IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MONROE COUNTY

ADMINISTRATIVE ORDER: 3.006

IN RE:

ESTABLISHMENT OF CIRCUIT CIVIL FORECLOSURE SUBDIVISION

_____:

WHEREAS, the Sixteenth Judicial Circuit, and the Florida State Courts System are experiencing an unprecedented number of mortgage foreclosures; and

WHEREAS, the Florida Legislature has allocated temporary funds specifically towards reducing the of backlog of foreclosure cases across the State of Florida; and

WHEREAS, the Supreme Court of Florida has issued a blanket order assigning senior judges to serve as temporary judges statewide in order to hear, conduct, try and determine the cases presented towards them; and

WHEREAS, the senior judges are vested with all the powers and prerogatives conferred by the Constitution and the laws of the State of Florida upon a judge of the court to which they are assigned; and

WHEREAS, the Chief Judge is charged by Rule 2.215(b)(4), Florida Rules of Judicial Administration, with the responsibility of assigning judges to courts and divisions in the Circuit, and

IT IS THEREFORE ORDERED THAT:

A. Within the Circuit Civil Division of the Sixteenth Judicial Circuit, a Circuit Civil Foreclosure Subdivision is hereby established.

B. The following case types shall be included in the Circuit Civil Foreclosure Subdivision:

    a. Commercial Foreclosures;
    b. Homestead Foreclosures;
    c. Non-Residential Homestead Foreclosures

C. Senior Judge Sandra Taylor, who has been assigned a blanket order by the Florida Supreme Court, hereby attached, shall be assigned all new, pending and reopened cases within the subdivision, with the exception of the following cases:

    07-CA-232-K Maresch v. Esposito
    08-CA-683-K Wells Fargo v. Worrell, et al
    08-CA-1396-K Bank of New York v. Murphy
    08-CA-1787-K Wells Fargo v. Hartley

09-CA-55-K US Bank v. Washington
09-CA-83-K Litton Loan Servicing v. Hardy
09-CA-537-K Deutsche Bank v. Henshaw
09-CA-981-K Fifth Third Bank v. Murphy & Quirk
09-CA-1429-K Capital One v. Vance
09-CA-1986-K HSBC v. Campbell
09-CA-2008-K HSBC v. Paglia
10-CA-61-K TIB Bank v. Stanley
10-CA-219-K JP Morgan Chase v. Lowry
10-CA-234-K JP Morgan Chase v. Palmeno

09-CA-131-M JP Morgan Chase v. Barlow

05-CA-156-P Igoe v. Petrusha
07-CA-851-P Igoe v. Petrusha
08-CA-331-P Washington Mutual v. Reardin
08-CA-488-P Wesco Distribution v. Lorelei Associates
09-CA-19-P Dedrick v. Lindback
09-CA-279-P Great Florida Bank v. Lorelei Associates, et al
09-CA-965-P Citimortgage v. Beattie
10-CA-41-P Bank of New York v. Peters

D. Any Commercial Foreclosure, Homestead Foreclosure or Non-Residential Homestead Foreclosure case currently disposed of that is reopened, shall be reassigned within the Circuit Civil Foreclosure Subdivision to Judge Sandra Taylor.

E. This Order shall take effect July 1, 2010, and terminate June 30, 2011. However, it shall not operate contrary to any incidental reassignment of cases or any other modifications that may have been or may be entered by the Chief Judge.

DONE AND ORDERED at Plantation Key, Monroe County, Florida, this 22nd day of June, 2010.

Honorable Luis Garcia
Chief Judge

Supreme Court of Florida

I, PEGGY A. QUINCE, under authority vested in me as Chief Justice of the Supreme Court of Florida under article V, section 2, of the Constitution of Florida and the rules of this Court promulgated thereunder, do hereby assign and designate THE HONORABLE SANDRA E. TAYLOR for statewide judicial service, effective January 1, 2009, and upon her retirement from active full judicial service, and which shall expire on September 30, 2011. JUDGE TAYLOR is authorized to hear, conduct, try, and determine the causes which shall be presented to the judge as a temporary judge of any circuit or county court in the State of Florida upon approval by the chief judge of that court and thereafter to dispose of all matters considered by the judge, including issues of fees and costs arising out of said causes, but excluding other matters subsequently raised that are collateral to said causes, during the term of this order. JUDGE TAYLOR, under and by virtue of the authority hereof, will be vested with all powers and prerogatives conferred by the Constitution and laws of the State of Florida upon a judge of the court to which the judge is assigned after her retirement from active full judicial service.

DONE AND ORDERED at Tallahassee, Florida, on December 3, 2008.

Peggy A. Quince
CHIEF JUSTICE
SUPREME COURT OF FLORIDA

ATTEST:

DEPUTY CLERK

STANDARD PROCEDURES AND REQUIREMENTS FOR
RESIDENTIAL AND COMMERCIAL MORTGAGE FORECLOSURE PROCEEDINGS
CIRCUIT CIVIL FORECLOSURE SUBDIVISION
SENIOR CIRCUIT JUDGE SANDRA TAYLOR
(beginning July 1, 2010)

The following standard procedures and requirements apply to all residential and commercial mortgage foreclosure actions in the Sixteenth Judicial Circuit's Circuit Civil Foreclosure Subdivision. These procedures and requirements have been established to enable the Court and Clerk of Court to efficiently process the greatly increased volume of foreclosure actions in our circuit.

Compliance with these standard procedures and requirements is **mandatory.** At a minimum, failure to follow the Court's requirements will result in the case being removed from the docket without prior notice. Additional sanctions may be applied in cases of willful, habitual or egregious non-compliance.

These procedures and requirements will be periodically updated and supplemented to meet the continuously changing demands of the Foreclosure Subdivision. You should consult these published requirements regularly.

CIRCUIT CIVIL FORECLOSURE SUBDIVISION REQUIREMENTS

I. No hearing time may be reserved for summary judgment hearings in foreclosure cases until the underlying motion and required supporting documentation are prepared and ready to file with the Clerk. Motions for summary judgment and accompanying supporting documentation shall be transmitted to the Clerk immediately after the hearing is set. In any event, all supporting documentation must be filed with the Clerk of Court at least twenty (20) days prior to the hearing in accord with Rule 1.510(c). The court will monitor compliance with these requirements and may cancel hearings and impose sanctions for failure to comply with these procedures and requirements.

II. Supporting documentation that must be part of the "Foreclosure Packet" includes, but is not limited to: the *Notice of Hearing*, the *Affidavit of Indebtedness*, the *Affidavit of Costs*, the *Affidavit as to Reasonableness of Attorney's Fees*, the *Notice of Sale*, the *Certificate of Title* and the *Certificate of Sale*. Counsel must also provide sufficient copies and pre-addressed postage-paid envelopes for all parties to receive copies of the final judgment and sale documents.

III. Parties seeking summary judgment in foreclosure actions shall file the motion and required supporting documentation only with the Clerk of Court. No documents or courtesy copies of your motion for summary judgment shall be sent to the judge's chambers.

cc: Clerk - Cir. Civil

IV. The summary judgment documentation submitted to the Clerk of Court shall include the Mortgage Foreclosure Summary Judgment Checklist, attached hereto as Exhibit "A". The checklist requires counsel's confirmation that appropriate steps have been taken to prepare the case for disposition by summary judgment, and that all documents supporting the motion have been timely filed or submitted. For good cause shown, upon the request of a party the court may waive the production of any item or document required by the checklist. Such requests shall be made before the checklist is filed and the hearing on the motion for summary judgment is scheduled.

V. Hearings on motions for summary judgment may be cancelled if the forms required (e.g. Supreme Court approved Final Judgment, Mortgage Foreclosure Summary Judgment Checklist, Certificate of Compliance with the Residential Mortgage Foreclosure Mediation Program, a copy of the most recently filed Form A) do not accompany the summary judgment motion or are not used, or if the documents required by the checklist are not timely filed, are missing and their absence is not adequately explained.

VI. Once scheduled, no hearing may be cancelled less than three (3) working days prior to the scheduled hearing unless the parties have completely resolved the issues involved. If a hearing is being cancelled, the Judge's assistant and all parties must be notified immediately.

VII. Telephonic hearings of ten minutes or less in duration, which do not require testimony, are accepted without entry of an order from the Court. Counsel must coordinate with all parties attending by telephone and place the call through to the court at the scheduled time.

VIII. The Florida Supreme Court *Uniform Final Judgment of Mortgage Foreclosure*, adopted February 11, 2010, SC09-1579 shall be used by all parties seeking summary judgment in mortgage foreclosure proceedings. **The final judgment should not include references to future advances or return of original documents.** The court will only entertain these matters upon further motion and order of the court. Further, **no Writs of Possession in foreclosure matters will be entered without an Order from the Court.** Plaintiffs are required to file a Motion for Writ of Possession indicating who is in possession of the property so that the Court may make a determination as to whether a hearing is needed or a Writ may be issued without a hearing.

IX. In the event it becomes necessary to cancel a foreclosure sale on short notice, the original motion to cancel and a proposed order shall be filed with the Clerk with copies FAXED to the judge's chambers and to opposing counsel. These motions will be reviewed expeditiously, and a copy of the signed order will be faxed or emailed to the attorney. Every motion must advise the court whether opposing parties have been contacted and whether they consent to the entry of the order. The court must also be made aware of whether any party has stated an objection to the proposed cancellation.

X. All consented to matters which do not need a hearing (i.e. Substitution of Counsel, Motion to Withdraw) should be forwarded to the Judge with sufficient copies and envelopes for her review and entry, if appropriate. The Orders must be submitted with an original and enough copies for each party and pre-addressed postage-paid envelopes.

XI. When sending proposed orders, it is extremely helpful if proposed orders are accompanied by a letter or memo stating: the proposed order is agreed to by all affected parties; or, the proposed order is in accordance with the ruling announced by the court on _____ (date); or, the

proposed order is in accordance with the administrative order permitting orders compelling discovery to be entered when no response has been made to discovery initiatives; or, the proposed order is sent pursuant to Rule ___ of the rules of civil procedure; or any other basis on which the Court should enter the order.

XII. An order granting a motion should grant the relief requested instead of merely reciting that the motion is granted. Similarly, an order approving a stipulation should also, at a minimum, order the parties to comply with its terms. An order denying a motion may merely recite that the motion is denied, unless other orders/directives are necessary because of the denial. When submitting orders to the Judge, place a title on all proposed orders: i.e., Order Dismissing Complaint, Order Compelling Discovery, Judgment in Favor of Defendant Doe; not simply "Order".

XIII. Do not send proposed Orders accompanied by a request for the Court to hold them for some specified period of time to see if objections to the order materialize; mail or fax your proposed order to opposing attorneys/parties before sending it to the Court. Thereafter, submit the proposed order to the judge with a cover letter stating that opposing counsel agrees or objects to the proposed order or that opposing counsel was given the opportunity to object to the proposed order, but did not.

