motion for rehearing, the issue has been waived”). If this issue can be waived and, if unpreserved, is not grounds for reversal on direct appeal, it should not be grounds for an extraordinary writ filed months after the time for an appeal has run. Although petitioners' motion filed in the trial court alleges that they did not waive compliance with the rule, there is no showing in this case that they did not have a sufficient opportunity to object to the insufficient notice either before the

summary judgment hearing, at the summary judgment hearing, or in a timely motion for rehearing. Petitioners have, therefore, neither shown a departure from the essential requirements of law nor that there is any basis for granting certiorari review. We, accordingly, deny the petition.

WARNER, STEVENSON and **HAZOURI, JJ.**, concur.

Fla.App. 4 Dist., 2009.

Azanza v. Private Funding Group, Inc.
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END OF DOCUMENT

Date of Printing: May 23, 2010

KEYCITE

C [Azanza v. Private Funding Group, Inc.](#), 24 So.3d 586, 34 Fla. L. Weekly D2055 (Fla.App. 4 Dist., Oct 07, 2009) (NO. 4D09-3751)

History

Direct History

=> [1 Azanza v. Private Funding Group, Inc.](#), 24 So.3d 586, 34 Fla. L. Weekly D2055 (Fla.App. 4 Dist. Oct 07, 2009) (NO. 4D09-3751)

Court Documents

Dockets (U.S.A.)

Fla.App. 4 Dist.

[2 ALVARO E. AZANZA AND MARIA A. CEDENO AZANZA v. PRIVATE FUNDING GROUP, INC., ETC.](#), NO. 4D09-3751 (Docket) (Fla.App. 4 Dist. Sep. 18, 2009)

From: Schreiber, Lee Ann </O=SAO20/OU=CACJIS/CN=RECIPIENTS/CN=LSCHREIBER>

To: Davis, Dana

CC:

Date: 1/21/2010 1:09:06 PM

Subject: ?RE: mortgage foreclosure bench book

Yes, he did say he would make me a copy for my library. I will probably come up on Wednesday for the A.M. session, That way I can get a feel for the traffic flow and timing. Any special place I should park?

From: Davis, Dana

Sent: Thursday, January 21, 2010 12:58 PM

To: Schreiber, Lee Ann

Subject: RE: mortgage foreclosure bench book

I will put a note on my calendar to get the bench book for you. Would you like a copy of your own?

We are in Charlotte the week of 2/1. He has foreclosures on Mondays and Wednesdays. The morning session starts at 9:00 and the afternoon begins at 1:00.

Dana Davis

Judicial Assistant to Hon. George C. Richards

Lee County 239-533-2705

Charlotte County 941-637-2375

From: Schreiber, Lee Ann

Sent: Thursday, January 21, 2010 11:43 AM

To: Davis, Dana

Subject: mortgage foreclosure bench book

Judge Richards asked me to send a email reminder to look for the mortgage foreclosure bench book in the Charlotte County office when you're there next. He was going to loan it to me.

Also, will you be in Charlotte the week of Feb 1? It is the first FULL week. I'd like to watch how he does the Charlotte

20TH CIR 03034

11_16_2010

Just saw you email - offer to help the new JA. I gotta know for sure what my assignment will be before deciding on a JA> We'll definitely take you u on the offer though. Thanks

From: Schreiber, Lee Ann </O=SAO20/OU=CACJIS/CN=RECIPIENTS/CN=LSCHREIBER>

To: Conderman, Ellen

CC:

Date: 11/5/2010 12:17:14 PM

Subject: ?FW: the split docket

FYI

From: Greider, Christine

Sent: Friday, November 05, 2010 1:04 PM

To: Schreiber, Lee Ann

Cc: Hendrickx, Jo-Ann

Subject: RE: the split docket

Sounds great. I will try to be there, but I have a 2 day, non-jury trial, if everything washes, I will be there and will keep you posted. It was really nice to spend time with you and everyone on Saturday.

Have a great weekend.