XIV. The judge will review all emergency motions prior to scheduling a hearing. Opposing counsel/parties are to be provided with a copy of the Motion in the same manner as the Court, unless reasons for no notice are stated. If the judge determines the matter is an emergency, your office will be contacted. Please be reminded that emergency matters involve only matters where the moving party will suffer irreparable harm if relief is not granted immediately. Emergency matters do not involve matters where the moving party just wants immediate relief and wishes to set a hearing solely for that reason.

XV. Motions for Rehearing, Reconsideration, New Trial, etc. will not be set for a hearing without prior approval of the judge. You must submit a copy of the motion to the Judge's office for consideration. If the judge determines that a hearing is required, your office will be contacted.

EXHIBIT "A"

MORTGAGE FORECLOSURE SUMMARY JUDGMENT CHECKLIST
CIRCUIT CIVIL MORTGAGE FORECLOSURE SUBDIVISION
SENIOR CIRCUIT JUDGE SANDRA TAYLOR

MORTGAGE FORECLOSURE SUMMARY JUDGMENT CHECKLIST
CIRCUIT CIVIL MORTGAGE FORECLOSURE SUBDIVISION
SENIOR CIRCUIT JUDGE SANDRA TAYLOR

PLAINTIFF:_____

CASE NUMBER:_____

DATE AND TIME OF HEARING_____

_____ 1. Motion for Summary Judgment, Notice of Hearing, Supporting Documentation

_____ 2. Original Note filed; or Count to Re-establish Lost Note plead and affidavit filed in support of lost note

_____ 3. Original Mortgage filed; or Count to Re-establish Lost Mortgage plead and affidavit filed in support of lost mortgage

_____ 4. Plaintiff is original lender or Allonge or Assignment filed

_____ 5. Affidavit of Indebtedness (Principal, Interest, Late Charges)

_____ 6. Affidavit as to Costs

_____ 7. Affidavit as to Attorneys Fees (rate/hours or flat fee)

_____ 8. Affidavit as to Reasonableness of Attorney's Fees (if required)

_____ 9. Affidavit as to non-military service

_____ 10. Service on defendants by process server or publication

_____ 11. Answer filed or default entered

_____ 12. Form A filed

_____ 13. Florida Supreme Court approved Uniform Final Judgment of Foreclosure utilized

_____14. Amounts in Final Judgment match amounts in affidavits; amounts are totaled

_____15. Notice of Sale, Certificate of Sale and Certificate of Title

ATTORNEY'S CERTIFICATE

I certify that I have read and complied with the Sixteenth Judicial Circuit's procedures and requirements for foreclosure actions. I understand that failure to comply with these requirements may result in the cancellation of a hearing or sanctions.

Date_____ _____

(Name)
(Florida Bar Number)
(Telephone Number)
(Fax Number)
(Email)

MEMORANDUM

TO: **All Counsel**

FROM: **JUDGE SANDRA TAYLOR**
16TH JUDICIAL CIRCUIT COURT - FLORIDA

RE: **CourtCall Telephonic Appearances**

DATE: **AUGUST 2010**

For appearances commencing in August 2010, I will join a growing number of Judges in Florida and around the country using CourtCall to conduct telephonic appearances by counsel ("CourtCall Appearances"). In my courtroom, CourtCall Appearances may generally be made for all non-evidentiary appearances including Pre-trial Conferences, Status Conferences and Motions for Summary Judgment. CourtCall is providing equipment to enhance the process. It is my hope that by making the process more uniform, your practice will become more productive and enjoyable so that the cost of litigation will be further reduced.

Counsel may make a CourtCall Appearance by serving and filing with CourtCall (not the Court), NOT LESS THAN THREE (3) COURT DAYS PRIOR TO THE HEARING DATE, a Request for Telephonic Appearance Form and paying a fee of $60.00 for each CourtCall Appearance. There are no subscription fees.

A CourtCall Appearance is made as part of a Court's regular calendar and all counsel who have timely filed their request form and paid the fee may appear by dialing the Courtroom's dedicated **toll free teleconference number, and access code (if any) which will be provided by CourtCall, LLC on the confirmation faxed to your office**. A pre-hearing check-in will occur five minutes prior to the scheduled hearing time. A CourtCall Appearance is voluntary and may be made without consent of the other party, and the Court continues to reserve the right to reject any request.

You may obtain additional information by calling the CourtCall Program Administrator, **CourtCall at (310) 342-0888 or (888) 882-6878.**

For more information about CourtCall please call CourtCall, LLC, not the Courtroom!!

Renee Parker

From: holly.elomina@keyscourts.net
Sent: Wednesday, May 12, 2010 3:09 PM
To: Renee Parker
Subject: FW: Foreclousure and Economic Recovery Program

For Judge Garcia....thank you!

Holly Elomina
Trial Court Administrator
(305) 295-3644

From: Heather Thuotte-Pierson [mailto:piersonh@flcourts.org]
Sent: Wednesday, May 12, 2010 9:02 AM
To: Holly Elomina
Subject: RE: Foreclousure and Economic Recovery Program

I have been told that all land use issues fall under the real property category, except those land issues involving eminent domain.

Hope that helps.

Heather

From: holly.elomina@keyscourts.net [mailto:holly.elomina@keyscourts.net]
Sent: Wednesday, May 12, 2010 8:22 AM
To: Heather Thuotte-Pierson
Subject: RE: Foreclousure and Economic Recovery Program

Thank you Heather. I appreciate your help.

Holly Elomina
Trial Court Administrator
(305) 295-3644

From: Heather Thuotte-Pierson [mailto:piersonh@flcourts.org]
Sent: Tuesday, May 11, 2010 4:30 PM
To: Holly Elomina
Subject: RE: Foreclousure and Economic Recovery Program

I know that all contract and indebtedness cases where considered in the original backlog calculation so all case types under this category could be considered for the program. Please note that the TCBC will be deciding on whether or not to include all the civil areas from the original plan or to limit the program's scope (or set priorities) since funding was reduced. I am still awaiting an answer regarding the land use cases and will let you know as soon as I can.

Heather

From: Holly Elomina [mailto:holly.elomina@keyscourts.net]
Sent: Monday, May 10, 2010 3:54 PM
To: Heather Thuotte-Pierson
Subject: Foreclousure and Economic Recovery Program

Good afternoon Heather,

In preparation for our plan, we are looking for some clarification regarding case types that are applicable to this effort. In a previous email, you listed the following case types:

mortgage foreclosures, real property, contracts and indebtedness, and county civil valued from $5,001 to $15,000

Are all types of contract disputes eligible for this effort, regardless of whether or not they are related to property or indebtedness? Also, would land use issues fall under the real property category? We just make to make sure that we direct the right types of cases to the new division we are establishing. If you are not the right person to be directing this question to, please let me know. Thank you for your assistance.

On another note, I will be sending in our revised allocations tomorrow morning.

Holly Elomina
Trial Court Administrator
16th Judicial Circuit
302 Fleming Street
Key West, FL 33040
(305) 295-3644
(305) 292-3435 Fax

Renee Parker

From: Holly Elomina
Sent: Tuesday, August 17, 2010 9:25 AM
To: Carol Koris; Kathy Rupp; Kim Stover; Leah Stevenson; Monica Guieb; Paulina Smith; Raquel Galvan; Renee Parker; Robin Barber; Star Garcia; Josephine Cieri; Sharon Hamilton; Denise Moore
Cc: Sandra Taylor; Winston Burrell; David Audlin; Judge Ptomey; Luis Garcia; Mark Jones; Peary Fowler; Ruth Becker; Tegan Slaton; Wayne Miller
Subject: Court Call

Importance: High

Follow Up Flag: Follow up
Flag Status: Flagged

Good morning,

Beginning September 1, 2010, Judge Taylor is going to be piloting the Court Call system for the foreclosure division. Court Call is a private vendor that facilitates telephonic court appearances for courts across the country. Court Call eliminates the need for calls to come into our direct numbers, essentially bogging down our lines and making your life crazy on those large open motion days. There is no cost to our court for Court Call, the burden of the costs is on the parties who wish to appear telephonically.

Next week, Court Call will be providing training for us regarding Court Call procedures. While we will only be piloting this in the Foreclosure Division, I am inviting each of you to attend a training to familiarize yourself with the process, in the event one of your judges becomes interested after it is established. The training will need to be done in a courtroom that has a Polycom speaker phone. In Key West and Plantation Key, it can be done in multiple courtrooms, as there is no limit to the number of lines that are authorized to use Court Call. We will be having two 15-20 minute sessions on Tuesday, August 24, 2010, at 12:00 pm and 3:00 pm. Please advise me at your earliest convenience which session you would like to attend. In Key West, Courtroom "A" and Courtroom "F" are both available. I have spoken to Leah regarding Marathon, which is available and Sharon, Denise, Robin, Renee and Carol can coordinate to see which courtroom will be available in Plantation Key.

Thank you in advance for your cooperation. Please contact me if you have any questions, or visit Court Call's website at www.courtcall.com which has a lot of useful information.

Holly Elomina
Trial Court Administrator
16th Judicial Circuit
302 Fleming Street
Key West, FL 33040
(305) 295-3644
(305) 292-3435 Fax

CourtCall ®Appearance Calendar

August 2010

24 Tuesday

Freeman **Judge Sandra Taylor**

16th Judicial Circuit Court

12:00 PM ET **Dial: (800) 584-7439** **Code: 823816#**

Time	Case Information	Attorney Information	
	Case #: 123456	Firm:	Wapnick & Alvarado
	Case Name:	Phone:	310-342-0888
	Test vs. Training	Contact:	Ignacio Acosta (TEST)
	Proceeding Type:	For	Plaintiff(s), Test
	Hearing		

Attorney Appearing: Ignacio Acosta (TEST) Wapnick & Alvarado **Tel No:** 310-342-0888 **Fax No:** 310-743-1850 **Representing:** Plaintiff(s), Test **Cust Ref. #**	**Calendar Status** Your CourtCall Appearance has been confirmed for Judge Sandra Taylor, Dept. Freeman at 12:00 PM ET on Tuesday, August 24th, 2010 At five minutes prior to the above time, dial (800) 584-7439 and dial access code 194358#

CONFIRMATION

16th Judicial Circuit Court

Case Name	Test vs. Training	
Case Number	123456	
Nature of hearing:	Hearing	
CourtCall ID#	3702316	(not access code)

Be prompt, or your case may be heard without you!

If you encounter any problems or if the Court has not joined the call within 15 minutes, remain on your teleconference and have a staff member call CourtCall, LLC at (310)342-0888 or 1(888)88 COURT.

Mandatory Instructions For Making A CourtCall® Appearance

1. IT IS COUNSEL'S RESPONSIBILITY TO DIAL INTO THE CONFERENCE AT LEAST FIVE MINUTES PRIOR TO THE SCHEDULED APPEARANCE TIME. COURTCALL DOES NOT CALL COUNSEL! If you are unavoidably late
and the Court is already in session, you must wait for an appropriate moment to announce yourself. Do not interrupt the Judge.

NEVER PLACE THE CONFERENCE ON HOLD. CELLULAR AND PAYPHONES ARE STRICTLY PROHIBITED.

2. When speaking with the Court, **always** talk directly into the handset and **state your name clearly each time you speak. DO NOT USE YOUR SPEAKERPHONE** as it may compromise the quality of the call for ALL participants, including the Court.

3. When you place your call, you must be in a QUIET AREA. Give the Court your absolute undivided attention. All background noise must be eliminated (i.e. cell phones, pagers, intercoms, typing, paper shuffling, dogs barking, babies crying, etc.) Your attention must be focused solely on the Court and you should refrain from making any unnecessary noise or engaging in conversations with others. Disruptions on the conference line will not be tolerated by the Court.

4. Once you have dialed into the conference you may be checked in by an operator or a clerk, alternatively, you may not be addressed until the Court calls your specific case. Listen carefully to the Court proceedings as the Court may make general observations applicable to all matters which will not be repeated.

***** The Court expects you to act professionally and failure to adhere to these instructions may result in the termination of your call or the entire conference, sanctions for a non-appearance or an order for counsel to appear in Court at the next session or such other consequences the Court deems appropriate, as well as withdrawing the privilege of appearing telephonically in the future. *****

It is counsel's responsibility to notify CourtCall of any continuance or cancelation prior to the scheduled hearing time to have your fee apply to the continued hearing or to be eligible for a refund as the Court will not notify CourtCall of any continuance or cancelation of your matter. Matters continued at the time of the hearing require a new form and a new fee for the continued date. To continue or cancel your CourtCall Appearance: Call (888) 882-6878 prior to the scheduled appearance time.

Stop writing checks or tracking credit card charges, open a CourtCall debit account and receive a monthly ledger identifying each CourtCall Appearance. Please call our office for details. Our address is CourtCall LLC, 6383 Arizona Circle, Los Angeles, CA 90045.

Renee Parker

From:	holly.elomina@keyscourts.net
Sent:	Monday, August 23, 2010 4:35 PM
To:	Denise Moore; Sharon Hamilton; Josephine Cieri; Carol Koris; Kathy Rupp; Kim Stover; Leah Stevenson; Monica Guieb; Paulina Smith; Raquel Galvan; Renee Parker; Robin Barber; Star Garcia
Cc:	'Winston Burrell'
Subject:	FW: CourtCall Training Confirmation - 16th JCC, FL
Attachments:	Sample Calendar Judge Taylor. FL.pdf; Sample Confirmation Judge Taylor. FL.pdf; Judge's Memo.Taylor.16thJCC.MonroeCo.FL.doc
Follow Up Flag:	Follow up
Flag Status:	Flagged

Good afternoon,

Please see information below and attached regarding the Court Call training tomorrow at noon or 3:00 pm. As a reminder, this call needs to be made from a courtroom or a hearing room that has a polycom conference phone. If you need any additional information or have any questions, please do not hesitate to contact me.

Holly Elomina
Trial Court Administrator
(305) 295-3644

From: Sha Eaves [mailto:seaves@courtcall.com]
Sent: Monday, August 23, 2010 4:04 PM
To: josephine.cieri@keyscourts.net; holly.elomina@keyscourts.net
Cc: cmoya@courtcall.com
Subject: CourtCall Training Confirmation - 16th JCC, FL

Hi Holly,

This email is to confirm our training/test call for tomorrow Tuesday, August 23rd, 2010 at 12:00 PM and 3:00 PM EST.

All Court Staff are invited and encouraged to attend.

Attached you will find:
1. Sample CourtCall Appearance Calendar
2. Sample Confirmation for CourtCall Telephonic Appearance
3. Sample Judicial Memorandum

To access your training call please dial the toll free number: 1-(800) 584-7439 and the Host Code: 823816# on your conference unit.

Please be sure your unit is plugged in and receiving dial tone. You may contact me if you have any difficulty accessing the conference.

Sha Eaves
Director of Courtroom Logistics
CourtCall, LLC
6383 Arizona Circle
Los Angeles, California 90045

- Direct Dial: 310.743.1859
- Direct Fax: 972.606.0840
- Toll Free: 888.882.6878 ext. 859

Renee Parker

From: Sue Bruce [bruces@flcourts.org]
Sent: Thursday, October 28, 2010 11:51 AM
To: Trial Court Chief Judges
Cc: Trial Court Budget Commission
Subject: Foreclosure Initiative
Attachments: 10.27.10.laurent.memo.docx

Follow Up Flag: Follow up
Flag Status: Flagged

Please see the attached memorandum from Judge John Laurent. Thanks!

Sue Bruce
Personal Secretary II
Office of the State Courts Administrator
500 S. Duval Street
Tallahassee, FL 32399
Phone: 850/922-5081
Fax: 850/488-0156

Florida State Courts System
500 South Duval Street
Tallahassee, FL 32399-1900
www.flcourts.org

MEMORANDUM

TO: Chief Judges of the Circuit Courts

FROM: John Laurent

DATE: October 28, 2010

SUBJECT: Foreclosure Initiative

In follow up to the Judicial Administration Committee conference call held on October 18, 2010, I am writing to reiterate the Trial Court Budget Commission's purpose for tracking the progress of cases the trial courts are hearing using funding provided for the foreclosure and economic recovery initiative. When the Florida Legislature appropriated special funding of $6 million to help the trial courts with the significant backload of foreclosure cases, the Trial Court Budget Commission established a measurement of progress that corresponded to the funding received: 62% of the backlog cases potentially could be processed because the Legislature funded 62% of the original request from the courts. A simple case tracking system was set up to monitor the progress and identify any reasons for delays. This is so that we will be able to report to the Legislature on how these funds were used. However, the Legislature has not specifically directed us to make such a report.

The 62% rate is not a quota. The 62% rate is simply a goal set by the TCBC to help measure the courts' progress in this initiative and document how the appropriation for the foreclosure initiative is being spent. The 62% rate was set before the initiative began and, most notably, before many of the lender moratoriums and other delays occurred. Please assure judges working on this project that the 62% rate was never intended to interfere with their ability to adjudicate each case fairly on its merits.

We will continue to monitor the progress of this initiative because we have an obligation to account for how these funds have been used. But we also will document all issues related to any difficulties that prevent or delay the court from hearing and disposing of cases before them.

JL/ks

cc: TCBC Members

Denise moore

16th Judicial Circuit
Job Description

Job Title: Civil and Probate Case Manager
Department: Family Court
Reports To: Family Court Coordinator
Prepared By: Sharon Hamilton
Prepared Date: January 22, 2010
Approved By: Holly Elomina
Approved Date: March 1, 2010

CIVIL AND PROBATE CASE MANAGER
Salary: $31,000.00

SUMMARY

This position requires significant organization, performing a variety of complex administrative duties within the office of the Family Court Coordinator. This is a circuit-wide position which will be housed in the upper keys division and will require some regular travel to the middle and lower keys courthouse divisions. This position is responsible for case management in both circuit civil and county civil cases. In addition, this position is responsible for providing case management for all open probate cases in the circuit. The person assigned to this position should have a general knowledge of circuit, county and probate rules and procedures. Working contacts are made with Judges, Judicial Assistants, Clerks of Court, attorneys, and litigants unrepresented by attorneys. The purpose of these contacts is to coordinate court processes and resources so cases can move in a timely and effective manner from filing to disposition.

This position requires considerable attention to detail, administrative and clerical skills, and strong communication skills. Good judgment and knowledge of court process and filing procedures are essential. Although the work is performed under the close supervision of the Family Court Coordinator, it requires independent judgment and the consistent ability to keep the cases moving in a forward progression.

ESSENTIAL DUTIES AND RESPONSIBILITIES

The essential duties and responsibilities include the following. (Other duties may be assigned. The omission of specific statements of duties does not exclude them from the position if the work is similar, related, or a logical assignment to the position).

- Review Overtime Standard reports for circuit and county civil cases.
- Prepare proper notices and orders in those cases where no record activity has occurred in the cases for 10 months pursuant to Florida Rules of Civil Procedure.
- Prepare scheduling orders on all civil cases and monitor each case for compliance.
- Review the Clerk of Court memos regarding the lack of compliance with probate cases and prepare a 15 day notice to the parties regarding compliance with the probate statute and rules. Diary compliance with the 15 day notice and prepare orders setting the cases for status hearing.
- Preparation of orders in civil and probate cases as required.
- Contact attorneys and self represented litigants as necessary for compliance with all notices and orders issued.
- Make copies, address envelopes, and send out correspondence and orders as directed.
- Ability to provide the Court with findings and recommendations in a verbal and/or written format.
- Ability to work independently, establish priorities, and define program goals.
- Ability to operate a personal computer and use software applications supported by the State Court system.
- Purchase office supplies. Monitor office equipment and inventory.

SUPERVISORY RESPONSIBILITIES

NONE

QUALIFICATIONS

To perform this job successfully, an individual must be able to perform each essential duty satisfactorily. The requirements listed herein are representative of the knowledge, skill, and/or ability required. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

EDUCATION and/or EXPERIENCE

High school diploma or general education degree (GED); and one to three months related experience and/or training; or equivalent combination of education and experience. Knowledge of court procedures. Ability to handle matters with the professional manner required of court employees. Ability to communicate clearly both orally and in writing, with very good spelling and writing. Ability to concentrate and perform job duties in a stressful working environment. Ability to use a personal computer and word processor.

LANGUAGE SKILLS

Ability to read, analyze, and interpret general business periodicals, professional journals, technical procedures, or governmental regulations. Ability to write reports, business correspondence, and procedure manuals. Ability to effectively present information and respond to questions from groups of managers, clients, customers, and the general public.

MATHEMATICAL SKILLS

Ability to calculate figures and amounts such as discounts, interest, commissions, proportions, percentages, area, circumference, and volume. Ability to apply concepts of basic algebra and geometry.

REASONING ABILITY

Ability to solve practical problems and deal with a variety of concrete variables in situations where only limited standardization exists. Ability to interpret a variety of instructions furnished in written, oral, diagram, or schedule form.

CERTIFICATES, LICENSES, REGISTRATIONS

None

PHYSICAL DEMANDS

The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

While performing the duties of this job, the employee is regularly required to sit; use hands to finger, handle, or feel; and talk or hear. The employee is occasionally required to walk and reach with hands and arms. The employee must occasionally lift and/or move up to 10 pounds.

WORK ENVIRONMENT

The work environment characteristics described here are representative of those an employee encounters while performing the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

The noise level in the work environment is usually moderate.

Josephine Cieri

Florida State Courts System
Class Specification

Class Title: Senior Secretary

Class Code: 2004
Pay Grade 11

General Description

The essential function of the position within the organization is to provide complex clerical/secretarial support. This position is responsible for a variety of office tasks. The position works under general supervision according to some procedures; and may decide how and when to complete tasks.

Examples of Work Performed

(Note: The examples of work as listed in this class specification are not necessarily descriptive of any one position in the class. The omission of specific statements does not preclude management from assigning specific duties not listed herein if such duties are a logical assignment to the position.)