Christine

From: Schreiber, Lee Ann

Sent: Friday, November 05, 2010 11:24 AM

To: Greider, Christine

Subject: the split docket

If you have an option re coming to Ft. Myers to observe, the best days would be Tues 11/16 or Wed 11/17 – those are the judicial case management conferences and pre trial conferences. Monday of that week (11/15) is a motion calendar and docket sounding – not anything you are unfamiliar with. The trial docket runs for Thursday & Friday (11/18 & 19) and Nov 29 to December 2 (I am out the week of T’giving) and you are quite familiar with trial stuff.

If you wanted to observe in Charlotte County (first FULL 2 weeks of each month), there’s no best time. The residential foreclosure trials are on Monday & Wednesday. Tuesday is DV/violence court and Thursday is dependency (which you will not have on your split docket).

Just wanted to give some info for your consideration. Talk to you soon, Lee

From: Schreiber, Lee Ann </O=SAO20/OU=CACJIS/CN=RECIPIENTS/CN=LSCHREIBER>

To: Greider, Christine

CC:

Date: 11/5/2010 10:24:16 AM

Subject: the split docket

If you have an option re coming to Ft. Myers to observe, the best days would be Tues 11/16 or Wed 11/17 – those are the judicial case management conferences and pre trial conferences. Monday of that week (11/15) is a motion calendar and docket sounding – not anything you are unfamiliar with. The trial docket runs for Thursday & Friday (11/18 & 19) and Nov 29 to December 2 (I am out the week of T'giving) and you are quite familiar with trial stuff.

If you wanted to observe in Charlotte County (first FULL 2 weeks of each month), there's no best time. The residential foreclosure trials are on Monday & Wednesday. Tuesday is DV/violence court and Thursday is dependency (which you will not have on your split docket).

Just wanted to give some info for your consideration. Talk to you soon, Lee

From: Schreiber, Lee Ann </O=SAO20/OU=CACJIS/CN=RECIPIENTS/CN=LSCHREIBER>

To: Conderman, Ellen

CC:

Date: 2/2/2010 11:18:22 AM

Subject: ?FW: my official start date of Monday February 8

Can you place the following dates in my Microsoft Outlook schedule so I know where I need to be and when? 2/9 +2/11 + 2/16

TY

From: Kyle, Keith

Sent: Tuesday, February 02, 2010 11:09 AM

To: Schreiber, Lee Ann; Carlin, John S.

Cc: Cary, G. Keith; Steinbeck, Margaret

Subject: RE: my official start date of Monday February 8

Lee, if there is still time/opportunity to "shadow," you may want to try and come up for DV Court next Tues. (Judge Richards will be presiding) and either the 16th or 23rd to watch me conduct DV hearings to get a flavor of different styles. I'm glad you are watching foreclosures up here tomorrow as we do conduct them a little differently up here compared to Lee Co. (we do not get the same level of assistance from the Clerk's office up here in comparison to Lee Co. in terms of review of paperwork, FJ's, etc.). I also strongly encourage you to come up on one of the two monthly judicial dependency days; e.g. Thursday 2/11).

From: Schreiber, Lee Ann

Sent: Tuesday, February 02, 2010 10:54 AM

To: Carlin, John S.; Kyle, Keith

Cc: Cary, G. Keith; Steinbeck, Margaret

Subject: my official start date of Monday February 8

Good morning Judges,

We're just less than a week out from my officially reporting for duty. I've been doing a few things unofficially, as time permits, and plan to observe Judge Richards' foreclosure docket for part of the morning tomorrow and have been invited to attend the Charlotte County Judge's meeting on Thursday which I plan to do.

I'm not sure where I'm supposed to go on Monday morning (I assume Charlotte County) or what schedule I will be observing. Let me know when and where I am need on Monday. These times, they are exciting!

Cordially,

20TH CIR 03038

Lee

From: Schreiber, Lee Ann </O=SAO20/OU=CACJIS/CN=RECIPIENTS/CN=LSCHREIBER>

To: Carlin, John S.