Schedules and coordinates meetings and prepares orders for judges' signatures; coordinates schedules for staff and contract mediators; prepares memoranda of agreements reached in mediation and submits to judges.

Transcribes legal memoranda from dictation, court orders and Supreme Court responses; proofreads for grammar, spelling, accuracy of quotations, proper case citation and format, and distributes memoranda as appropriate.

Answers departmental telephones; provides information, directs callers to appropriate personnel or department, or takes and relays messages.

Serves as receptionist; greets visitors and checks in appointments; provides information, and directs visitors to appropriate personnel or department.

Performs complex clerical/secretarial tasks, such as typing and processing documents such as letters, agreements, work orders or memoranda; performing research; processing and distributing mail; preparing paperwork for meetings; preparing reports; or maintaining calendars or record systems.

Transfers legal memoranda to research directory; prepares labels and filings; scans office files onto disks; assists in keeping a log of all case files and assigns new cases; maintains index of cases assigned and monitors current status; prepares periodic reports.

Performs special tasks, such as signing materials in and out, screening cases and reviewing files, gathering data for special reports, or assisting with special projects.

Performs duties of other Courts System personnel in their absence as directed.

Performs routine office tasks, such as scanning documents, performing data entry, faxing, filing or photocopying.

Receives requests for interpreter services; dispatches assignments to interpreters; tracks assignments and maintains records and documentation of work provided.

Performs purchasing duties via p-card and purchase orders.

Processes travel authorization requests and travel reimbursement forms.

Competencies

Data Responsibility:

Refers to information, knowledge, and conceptions obtained by observation, investigation, interpretation, visualization, and mental creation. Data are intangible and include numbers, words, symbols, ideas, concepts, and oral verbalizations.

Gathers, organizes, analyzes, examines, or evaluates data or information and may prescribe action based on these data or information.

People Responsibility:

Refers to individuals who have contact with or are influenced by the position.

Provides assistance to people to achieve task completion; may instruct or assign duties to coworkers.

Assets Responsibility:

Refers to the responsibility for achieving economies or preventing loss within the organization.

Has responsibility and opportunity for achieving moderate economies and/or preventing moderate losses through the management of a small division; handling supplies of high value or moderate amounts of money consistent with the operation of a small division.

Mathematical Requirements:

Deals with quantities, magnitudes, and forms and their relationships and attributes by the use of numbers and symbols.

Uses addition, subtraction, multiplication, and division; may compute ratios, rates, and percents.

Communications Requirements:

Involves the ability to read, write, and speak.

Reads technical instructions, charts, and/or procedures manuals; composes routine reports and completes job forms; speaks compound sentences using standard grammar.

Complexity of Work:

Addresses the analysis, initiative, ingenuity, creativity, and concentration required by the position and the presence of any unusual pressures.

Performs semi-routine work involving set procedures and rules, but with frequent problems; requires normal attention with short periods of concentration for accurate results or occasional exposure to unusual pressure.

Impact of Decisions:

Refers to consequences such as damage to property, loss of data or property, exposure of the organization to legal liability, or injury or death to individuals.

The impact of decisions is moderately serious – affects work unit and may affect others.

Equipment Usage:

Refers to inanimate objects such as substances, materials, machines, tools, equipment, work aids, or products. A thing is tangible and has shape, form, and other physical characteristics.

Handles machines, tools, equipment, or work aids involving some latitude for judgment regarding attainment of standard or in selecting appropriate items, such as computers, peripherals, or software programs such as word processing or spreadsheets.

Education and Experience Guidelines

Education:

Refers to job specific training and education that is recommended for entry into the position. Additional relevant experience may substitute for the recommended educational level on a year-for-year basis.

High school diploma or GED.

Experience:

Refers to the amount of related work experience that is recommended for entry into the position that would result in reasonable expectation that the person can perform the required tasks. Additional relevant education may substitute for the

recommended experience on a year-for-year basis, excluding supervisory experience.

Two years of experience in office skills, computer operation or a closely related field.

Licenses, Certifications, and Registrations Required:

Refers to professional, state, or federal licenses, certifications, or registrations required to enter the position.

None

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

TABLE OF CONTENTS

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. 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

(Fla. 3d DCA 1990); *Crystal River Lumber Co. v. Knight Turpentine Co.*, 67 So. 974, 975 (Fla. 1915).

(b) If junior lien holders are not joined, their rights in the real property survive the foreclosure action.

(c) Joinder of original parties to the deed or mortgage is essential when a reformation count is needed to remedy an incorrect legal description contained in the deed and/or mortgage. *Chanrai Inv., Inc. v. Clement,* 566 So. 2d 838, 840 (Fla. 5th DCA 1990). As such, the original grantor and grantee are necessary parties in an action to reform a deed. *Id.*

6. Prior titleholders that signed the note and mortgage do not have to be named in the foreclosure action unless:

(a) Mortgagee seeks entry of a deficiency judgment against the prior unreleased mortgagors in the foreclosure action. *PMI Ins. Co. v. Cavendar,* 615 So. 2d 710, 711 (Fla. 3d DCA 1993).

Superior Interests

1. First or senior mortgagees are never necessary or proper parties to the foreclosure action by the junior mortgagee. *Garcia v. Stewart,* 906 So. 2d 1117, 1119 (Fla. 4th DCA 2005); *Poinciana Hotel of Miami Beach, Inc. v. Kasden,* 370 So. 2d 399, 401 (Fla. 3d DCA 1979).

(a) Senior liens are unaffected by the foreclosure of a junior mortgage.

2. **Purchase money mortgage defined** - proceeds of the loan are used to acquire the real estate or to construct improvements on the real estate. § 7.2(a), Restatement (Third) of Property; Mortgages (2008). The purchase and conveyance of real property occur simultaneously and are given as security for a purchase money mortgage.

(a) Purchase money mortgages - priority over all prior claims or liens that attach to the property through the mortgagor, even if latter be prior in time. *BancFlorida v. Hayward,* 689 So. 2d 1052, 1054 (Fla. 1997); *Sarmiento v. Stockton, Whatley, Davin & Co.,* 399 So. 2d 1057, 1058 (Fla. 3d DCA 1981).

(1) Priority does not extend beyond the amount of the purchase money advanced. *Citibank v. Carteret Sav. Bank, F.A.*, 612 So. 2d 599, 601 (Fla. 4th DCA 1992).

Association Liens and Assessments

1. Condominium Associations - Section 718.116(1)(b), Fla. Stat. (2010) establishes the liability of the first mortgagee, its successor or purchaser for condominium assessments and maintenance as the lesser of:

(a) unit's unpaid common expenses and regular periodic assessments which came due 6 months prior to title acquisition; or

(b) one per cent of the original mortgage debt (provided condominium association is joined as a defendant).

(1) The law is clear that the purchaser of a condominium unit has liability for unpaid condominium assessments. § 718.1176, Fla. Stat (2010). This statutory cap, limits the liability of foreclosing mortgagees for unpaid condominium assessments that become due prior to acquisition of title. This safe harbor applies only to the first mortgagee or a subsequent holder of the first mortgage. *Bay Holdings, Inc. v. 2000 Island Boulevard Condo. Ass'n.*, 895 So. 2d 1197 (Fla. 3d DCA 2005. The term "successor or assignee" as used with respect to a first mortgagee includes only a subsequent holder of the first mortgage. § 718.116(1)(g), Fla. Stat. (2010). Other entities that acquire title are not entitled to this limitation of liability and are "jointly and severally liable for all unpaid assessments that come due up to the time of transfer of title." § 718.116(1)(a), Fla. Stat. (2010).

2. Homeowners' Association's - Section 720.3085(2)(c)(1), Fla. Stat. (2010) establishes the liability of the first mortgagee, its successor or purchaser for homeowner's assessments and maintenance as the lesser of:

(a) parcel's unpaid common expenses and regular periodic or special assessments which accrued 12 months prior to acquisition of title; or

(b) one per cent of the original mortgage debt.

(c) Homeowners' Association's lien for assessments had priority over purchase money mortgage where Association's declaration of covenants contained express

provision establishing priority. *Ass'n. of Poinciana Vill. v. Avatar Props.,* 724 So. 2d 585, 587 (Fla. 5th DCA 1999).

(d) The limitations on the first mortgagee's liability only apply if the lender filed suit and initially joined the homeowner's association as a defendant. § 720.3085(2)(c), Fla. Stat. (2010).

(e) Statutory revisions of the 2008 Legislature failed to remedy the potential super-priority of liens recorded prior to July 1, 2008. (Prior statutory version amended by the 2007 Legislature gave homeowner's association liens a priority, even if the mortgage was filed first in time.) Arguably, many homeowners' associations have subordination language in their declaration of covenants providing that their lien is subordinate to the mortgage. However, the subordination language is not standard in all declarations. Any challenge to the priority if the mortgage will likely be resolved on the basis of impairment of contract.

3. "Reverse foreclosures" defined – where association takes title and pursues lender or where association sets done the motion for summary judgment due to delays by lenders.

4. Cannot force lenders to pay association fees during pendency of foreclosure. *U. S. Bank Nat'l. Ass'n. as Trustee v. Tadmore,* 2009 WL 4281301 (Fla. 3d DCA 12/2/09).

Judgment Liens

1. Section 55.10(1), Fla. Stat. (2010) applies to judgment liens.

(a) Requirements: (1) must contain address of the party in the judgment or in an accompanying affidavit; and (2) a certified copy of judgment lien must be recorded in the official records of the county.

(b) Judgment liens recorded after July 1, 1994 retain their judgment lien status for a period of 10 years from recording. A judgment lien is renewable by recording a certified copy of the judgment containing a current address prior to the expiration of the judgment lien. § 55.10(2), Fla. Stat. (2010).

Filing of the Lis Pendens

1. Filing of lis pendens - cuts off the rights of any person whose interest arises after filing. *Bowers v. Pearson,* 135 So. 562 (Fla. 1931).

(a) Constitutes bar to the enforcement against the subject real property of any other unrecorded interests and liens unless the holder of the unrecorded interest intervenes within twenty days of the notice of the lis pendens. § 48.23(1)(b), Fla. Stat. (2010).

2. Validity of a notice of lis pendens is one year from filing. § 48.23(2), Fla. Stat. (2010).

(a) Exception: One year period may be tolled by the trial court's exercise of discretion or appellate review. *Olesh v. Greenberg,* 978 So. 2d 238, 242 (Fla. 5th DCA 2008); *Vonmitschke-Collande v. Kramer,* 841 So. 2d 481, 482 (Fla. 3d DCA 2002).

3. Lis pendens automatically dissolved upon dismissal of foreclosure. Rule 1.420(f), Fla. R. Civ. P. (2010).

(a) Lis pendens revived or reinstated upon the reversal of dismissal. *Vonmitschke-Collande,* 841 So. 2d at 482.

The Foreclosure Complaint

1. Florida Supreme Court Form for foreclosure - Form 1.944, Fla. R. Civ. P. (2010). Requisite allegations assert: jurisdiction, default, acceleration and the legal description of the real property. As of 2/11/10, complaint must be verified. Rule 1.110(b), Fla. R. Civ. P. (2010).

(a) Plaintiff must allege that he is the present owner and holder of the note and mortgage. *Edason v. Cent. Farmers Trust Co.,* 129 So. 698, 700 (Fla. 1930).

(b) If plaintiff is a nonresident corporation, it must comply with the condition precedent of filing a nonresident bond, upon commencement of the action. § 57.011, Fla. Stat. (2010). If plaintiff has failed to file the requisite bond within 30 days after commencement, the defendant may move for dismissal (after 20 days notice to plaintiff).

(c) Rule 1.130(a), Fla. R. Civ. P. (2010) mandates that a copy of the note and mortgage be attached to the complaint. *Eigen v. FDIC,* 492 So. 2d 826 (Fla. 2d DCA 1986).

(d) If note and mortgage assigned, complaint should allege assignment. Attachment of the assignment is preferred but may not be required since the cause of action is based on the mortgage; not the assignment. Rule 1.130(a), Fla. R. Civ. P. (2010), *WM Specialty Mortgage, LLC v. Salomon,* 874 So. 2d 680, 682 (Fla. 4th DCA 2004); *Chemical Residential Mortgage v. Rector,* 742 So. 2d 300 (Fla. 1st DCA 1998); *Johns v. Gillian,* 184 So. 140, 144 (Fla. 1938).

(e) Junior lien holders - allegation is sufficient if it states that the interest of a defendant accrued subsequent to the mortgage and he is a proper party. *Internat'l. Kaolin Co. v. Vause,* 46 So. 3, 7 (Fla. 1908).

(f) Federal tax lien allegation must state interest of the United States of America, including: the name and address of the taxpayer, the date and place the tax lien was filed, the identity of the Internal Revenue office which filed the tax lien and if a notice of tax lien was filed. Title 28 U. S. C. § 2410(b). A copy of the tax lien must be attached as an exhibit.

(g) Local taxing authority or State of Florida party defendant - allegation should state with particularity the nature of the interest in the real property. § 69.041(2), Fla. Stat. (2010).

(h) Complaint must include statement of default. Default based on unpaid taxes or insurance must be alleged with particularity. *Siahpoosh v. Nor Props.,* 666 So. 2d 988, 989 (Fla. 4th DCA 1996).

(i) Complaint should allege compliance with condition precedent, particularly notices.

(j) Legal description of the subject real property.

(k) Attorney fees - must be pled or it is waived. *Stockman v. Downs,* 573 So. 2d 835, 838 (Fla. 1991): Allegation as to obligation to pay a reasonable attorney fee is sufficient to claim entitlement. *Wallace v. Gage,* 150 So. 799, 800 (Fla. 1933). The claim of attorney fees is based on contractual language in the note and mortgage.

(l) Additional counts include: reestablishment of the note and reformation. Reestablishment of the note is necessary if the note is lost; reformation of the note is needed if material terms are missing. Reformation of the mortgage applies if there is a legal description discrepancy; reformation of deed is there is a deed problem.

(m) Deficiency judgment – if plaintiff seeks a deficiency, the guarantors must be sued.

Original Document Filing and Reestablishment of the Note

1. Note - Lender is required to either present the original promissory note or give a satisfactory explanation for the lender's failure to present it prior to it being enforced. *Nat'l. Loan Investors, L.P. v. Joymar Associates,* 767 So. 2d 549, 550 (Fla. 3d DCA 2000).

(a) A limited exception applies to lost, destroyed or stolen instruments. *Id.*

2. A lost promissory note is a negotiable instrument. § 673.1041(1), Fla. Stat. (2008); *Thompson v. First Union Bank,* 643 So. 2d 1179 (Fla. 5th DCA 1994).

(a) Loss or unintentional destruction of a note does not affect its validity or enforcement.

3. Reestablishment of the lost note - An owner of a lost, stolen or destroyed instrument may maintain an action by showing proof of his ownership, facts that prevent the owner from producing the instrument and proof of the terms of the lost instrument. § 673.3091(2), Fla. Stat. (2004); *Lawyer's Title Ins. Co., Inc. v. Novastar Mortgage, Inc.,* 862 So. 2d 793, 798 (Fla. 4th DCA 2004); *Gutierrez v. Bermudez,* 540 So. 2d 888, 890 (Fla. 5th DCA 1989).

(a) Owner of note is not required to have held possession of the note when the loss occurred to maintain an action against the mortgagor. *Deaktor v. Menendez,* 830 So. 2d 124, 126 (Fla. 3d DCA 2002). Further, plaintiff is not required to prove the circumstances of the loss or destruction of the note to seek enforcement. *Id.,* at 127. Plaintiff must show only that it was entitled to enforce the note at the time of loss or that it has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred. §

673.3091(1)(a), Fla. Stat. (2010); *MERS v. Badra,* 991 So. 2d 1037, 1039 (Fla. 4th DCA 2008).

(b) If plaintiff is not in possession of the original note and did not reestablish it, plaintiff cannot foreclose on the note and mortgage. § 673.3091(1), Fla. Stat. (2004); *Dasma Invest., LLC v. Realty Associates Fund III, L.P.* 459 F. Supp. 2d 1294, 1302 (S.D. Fla. 2006).

(c) The filing of a duplicate copy of the note is sufficient to satisfy statutory requirements in a foreclosure action. *Perry v. Fairbanks Capital Corp.,* 888 So. 2d 725 (Fla. 5th DCA 2004). If there is no copy, Plaintiff should file a lost note affidavit, ledger or a summary of loan terms.

(1) **Checklist for lost note affidavit:**

(a) original principal balance;

(b) signators and date note executed;

(c) rate of interest;

(d) unpaid balance and default date;

(e) affiant status must be banking representative with knowledge of the particular loan;

(f) indemnity language, precluding subsequent foreclosure judgment on the same note.

(d) Where the original note is lost, the court may require indemnification of the borrower for subsequent prosecution on the note and may require a bond to secure same. *Lovingood v. Butler Construction Co.,* 131 So. 126, 135 (Fla. 1930). Consider bonds particularly where there is a securitized trust.

1. Mortgage – Copy of mortgage is sufficient. *Perry,* 888 So. 2d at 726.

(a) Mortgage must contain correct legal description. *Lucas v. Barnett Bank of Lee County,* 705 So. 2d 115, 116 (Fla. 2d DCA 1998). If not, final judgment must be set aside. However, this can be corrected prior to final judgment.

Fair Debt Collection Practices Act (FDCPA)

1. Purpose - eliminate abusive debt collection practices by debt collectors and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e).

2. Some Florida courts held - attorneys engaged in regular foreclosure work met the general definition of debt collector and are subject to the FDCPA. *Sandlin v. Shapiro,* 919 F. Supp. 1564, 1567 (M.D. Fla. 1996), (law firm engaged in collection foreclosure work was considered a debt collector where the firm sent correspondence advising of payoff and reinstatement figures and directed mortgagors to pay the law firm).

3. Under FDCPA, a debt collector's obligation to send a Notice of Debt is triggered by an initial communication with the consumer. *McKnight v. Benitez,* 176 F. Supp. 1301, 1304 (M.D. Fla. 2001).

(a) Filing of suit is not "an initial communication which otherwise would have given rise to notice and verification rights." *Acosta v. Campbell,* 2006 WL 3804729 (M.D. Fla. 2006).

(b) Foreclosure law firms have adopted the practice of attaching to their complaint: "Notice Required under the Fair Debt Collection Practice Act." This notice held ineffective in *Martinez v. Law Offices of David J. Stern,* 266 B.R. 523 (Bank. S.D. Fla. 2001).

Mandatory Mediation of Homestead Foreclosures

1. Based on the exponential increase in filings of mortgage foreclosure cases in the Eleventh Judicial Circuit Court, the Chief Judge implemented four Administrative Orders in the following sequence:

(a) Administrative Order 09-08 applies to all residential foreclosure actions involving homestead properties filed on or after May 1, 2009. AO 09-08 established the 11th Circuit Homestead Access to Mediation Program (CHAMP) mandating mandatory mediation of homestead foreclosures prior to the matter being set for final hearing. At the time of filing the complaint, Plaintiff is required to transmit to the

Program Manager, the Collins Center, a notice form (Form A) with borrower's contact information. Within five days of filing the complaint, Plaintiff must tender a cost check in the amount of $750.00 to cover the administrative costs of the mediation. The Collins Center responsibilities include: contacting the borrower, referring the borrower to financial counseling and making financial documentation available electronically to the Plaintiff. Plaintiff's counsel and the borrower are required to be physically present at mediation; the lender's representative must attend, but is allowed to participate by telephone. Within ten days of the completion of the mediation, the mediator must report the mediation results to the court.

(b) Administrative Order 09-09 revised the following forms: the civil cover sheet, Plaintiff's certification of settlement authority, Plaintiff's certification of residential mortgage foreclosure case status and the final judgment of foreclosure.

This Administrative Order specifically exempts condominium and homeowners' association fee foreclosures, private investor mortgage foreclosures, foreclosures of non-homestead properties and construction lien foreclosures.

(c) Administrative Order 09-09 A1 acknowledged the statutory authority of the Clerk of the Courts to conduct the sale of real or personal property by electronic means. This Administrative Order further proscribed adherence to certain procedures concerning tenant occupied residential properties under the "Protecting Tenants at Foreclosure Act of 2009." Amending the specific format of the final judgment of foreclosure, this Administrative Order prohibited the issuance of immediate writs of possession.

(d) Administrative Order 09-18 responded to the Clerk of the Court's request for formal approval to conduct on-line auctions, in lieu of on-site auctions for the sale of real property.

2. On December 28, 2009, the Florida Supreme Court issued Administrative Order 09-54, adopting the recommendations of the Task Force on Residential Mortgage Foreclosure Cases and establishing a uniform, statewide managed mediation program. The Florida Supreme Court approved the Task Force's Model Administrative Order, with minor changes to be implemented by each circuit chief judge.

3. On February 26, 2010, the Eleventh Judicial Circuit Court issued Administrative Order 10-03 A1 requiring mandatory mediation of all homestead mortgage foreclosure actions subject to the federal Truth in Lending Act, Regulation Z. Administrative Order 10-03 A 1 applies to actions filed after March 29, 2010. Specifically exempted from this Administrative Order are condominium and homeowners' association fee foreclosures and mechanics and construction lien foreclosures. This Administrative Order constitutes a formal referral to mediation through the Residential Mortgage Foreclosure Mediation (RMFM) Program; parties are ineligible for default judgment, a summary judgment or final hearing until they have fully complied with mediation requirements.

Basic Procedural Requirements of Administrative Order 10-03 A1 include:

(a) When suit is filed, plaintiff must file a completed Form A with the Clerk listing the last known mailing address and phone number for each party. One business day after filing the complaint, plaintiff must transmit Form A to the Program Manager of the RMFM along with the case number of the action. The Collins Center for Public Policy, Inc. is the contract Program Manager in the Eleventh Judicial Circuit. At the time of the filing of the complaint, the Plaintiff must tender RMFM fees in the amount of $400.00; the balance of fees in the amount of $350.00 must be paid by Plaintiff within 10 days after notice of the mediation conference.