Kyle, Keith

CC: Cary, G. Keith

Steinbeck, Margaret

McHugh, Michael

Atkins, Joanne

Conderman, Ellen

Date: 2/3/2010 3:05:58 PM

Subject: ?RE: my official start date of Monday February 8

So far, at the suggestion of Judge Kyle, I have placed the following dates on my schedule for shadowing:

Tuesday 2/9 shadow Judge Richards DV court

Thursday 2/11 shadow Judge Kyle dependency court

Tuesday 2/16 shadow Judge Kyle DV court (even though Lee County week)

I'd like to shadow a few criminal first appearance judges to get an idea of what all the "Duty Judges" cover I've not yet read the handbook) in both counties during my 3 week orientation if possible. I'd like to observe some contested foreclosure cases as well. Also, anything on the civil dockets with different judges/different styles would be welcome.

From: Carlin, John S.

Sent: Tuesday, February 02, 2010 2:40 PM

To: Schreiber, Lee Ann; Kyle, Keith

Cc: Cary, G. Keith; Steinbeck, Margaret; McHugh, Michael; Atkins, Joanne

Subject: RE: my official start date of Monday February 8

Lee,

Once you have a Charlotte county schedule, let me know and I will put together a Lee County "shadow" schedule. I am copying Judge McHugh as I will ask that he assist with this coordination. It would be good to see some civil hearings in Lee County as well as the Friday foreclosure docket. We have a total of three shadow weeks prior to your official start on March 1. As you know, you will be in Charlotte for the weeks of March 1 and March 8 and then return to Lee the week of March 15. I think that it would also be beneficial for you, Ellen and me to meet with Judge Richards and Dana Davis to discuss their current scheduling of foreclosure hearings and see if they have any ideas on how to improve this foreclosure system. I will have Joanne coordinate this meeting. Please let me know what else I can assist you with during your transition.

20TH CIR 03040

John

From: Schreiber, Lee Ann
Sent: Tuesday, February 02, 2010 10:54 AM
To: Carlin, John S.; Kyle, Keith
Cc: Cary, G. Keith; Steinbeck, Margaret
Subject: my official start date of Monday February 8

Good morning Judges,

We're just less than a week out from my officially reporting for duty. I've been doing a few things unofficially, as time permits, and plan to observe Judge Richards' foreclosure docket for part of the morning tomorrow and have been invited to attend the Charlotte County Judge's meeting on Thursday which I plan to do.

I'm not sure where I'm supposed to go on Monday morning (I assume Charlotte County) or what schedule I will be observing. Let me know when and where I am need on Monday. These times, they are exciting!

Cordially,

Lee

RESIDENTIAL FORECLOSURE BENCH BOOK

Prepared by

Honorable Jennifer D. Bailey
Administrative Judge
Circuit Civil Jurisdiction Division
Eleventh Judicial Circuit of Florida

and

Doris Bermudez-Goodrich
Assistant General Counsel
Eleventh Judicial Circuit of Florida

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Introduction

1. Foreclosure is the enforcement of a security interest by judicial sale of collateral. All mortgages shall be foreclosed of equity. § 702.01, Fla. Stat. (2010).

2. **Definitions:**

(a) **Mortgage:** any written instrument securing the payment of money or advances including liens to secure payment of assessments for condominiums, cooperatives and homeowners' associations. § 702.09, Fla. Stat. (2010).

A mortgage creates only a specific lien against the property; it is not a conveyance of legal title or of the right of possession. § 697.02, Fla. Stat. (2010); *Fla. Nat'l. Bank & Trust Co. of Miami v. Brown*, 47 So. 2d 748 (1949).

(b) **Mortgagee:** refers to the lender; the secured party or holder of the mortgage lien. § 721.82(6), Fla. Stat. (2010).

(c) **Mortgagor:** refers to the obligor or borrower; the individual or entity who has assumed the obligation secured by the mortgage lien. § 721.82(7), Fla. Stat. (2010). The mortgagor holds legal title to the mortgaged property. *Hoffman v. Semet*, 316 So. 2d 649, 652 (Fla. 4th DCA 1975).

3. To foreclosure the mortgage lien and extinguish equities of redemption, secured parties must file a civil action. § 45.0315, Fla. Stat. (2010).

Lender's Right to Foreclose

1. Constitutional obligation to uphold mortgage contract and right to foreclose. F. S. A. Const. Art 1 § 10.

(a) Right unaffected by defendant's misfortune. *Lee County Bank v. Christian Mut. Found., Inc.*, 403 So. 2d 446, 449 (Fla. 2d DCA 1981); *Morris v. Waite*, 160 So. 516, 518 (Fla. 1935).

(b) Right not contingent on mortgagor's health, good fortune, ill fortune, or the regularity of his employment. *Home Owners' Loan Corp. v. Wilkes*, 178 So. 161, 164 (Fla. 1938).

(c) Contract impairment or imposition of moratorium is prohibited by court. *Lee County Bank v. Christian Mut. Foundation, Inc.*, 403 So. 2d 446, 448 (Fla. 1981).

Default

1. Right to foreclosure accrues upon the mortgagor's default.
2. Basis for default:
 - (a) mortgagor's failure to tender mortgage payments; or
 - (b) impairment of security, including failure to pay taxes or maintain casualty insurance.

Acceleration

1. Acceleration - gives the mortgagee the authority to declare the entire mortgage obligation due and payable immediately upon default.
2. Mortgage Acceleration Clause - confers a contract right upon the note or mortgage holder which he may elect to enforce upon default. *David v. Sun Fed. Sav. & Loan Ass'n.*, 461 So. 2d 93, 94 (Fla. 1984).
 - (a) Absent acceleration clause, lender can only sue for amount in default. *Kirk v. Van Petten*, 21 So. 286 (Fla. 1896).
3. Commencement - upon delivery of written notice of default to the mortgagor; prior notice is not required unless it is a contractual term. *Millett v. Perez*, 418 So. 2d 1067 (Fla. 3d DCA 1982); *Fowler v. First Sav. & Loan Ass'n. of Defuniak Springs*, 643 So. 2d 30, 34 (Fla. 1st DCA 1994), (filing of complaint is notice of acceleration).
4. Pre-acceleration - mortgagor may defeat foreclosure by the payment of arrearages, thereby reinstating the mortgage. *Pici v. First Union Nat'l. Bank of Florida*, 621 So. 2d 732, 733 (Fla. 2d DCA 1993).

Statute of Limitations

1. Five year statute of limitations period - applies specifically to mortgage foreclosure actions. § 95.11(2)(c), Fla. Stat. (2010); *Farmers & Merch. Bank v. Riede*, 565 So. 2d 883, 885 (Fla. 1st DCA 1990).
2. Commencement of limitations period:
 - (a) General rule – commencement upon accrual of the cause of action; this occurs when the last element of the cause of action is satisfied (for example, default).

§ 95.031(1), Fla. Stat. (2010); *Maggio v. Dept. of Labor & Employment Sec.*, 910 So. 2d 876, 878 (Fla. 2d DCA 2005).

(b) A note or other written instrument - when the first written demand for payment occurs. *Ruhl v. Perry*, 390 So. 2d 353, 357 (Fla. 1980).

(c) Oral loan payable on demand - commencement upon demand for payment. *Mosher v. Anderson*, 817 So. 2d 812, 813 (Fla. 2002).

3. Tolling of the limitations period - acknowledgment of the debt or partial loan payments subsequent to the acceleration notice toll the statute of limitations. § 95.051(1)(f), Fla. Stat. (2010); *Cadle Company v. McCartha*, 920 So. 2d 144, 145 (Fla.5th DCA 2006).

(a) Tolling effect - starts the running anew of the limitations period on the debt. *Wester v. Rigdon*, 110 So. 2d 470, 474 (Fla. 1st DCA 1959).

Jurisdiction

1. Court's judicial authority over real property based on *in rem* jurisdiction.

2. Two part test to establish *in rem* jurisdiction: (1) jurisdiction over the class of cases to which the case belongs, and (2) jurisdictional authority over the property or *res* that is the subject of the controversy. *Ruth v. Dept. of Legal Affairs*, 684 So. 2d 181, 185 (Fla. 1996).