(b) Upon receipt of Form A, the Program Manager must contact the borrower and refer the borrower an approved mortgage foreclosure counselor. Foreclosure counseling must be completed no later than 30 days from the Program Manager's initial contact with the borrower. If the Program Manager is unable to contact the borrower within this time frame, the borrower will have been deemed to elect nonparticipation in the RMFM Program.

(c) The Program Manager must transmit the borrower's financial disclosure for mediation no later than 60 days after the Program Manager receives Form A from Plaintiff.

(d) The Program Manager shall schedule a mediation session no earlier than 60 days and no later than 120 days after suit is filed.

(e) Plaintiff's representative may appear by telephone upon 5 days notice prior to the mediation; plaintiff's attorney, the borrower and the borrower's attorney, if any, must attend in person. The court may dismiss the action without prejudice or impose other sanctions for failure to attend. Within 10 days after completion of mediation, the mediator must issue a report advising the court as to the parties' attendance and result.

Service of Process

1. Due service of process is essential to satisfy jurisdictional requirements over the subject matter and the parties in a foreclosure action. Rule 1.070, Fla. R. of Civ. P. (2010) and Chapters 48 and 49 of the Florida Statutes.

2. Service of process must be made upon the defendant within 120 days after the filing of the initial pleading. Rule 1.070(j), Fla. R. Civ. P. (2010). Absent a showing of excusable neglect or good cause, the failure to comply with the time limitations may result in the court's dismissal of the action without prejudice or the dropping of the defendant.

Personal Service

1. Section 48.031 (1), Fla. Stat. (2010) requires that service of process be effectuated by a certified process server on the person to be served by delivery of the complaint or other pleadings at the usual place of abode or by leaving the copies at the individual's place of abode with any person residing there, who is 15 years of age or older and informing them of the contents. § 48.27, Fla. Stat. (2010).

(a) Ineffective service - Leaving service of process with a doorman or with a tenant, when the defendant does not reside in the apartment is defective service. *Grosheim v. Greenpoint Mortgage Funding, Inc.*, 819 So. 2d 906, 907 (Fla. 4th DCA 2002). Evidence that person resides at a different address from service address is ineffective service. *Alvarez v. State Farm Mut. Ins. Co.*, 635 So. 2d 131 (Fla. 3d DCA 1994).

(b) Judgment subject to collateral attack where plaintiff did not substantially comply with the statutory requirements of service.

2. Substitute service authorized by Section 48.031 (2), Fla. Stat. (2010). Substitute service may be made upon the spouse of a person to be served, if the cause of action is not an adversary proceeding between the spouse and the person to be served, and if the spouse resides with the person to be served.

(a) Statutes governing service of process are strictly construed. *General de Seguros, S.A. v. Consol. Prop. & Cas. Ins. Co.,* 776 So. 2d 990, 991 (Fla. 3d DCA 2001). (reversed with directions to vacate default judgment and quash service of process since substituted service was not perfected).

(b) Use of private couriers or Federal Express held invalid. *Id.; FNMA v. Fandino, 751 So. 2d 752, 753* (Fla. 3d DCA 2000), (trial courts voiding of judgment affirmed based on plaintiff's failure to strictly comply with substitute service of process which employed FedEx).

(c) Evading service of process – defined by statute as concealment of whereabouts. § 48.161(1), Fla. Stat. (2010); *Bodden v. Young,* 422 So. 2d 1055 (Fla. 4th DCA 1982).

(1) The Florida case which clearly illustrates concealment is *Luckey v. Smathers & Thompson,* 343 So. 2d 53 (Fla. 3d DCA 1977). In *Luckey,* the defendant had "for the purpose of avoiding all legal matters, secreted himself from the world and lived in isolation in a high security apartment refusing to answer the telephone or even to open his mail." *Id.* at 54. The Third District Court of Appeal affirmed the trial court's decision denying defendant's motion to vacate the writ of execution and levy of sale based on a record of genuine attempts to serve the defendant. The Third District Court further opined that "there is no rule of law which requires that the officers of the court be able to breach the self-imposed isolation in order to inform the defendant that a suit has been filed against him." *Id.*

(2) Effective proof of evading service must demonstrate plaintiff's attempts in light of the facts of the case (despite process server's 13 unsuccessful attempts at service, evasion was not proved based on evidence that the property was occupied and defendant's vehicle parked there.) *Wise v. Warner,* 932 So. 2d

591, 592 (Fla. 5th DCA 2006). Working whose place of employment was known to the sheriff was not concealing herself or avoiding process, sheriff only attempted service at the residence during work hours. *Styles v. United Fid. & Guaranty Co.,* 423 So. 2d 604 (Fla. 3d DCA 1982).

(3) Statutory requirements satisfied if papers left at a place from which the person to be served can easily retrieve them and if the process server takes reasonable steps to call the delivery to the attention of the person to be served. *Olin Corp. v. Haney,* 245 So. 2d 669 (Fla 4th DCA 1971).

3. Service on a corporation - may be served on the registered agent, officer or director. Section 48.081(2)(b), Fla. Stat. (2010) - if the address provided for the registered agent, officer, director, or principal place of business is a residence or private mailbox, service on the corporation may be made by serving the registered agent, officer or director in accordance with § 48.031, Fla. Stat. (2010).

Constructive Service by Publication

1. Section 49.011(1), Fla. Stat. (2010) identifies the enforcement of a claim of lien to any title or interest in real property such as foreclosure actions.

2. Sections 49.021-40.041, of the Florida Statutes govern constructive service or service by publication. Constructive service statutes are strictly construed against the party seeking to obtain service. *Levenson v. McCarty,* 877 So. 2d 818, 819 (Fla. 4th DCA 2004).

3. Service by publication - only available when personal service cannot be made. *Godsell v. United Guaranty Residential Insurance,* 923 So. 2d 1209, 1212 (Fla. 5th DCA 2006), (service by publication is void when plaintiff knew of the defendant's Canadian residency, but merely performed a skip trace in Florida and made no diligent search and inquiry to locate Canadian address); *Gross v. Fidelity Fed. Sav. Bank of Fla.,* 579 So. 2d 846, 847 (Fla. 4th DCA 1991), (appellate court reversed and remanded to quash service of process and default based on plaintiff's knowledge of defendant's out of state residence address and subsequent failure to attempt personal service).

(a) Plaintiff must demonstrate that an honest and conscientious effort, reasonably appropriate to the circumstances, was made to acquire the necessary information and comply with the applicable statute. *Dor Cha, Inc. v. Hollingsworth,* 8786 So. 2d 678, 679 (Fla. 4th DCA 2004), (default judgment reversed based on plaintiff's crucial misspelling of defendant's name and subsequent search on wrong individual).

(b) Condition precedent to service by publication - Section 49.041, Fla. Stat., (2010), requires that the plaintiff file a sworn statement that shows (1) a diligent search and inquiry has been made to discover the name and residence of such person, (2) whether the defendant is over the age of 18, of if unknown, the statement should set forth that it is unknown, and (3) the status of the defendant's residence, whether unknown or in another state or country. Section 49.051, Fla. Stat. (2010) applies to service by publication on a corporation.

(c) Plaintiff is entitled to have the clerk issue a notice of action subsequent to the filing of its sworn statement. Pursuant to § 49.09, Fla. Stat., (2010), the notice requires defendant to file defenses with the clerk and serve same upon the plaintiff's attorney within 30 days after the first publication of the notice.

> (1) Notice - published once each week for two consecutive weeks, with proof of publication filed upon final publication. §49.10(1)(c)(2), Fla. Stat. (2010).

(d) Affidavit of diligent search - need only allege that diligent search and inquiry have been made; it is not necessary to include specific facts. *Floyd v. FNMA,* 704 So. 2d 1110, 1112 (Fla. 5th DCA 1998), (final judgment and sale vacated based on plaintiff's failure to conduct diligent search to discover deceased mortgagor's heirs residence and possession of the subject property). However:

> (1) Better practice is to file an affidavit of diligent search that contains all details of the search. *Demars v. Vill. of Sandalwood Lakes Homeowners Ass'n.,* 625 So. 2d 1219, 1222 (Fla. 4th DCA 1993), (plaintiff's attorney failed to conduct diligent search and

inquiry by neglecting to follow up on leads which he knew were likely to yield defendant's residence).

(a) **Diligent search and inquiry checklist**

Form 1.942, Fla. R. Civ. P. (2010) contains a basic checklist of a diligent search and inquiry to establish constructive service. This Form adds consideration of inquiry of tenants as to the location of the owner/landlord of tenant occupied property. Further, the Form utilizes the following sources:

(1) Inquiry as to occupants in possession of the subject property;

(2) Inquiry of neighbors;

(3) Public records search of criminal/civil actions;

(4) Telephone listings;

(5) Tax collector records;

(6) Utility Co. records;

(7) Last known employer;

(8) U. S. Post Office;

(9) Local police department, correctional department;

(10) Local hospitals;

(11) Armed Forces of the U.S.;

(12) Department of Highway Safety & Motor Vehicles;

(13) School board enrollment verification, if defendant has children;

(14) An inquiry of the Division of Corporations, State of Florida, to determine if the defendant is an officer, director or registered agent;

(15) Voter registration records.

(f) The plaintiff bears the burden of proof to establish the legal sufficiency of the affidavit when challenged. *Id.* If constructive service of process is disputed, the trial court has the duty of determining: (1) if the affidavit of diligent search is legally sufficient; and (2) whether the plaintiff conducted an adequate search to locate the defendants. *First Home View Corp. v. Guggino,* 10 So. 3d 164, 165 (Fla. 3d DCA 2009).

(g) **Diligent search test** - whether plaintiff reasonably employed the knowledge at his command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstances. *Shepheard v. Deutsche Bank Trust Co. Am.s,* 922 So. 2d 340, 343 (Fla. 5th DCA 2006), (reversed and voided judgment as to defendant wife based on plaintiff's failure to strictly comply with statute, when they had been informed of defendant's correct address in England). Plaintiff's reliance on constructive service, when a doorman in New York repeatedly informed the process server of the Defendant's location in Florida, reflects an insufficient amount of reasonable efforts to personally serve the defendant to justify the use of constructive service. *De Vico v. Chase Manhattan Bank,* 823 So. 2d 175, 176 (Fla. 3d DCA 2002). Similarly, failure to inquire of the most likely source of information concerning whereabouts of a corporation, or an officer or agent, does not constitute reasonable diligence. *Redfield Investments, A. V. V. v. Village of Pinecrest,* 990 So. 2d 1135, 1139 (Fla. 3d DCA 2008).

(h) Defective service of process - judgment based on lack of diligent search and inquiry constitutes improper service and lacks authority of law. *Batchin v. Barnett Bank of Southwest Fla.,* 647 So. 2d 211,213 (Fla. 2d DCA 1994).