(a) Class of case - jurisdictional parameters defined by Article V Section 5(b), Florida Constitution, implemented by Section 26.012(2)(g), Fla. Stat. (2010). *Alexdex Corp. v. Nachon Enter., Inc.*, 641 So. 2d 858 (Fla. 1994), (concurrent equity jurisdiction over lien foreclosures of real property that fall within statutory monetary limits). *Id.*, at 863.

(b) Jurisdictional authority over real property only in the circuit where the land is situated. *Hammond v. DSY Developers, LLC.*, 951 So. 2d 985, 988 (Fla. 2d DCA 2007). *Goedmakers v. Goedmakers*, 520 So. 2d 575, 578 (Fla. 1988); (court lacks *in rem* jurisdiction over real property located outside the court's circuit). If real property lies in two counties, the foreclosure suit may be maintained in either county, however, the notice of sale must be published in both. § 702.04, Fla. Stat. (2010).

Parties to the Foreclosure Action

Plaintiff

1. Must be the owner/holder of the note as of the date of filing suit. *Jeff-Ray Corp. v. Jacobsen*, 566 So. 2d 885 (Fla. 4th DCA 1990); see also, *WM Specialty Mortgage, LLC v. Salomon*, 874 So. 2d 680, 682 (Fla. 4th DCA 2004).

(a) The holder of a negotiable instrument means the person in possession of the instrument payable to bearer or to the identified person in possession. § 671.201(21), Fla. Stat. (2010).

(1) Endorsement in blank – where unsigned and unauthenticated, an original note is insufficient to establish that the plaintiff is the owner and holder of the note. Must have affidavits or deposition testimony establishing plaintiff as owner and holder. *Riggs v. Aurora Loan Services, LLC*, 2010 WL 1561873 (Fla. 4th DCA 4/21/10).

(b) The holder may be the owner or a nominee, such as a servicer, assignee or a collection and litigation agent. Rule 1.210(a), Fla. R. Civ. P. (2010) provides that an action may be prosecuted in the name of an authorized person without joinder of the party for whose benefit the action is brought. See also, *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1184 (Fla. 3d DCA 1985).

(c) Plaintiff's nominee has standing to maintain foreclosure based on real party in interest rule. *Mortgage Electronic Registration Systems, Inc. v. Revoredo*, 955 So. 2d 33 (Fla. 3d DCA 2007), (*MERS* was the holder by delivery of the note); *Mortgage Elec. Registration Systems, Inc. v. Azize*, 965 So. 2d 151 (Fla. 2d DCA 2007); *Philogene v. ABN AMRO Mortgage Group, Inc.*, 948 So. 2d 45 (Fla. 4th DCA 2006).

2. Assignment of note and mortgage - Plaintiff should assert assignee status in complaint. Absent formal assignment of mortgage or delivery, the mortgage in equity passes as an incident of the debt. *Perry v. Fairbanks Capital Corp.*, 888 So. 2d 725, 726 (Fla. 5th DCA 2004); *Johns v. Gillian*, 134 Fla. 575, 579 (Fla. 1938); *Warren v. Seminole Bond & Mortg. Co.*, 127 Fla. 107 (Fla. 1937), (security follows the note, the assignee of the note secured by a mortgage is entitled to the benefits of the security). Assignments must be recorded to be valid against creditors and subsequent

purchasers. § 701.02, Fla. Stat. (2010). See also, *Glynn v. First Union Nat'l. Bank*, 912 So. 2d 357, 358 (Fla. 4th DCA 2005).