(1) Judgment rendered void - when defective service of process amounts to no notice of the proceedings. *Shepheard,* 922 So. 2d at 345. Void judgment is a nullity that cannot be validated by the passage of time and may be attacked at any time. *Id.*

(2) Judgment rendered voidable - irregular or defective service actually gives notice of the proceedings. *Id.*

(i) Limitations of constructive service – only confers in rem or quasi in jurisdiction; restricted to the recovery of mortgaged real property.

(1) No basis for deficiency judgment - constructive service of process cannot support a judgment that determines an issue of personal liability. *Carter v. Kingsley Bank,* 587 So. 2d 567, 569 (Fla. 1st DCA 1991), (deficiency judgment cannot be obtained absent personal service of process).

Service of Process outside the State of Florida and in Foreign Countries

1. Section 48.194(1), Fla. Stat., (2010) - authorizes service of process in the same manner as service within the state, by an officer in the state where the person is being served. Section states that service of process outside the United States may be required to conform to the provisions of Hague Convention of 1969 concerning service abroad of judicial and extrajudicial documents in civil or commercial matters.

2. The Hague Convention creates - appropriate means to ensure that judicial and extra-judicial documents to be served abroad shall be brought to the addressee in sufficient time. *Koechli v. BIP Int'l.*, 861 So. 2d 501, 502 (Fla. 5th DCA 2003).

(a) Procedure - process sent to a designated central authority, checked for compliance, served under foreign nation's law, and certificate prepared which documents the place and date of service or an explanation as to lack of service. *Id.* (return by the central authority of a foreign nation of completed certificate of service was prima facie evidence that the authority's service on a defendant in that country was made in compliance with the Hague Convention and with the law of that foreign nation).

(b) Compliance issues - see *Diz v. Hellman Int'l. Nat'l. Forwarders,* 611 So. 2d 18 (Fla. 3d DCA 1992), (plaintiff provided a faulty address to the Spanish authorities and the trial judge entered a default judgment, which appellate court reversed).

3. Service by registered mail - authorized by Section 48.194(2), Fla. Stat. (2010). Permits service by registered mail to nonresidents where the address of the person to be served is known.

(a) Section 48.192(2)(b), Fla. Stat. (2010), provides that plaintiff must file an affidavit which sets forth the nature of the process, the date on which the process was mailed by registered mail, the name and address on the envelope containing the process that was mailed, the fact that the process was mailed by registered mail and was accepted or refused by endorsement or stamp. The return envelope from the attempt to mail process should be attached to the affidavit.

Service of process and timeshare real property:

1. Foreclosure proceedings involving timeshare estates may join multiple defendants in the same action. § 721.83, Fla. Stat. (2010).

2. There are additional options to effectuating service of process for a timeshare foreclosure.

(a) Substitute service may be made upon the obligor's appointed registered agent. § 721.85(1), Fla. Stat. (2010).

(b) When quasi in rem or in rem relief only is sought, service may be made on any person whether the person is located inside or outside the state by certified or registered mail, addressed to the person to be served at the notice address. § 721.85(a), Fla. Stat. (2010).

Substitution of Parties

1. Substitution is not mandatory; the action may proceed in the name of the original party. However, to substitute a new party based on a transfer of interest requires a court order. *Tinsley v. Mangonia Residence 1, Ltd.*, 937 So. 2d 178, 179 (Fla. 4th DCA 2006), Rule 1.260, Fla. R. Civ. P.

2. Order of substitution must precede an adjudication of rights of parties, including default. *Floyd v. Wallace,* 339 So. 2d 653 (Fla. 1976); *Campbell v. Napoli,* 786 So. 2d 1232 (Fla. 2d DCA 2001), (error to enter judgment without a real party against whom judgment could be entered).

3. When substitution is permitted, plaintiff must show the identity of the new party's interest and the circumstances.

Entry of Default

1. Without proof of service demonstrating adherence to due process requirements, the Plaintiff is not entitled to entry of default or a default final judgment.

(a) Failure to effectuate service - places the jurisdiction in a state of dormancy during which the trial court or clerk is without authority to enter a default. *Armet*

S.N.C. di Ferronato Giovanni & Co. v. Hornsby, 744 So. 2d 1119, 1121 (Fla. 1st DCA 1999); *Tetley v. Lett,* 462 So. 2d 1126 (Fla. 4th DCA 1984).

2. Legal effect of default - admission of every cause of action that is sufficiently well-pled to properly invoke the jurisdiction of the court and to give due process notice to the party against whom relief is sought. *Fiera.Com, Inc. v. Digicast New Media Group, Inc.,* 837 So. 2d 451, 452 (Fla. 3d DCA 2003). Default terminates the defending party's right to further defend, except to contest the amount of unliquidated damages. *Donohue v. Brightman,* 939 So. 2d 1162, 1164 (Fla. 4th DCA 2006).

3. Plaintiff is entitled to entry of default if the defendant fails to file or serve any paper 20 days after service of process. Rule 1.040(a)(1), Fla. R. Civ. P. (2010).

(a) State of Florida has 40 days in which to file or serve any paper in accordance with Section 48.121, Fla. Stat. (2008).

(b) United States of America has 60 days to file under the provisions of 28 U.S.C.A. § 2410(b); Rule 12(a)(3), Fed. R. Civ. P.

4. **Service Members Civil Relief Act of 2003 (formerly, Soldier's & Sailors Act)**

(a) Codified in 50 App. U. S. C. A. § 521 - tolls proceedings during the period of time that the defendant is in the military service.

(b) Act precludes entry of default; there is no need for the service member to demonstrate hardship or prejudice based on military service. *Conroy v. Aniskoff,* 507 U.S. 511, 512 (1993). Service member with notice of the foreclosure action, may obtain a stay of the proceedings for a period of 9 months. 50 App. U. S. C. A. § 521 (d) was superseded by the Housing and Economic Recovery Act of 2008, § 2203, which expires on 12/31/10. Upon expiration, the original 90 day period will re-take effect.

(c) Determination of military status – to obtain default, plaintiff must file an affidavit stating:

(1) defendant is not in military service; or

(2) plaintiff is unable to determine if the defendant is in the military service. 50 App. U. S. C. A. § 521(b)(1).

(d) Unknown military status - the court may require the plaintiff to file a bond prior to entry of judgment. 50 App. U. S. C. A. § 521(b)(3).

5. Plaintiff is required to serve the defendant with notice of the application for default. Failure to notice defendant's attorney entry of subsequent default is invalid; rendering resulting judgment void. *U.S. Bank Nat'l. Ass'n. v. Lloyd,* 981 So. 2d 633, 634 (Fla. 2d DCA 2008).

6. Non-Military Affidavit required - must be based on: personal knowledge, attest to the fact that inquiry was made of the Armed Forces, and affiant must state that the defendant is not in the armed forces. *The Fla. Bar Re: Approval of Forms,* 621 So. 2d 1025, 1034 (Fla. 1993). Affidavits based on information and belief are not in compliance.

(a) Non-military affidavit is valid for one year.

Appointment of a Guardian ad Litem

1. The best practice is appointment when unknown parties are joined and service effected through publication. For example, a guardian ad litem should be appointed to represent the estate of a deceased defendant or when it is unknown if the defendant is deceased. § 733.308, Fla. Stat. (2010).

(a) Section 65.061(2), Fla. Stat. (2010) states that a "guardian ad litem shall not be appointed unless it affirmatively appears that the interest of minors, persons of unsound mind, or convicts are involved."

(b) Rule 1.210(b), Fla. R. Civ. P. (2010) provides that the court "shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented...for the protection of the minor or incompetent person." Similarly, Rule 1.511(e), Fla. R. Civ. P. (2010) maintains that "final judgment after default may be entered by the court at any time, but no judgment may be entered against an infant or incompetent person unless represented by a guardian."

Appointment of a Receiver

1. During a foreclosure, appointment of a receiver for condominium and homeowners' associations is governed by statute, although it may also be authorized by association by-laws.

(a) Section 718.116(6)(c), Fla. Stat. (2010), provides that the court in its discretion may require the resident condominium unit owner to pay a reasonable rental for the unit. During the "pendency of the foreclosure action, the condominium association is entitled to the appointment of a receiver to collect the rent." *Id.*

(b) Similarly, Section 720.3085(1)(d), Fla. Stat. (2010) governs homeowners' associations. Post judgment, this Section provides that the court may require the parcel owner to pay a reasonable rent for the parcel. If the parcel is rented or leased during the pendency of the foreclosure, the homeowners' association is entitled to the appointment of a receiver. *Id.*

(c) Blanket motions for appointment of a receiver for units prior to the filing of a foreclosure action do not meet the requirements of either statutory provision.

2. The movant for appointment of a receiver for real property which does not qualify under the condominium or homeowners' association statutes must satisfy basic prerequisites. These basic prerequisites are the same legal standards applicable to non-foreclosure proceedings, as injunctive relief.

(a) This equitable prejudgment remedy must be exercised with caution as it is in derogation of the legal owner's fundamental right of possession of his property and only warranted if there is a showing that the secured property is being wasted or otherwise subject to serious risk of loss. *Alafaya Square Association, Ltd. v. Great Western Bank,* 700 So. 2d 38, 41 (Fla. 5th DCA 1997); *Twinjay Chambers Partnership v. Suarez,* 556 So. 2d 781, 782 (Fla. 2d DCA 1990); *Electro Mechanical Products, Inc. v. Borona,* 324 So. 2d 638 (Fla. 3d DCA 1976).

(b) In the absence of a showing that the property is being wasted or otherwise subject to serious risk of loss, appointment of a receiver is unjustified. *Seasons P'ship 1 v. Kraus-Anderson, Inc.,* 700 So. 2d 60, 62 (Fla. 2d DCA 1997).

(c) The party seeking appointment must show that there is a substantial likelihood that it will prevail on the merits at the conclusion of the case and must present sufficient proof that appointment of a receiver is warranted. *Keybank National Association v. Knuth, Ltd.*, 2009 WL 2448160, 2448161 (Fla. 3d DCA, Aug. 12, 2009).

(d) A final prerequisite to appointment of a receiver is that the movant must post a bond, for either the plaintiff or the receiver. Rule 1.620(c), Fla. Rules of Civ. P. (2010); *Boyd v. Banc One Mortgage Corp.*, 509 So. 2d 966,967 (Fla. 3d DCA 1987).

Summary Final Judgment of Foreclosure

1. Legal standard – No genuine issue of material fact and movant is entitled to a judgment as a matter of law. Also, outstanding discovery can preclude summary judgment.

2. Burden of Proof - The plaintiff bears the burden of proof to establish the nonexistence of disputed issues of material fact. *Delandro v. Am.'s. Mortgage Servicing, Inc.*, 674 So. 2d 184, 186 (Fla. 3d DCA 1996); *Holl v. Talcott,* 191 So. 2d 40, 43 (Fla. 1966).