(a) No requirement of a written and recorded assignment of the mortgage to maintain foreclosure action where evidence establishes plaintiff as owner and holder of the note on date of filing suit. *Perry*, 888 So. 2d at 726; *WM Specialty Mortgage, LLC*, 874 So. 2d at 682; *Chem. Residential Mortgage v. Rector*, 742 So. 2d 300 (Fla. 1st DCA 1998); *Clifford v. Eastern Mortg. & Sec. Co.*, 166 So. 562 (Fla. 1936). However, the incomplete, unsigned and unauthenticated assignment of mortgage attached as an exhibit to purported mortgage holder and note holder's response to motion to dismiss did not constitute admissible summary judgment evidence sufficient to establish standing. *BAC Funding Consortium, Inc. ISAOA/ATIMA v. Jean Jacques*, 2010 WL 476641 (Fla. App. 2 DCA Feb. 12, 2010). If plaintiff has an assignment of mortgage recorded prior to the date of filing suit, then he can enforce even if possession of note never physically delivered. Florida courts recognize constructive delivery. "The absence of the note does not make a mortgage unenforceable." *Lawyers Title Ins. Co. Inc v. Novastar Mortgage, Inc.*, 862 So. 2d 793, 798 (Fla. 4th DCA 2004). Assignment may be by physical delivery (provide evidence) or by written assignment.

3. MERS – What is it? Mortgage Electronic Registration Systems is a corporation which maintains an electronic registry tracking system of servicing and ownership rights to mortgages throughout the United States. In many cases MERS is the mortgagee of record and is identified in the mortgage. On each MERS loan there is an 18 digit number used for tracking. Through the MERS servicer ID number, homeowners can identify their lender with borrower name and property address.

4. Since the promissory note is a negotiable instrument, plaintiff must present the original note or give a satisfactory explanation for its absence. § 90.953(1), Fla. Stat. (2010); *State Street Bank and Trust Co. v. Lord*, 851 So. 2d 790, 791 (Fla. 4th DCA 2003). A satisfactory explanation includes loss, theft, destruction and wrongful possession of the note. § 673.3091(1), Fla. Stat. (2010). Reestablishment of the note is governed by § 673.3091(2), Fla. Stat. (2010).

Necessary and Proper Defendants

1. The owner of the fee simple title - only indispensable party defendant to a foreclosure action. *English v. Bankers Trust Co. of Calif., N. A.*, 895 So 2d 1120, 1121 (Fla. 4th DCA 2005). Foreclosure is void if titleholder omitted. *Id.* If a spouse fails to sign the mortgage, lender may still foreclose on property owned by husband and wife when both spouses knew of loan and purchased in joint names. *Countrywide Home Loans v. Kim*, 898 So. 2d 250 (Fla. 2005).

(a) Indispensable parties defined - necessary parties so essential to a suit that no final decision can be rendered without their joinder. *Sudhoff v. Federal Nat'l. Mortgage Ass'n.*, 942 So. 2d 425, 427 (Fla. 5th DCA 2006).

2. Failure to join other necessary parties - they remain in the same position as they were in prior to foreclosure. *Abdoney v. York*, 903 So. 2d 981, 983 (Fla. 2d DCA 2005).

3. Omitted party - only remedies are to compel redemption or the re-foreclosure in a suit de novo. *Id.*; *Quinn Plumbing Co. v. New Miami Shores Corp.*, 129 So. 2d 690, 693 (Fla. 1930).

4. Death of titleholder prior to entry of final judgment - beneficiaries of the titleholder and the personal representative are indispensable parties. *Campbell v. Napoli*, 786 So. 2d 1232 (Fla. 2d DCA 2001).

(a) If indispensable parties not joined, action abated pending proper joinder. *Id.* As such, suit against a decedent alone will result in abatement.

(b) Post-judgment death of titleholder, these parties are not deemed indispensable parties. *Davis v. Scott*, 120 So. 1 (Fla. 1929).

5. Necessary parties to the foreclosure action - all subordinate interests recorded or acquired subsequent to the mortgage.

(a) Includes: junior mortgagees, holders of judgments and liens acquired after the superior mortgage, lessees and tenants/parties in possession of the real property. *Posnansky v. Breckenridge Estates Corp.*, 621 So. 2d 736, 737 (Fla. 4th DCA 1993); *Commercial Laundries, Inc., v. Golf Course Towers Associates*, 568 So. 2d 501, 502