3. Content of motion for summary judgment – plaintiff should allege:

1) execution of note and mortgage; 2) plaintiff's status as owner and holder (or representative); 3) date of default; 4) notice of default and acceleration; 5) amount due and owing; 6) relief sought; and 7) address affirmative defenses, if any.

4. Filing of the Motion - at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. Rule 1.510(a), Fla. R. Civ. P. (2010). The motion for summary judgment, supporting affidavits and notice of hearing must be served on a defendant at least (20) twenty days before the summary judgment hearing. Rule 1.510(c), Fla. R. Civ. P. (2010); *Verizzo v. Bank of New York,* 2010 WL 711862 (Fla. 2 DCA Mar. 3, 2010); *Mack v. Commercial Industrial Park, Inc.*, 541 So. 2d 800, 801 (Fla. 4th DCA 1989).

(a) Opposition materials and evidence supportive of a denial of a motion for summary judgment must be identified. Rule 1.510(c), Fla. R. Civ. P. (2010). Notice of opposition must be mailed to the movant's attorney at least five days prior to the day of hearing or delivered no later than 5:00 P. M., (2) two business days prior to the day of the hearing on the summary judgment.

(b) The movant for summary judgment must factually refute or disprove the affirmative defenses raised, or establish that the defenses are insufficient as a matter of law. *Leal v. Deutsche Bank Nat'l. Trust Co.,* 21 So. 3d 907, 908 (Fla. 3d DCA 2009).

(c) Filing of cross motions is subject to the 20-day notice period. *Wizikowsji v. Hillsborough County,* 651 So. 2d 1223 (Fla. 2d DCA 1995).

5. Requirement for motion for summary judgment - due notice and a hearing. Proof of mailing of notice of the final summary judgment hearing created presumption that notice of hearing was received. *Blanco v. Kinas,* 936 So. 2d 31, 32 (Fla. 3d DCA 2006).

6. **Affidavits in support of Summary Judgment**

Affidavits in support of the motion must be made based on personal knowledge and set forth facts that would be admissible in evidence, and demonstrate that the affiant is competent to testify on the matters presented.

(a) Affidavit of Indebtedness – Must be signed by a custodian of business record with knowledge. In general, the plaintiff's affidavit itemizes:

(1) property address,

(2) principal balance,

(3) interest (calculated from default up until the entry of judgment, when the mortgage provides for automatic acceleration upon default, *THFN Realty Co. v. Kirkman/Conroy, Ltd.,* 546 So. 2d 1158 (Fla. 5th DCA 1989). (best practice is to include per diem interest),

(4) late charges (pre-acceleration only), *Fowler v. First Fed. Sav. & Loan Ass'n.,* 643 So. 2d 30, 33(Fla. 1st DCA 1994).),

(5) prepayment penalties – unavailable in foreclosure actions, *Fla. Nat'l*

Bank v. Bankatlantic, 589 So. 2d 255, 259 (Fla. 1991), unless specifically authorized in note in the event of acceleration and foreclosure. *Feinstein v. Ashplant,* 961 So. 2d 1074 (Fla. 4th DCA 2007).

(6) property inspections & appraisals,

(7) hazard insurance premiums and taxes.

(b) Affidavit of Costs - This affidavit details:

(1) the filing fee,

(2) service of process,

(3) and abstracting costs.

(c) Affidavit of attorney's time - references the actual time the attorney expended on the foreclosure file and references the actual hourly billable rate or the flat fee rate which the client has agreed to pay. The Fla. Supreme Court endorsed the lodestar method. *Bell v. U. S. B. Acquisition Co.,* 734 So. 2d 403, 406 (Fla. 1999). The hours may be reduced or enhanced in the discretion of the court, depending on the novelty and difficulty of questions involved. *Fla. Patient's Compensation Fund v. Rowe,* 472 So. 2d 1145, 1150 (Fla. 1985). With regard to uncontested time, plaintiff is not required to keep contemporaneous time records since the lender is contractually obligated to pay a flat fee for that time. *Id.*

(d) Affidavit as to reasonableness of attorneys' fee - Affidavit of attorney's fee must be signed by a practicing attorney not affiliated with the plaintiff's firm, attesting to the rate as reasonable and customary in the circuit. Affiant should reference and evaluate the attorney fee claim based on the eight factors set forth in Rule 4-1.5(b)(1) Rules Regulating the Fla. Bar. Of these, relevant factors, such as the time and labor required, the customary fee in the locality for legal services of a similar nature, and the experience and skill of the lawyer performing the service must be examined. An award of attorney fees must be supported by expert evidence. *Palmetto Federal Savings and Loan Association v. Day,* 512 So. 2d 332 (Fla. 3d DCA 1987).

(1) Where there is a default judgment and the promissory note or mortgage contains a provision for an award of attorney fees,

Section 702.065(2), Fla. Stat. (2010) provides that "it is not necessary for the court to hold a hearing or adjudge the requested attorney's fees to be reasonable if the fees do not exceed 3 per cent of the principal amount owed at the time of the filing of the complaint." *Florida Patient's Compensation Fund v. Rowe,* 472 So. 2d 1145 (Fla. 1985). *Id.* This statutory provision confirms that "such fees constitute liquidated damages in any proceeding to enforce the note or mortgage." *Id.*

(2) The judgment must contain findings as to the number of hours and the reasonable hourly rate. *Id.* at 1152. The requirements of *Rowe* are mandatory and failure to make the requisite findings is reversible error. *Home Insurance Co. v. Gonzalez,* 648 So. 2d 291, 292 (Fla. 3d DCA 1995). "An award of attorneys' fees must be supported by competent substantial evidence in the record and contain express findings regarding the number of hours reasonably expended and a reasonable hourly rate for the type of litigation involved." *Stack v. Homeside Lending, Inc.* 976 So. 2d 618, 620 (Fla. 2d DCA 2008).

Affirmative Defenses

1. Genuine existence of material fact - precludes entry of summary judgment. *Manassas Inyestments Inc. v. O'Hanrahan,* 817 So. 2d 1080 (Fla. 2d DCA 2002).

2. Legal sufficiency of defenses - Certainty is required when pleading affirmative defenses; conclusions of law unsupported by allegations of ultimate fact are legally insufficient. *Bliss v. Carmona,* 418 So. 2d 1017, 1019 (Fla. 3d DCA 1982) "Affirmative defenses do not simply deny the facts of the opposing party's claim; they raise some new matter which defeats an otherwise apparently valid claim." *Wiggins v. Protmay,* 430 So. 2d 541, 542 (Fla. 1 DCA 1983). Plaintiff must either factually refute affirmative defenses or establish that they are legally insufficient. *Frost v. Regions Bank,* 15 So. 3d 905, 906 (Fla. 4th DCA 2009).

3. **Affirmative defenses commonly raised:**

(a) Payment – Where defendants alleged advance payments and plaintiff failed to refute this defense, plaintiff not entitled to summary judgment. *Morroni v. Household Fin. Corp. III,* 903 So. 2d 311, 312 (Fla. 2d DCA 2005). Equally, if the affidavit of indebtedness is inconclusive (for example, includes a credit for unapplied funds without explanation), and the borrower alleges the defense of inaccurate accounting, then summary judgment should be denied. *Kanu v. Pointe Bank,* 861 So. 2d 498 (Fla. 4th DCA 2003). However, summary judgment will be defeated if payment was attempted, but due to misunderstanding or excusable neglect coupled with lender's conduct, contributed to the failure to pay. *Campbell v. Werner,* 232 So. 2d 252, 256 (Fla. 3d DCA 1970); *Lieberbaum v. Surfcomber Hotel Corp.,* 122 So. 2d 28, 29 (Fla. 3d DCA 1960), (Court dismissed foreclosure complaint where plaintiffs knew that some excusable oversight was the cause for non-payment, said payment having been refused and subsequently deposited by defendants into the court registry).

(b) Failure to comply with conditions precedent – such as Plaintiff's failure to send the Notice of Default letter. Failure to receive payoff information does not preclude summary judgment. *Walker v. Midland Mortgage Co.,* 935 So. 2d 519, 520 (Fla. 3d DCA 2006).

(c) Estoppel is usually based on: a representation as to a material fact that is contrary to a later-asserted position; reliance on that representation; and a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. *Harris v. Nat'l. Recovery Agency,* 819 So. 2d 850, 854 (Fla. 4th DCA 2002); *Jones v. City of Winter Haven,* 870 So. 2d 52, 55 (Fla. 2d DCA 2003), (defendant defeated city's foreclosure based on evidence presented which indicated that the city had agreed to stop fines for noncompliance with property code if homeowner hired a licensed contractor to make repairs).

(d) Waiver – the knowing and intentional relinquishment of an existing right. *Taylor v. Kenco Chem. & Mfg. Co.,* 465 So. 2d 581, 588 (Fla. 1st DCA 1985). When properly pled, affirmative defenses that sound in waiver (and estoppel) present

genuine issues of material fact which are inappropriate for summary judgment. *Schiebe v. Bank of Am.*, 822 So. 2d 575 (Fla. 5th DCA 2002).

> (1) Acceptance of late payments - common defense asserting waiver is the lenders acceptance of late payments. However, the lender has the right to elect to accelerate or not to accelerate after default. *Scarfo v. Peever,* 405 So. 2d 1064, 1065 (Fla. 5th DCA 1981). Default predicated on defendant's failure to pay real estate taxes, could not be overcome by defendant's claim of estoppel due to misapplication of non-escrow payments. *Lunn Woods v. Lowery,* 577 So. 2d 705, 707 (Fla. 2d DCA 1991).

(e) Fraud in the inducement - defined as situation where parties to a contract appear to negotiate freely, but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior. *HTP, Ltd. v. Lineas Aereas Costarricenses, S. A.*, 685 So. 2d 1238, 1239 (Fla. 1996).

Affirmative defense of fraud in the inducement based on allegation that seller failed to disclose extensive termite damage resulted in reversal of foreclosure judgment. *Hinton v. Brooks,* 820 So. 2d 325 (Fla. 5th DCA 2001). (Note that purchasers had first filed fraud in the inducement case and seller retaliated with foreclosure suit). Further, the appellate court opined in the *Hinton* case that fraud in the inducement was not barred by the economic loss rule. *Id.*

(f) Usury – defined by § 687.03, Fla. Stat. (2010), as a contract 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. If the loan exceeds $500,000 in amount or value, then the applicable statutory section is § 687.071, Fla. Stat. (2010). A usurious contract is unenforceable according to the provisions of Section 687.071(7), Fla. Stat. (2010).

(g) Forbearance agreement - Appellate court upheld summary judgment based on Defendant's failure to present any evidence as to the alleged forbearance

agreement of prior servicer to delay foreclosure until the settlement of his personal injury case. *Walker v. Midland Mortgage Co.*, 935 So. 2d at 520. If evidence of forbearance is submitted, it may defeat summary judgment.

(h) Statute of limitations - Property owner successfully asserted that foreclosure filed five years after mortgage maturity date was barred by statute of limitations; mortgage lien was no longer valid and enforceable under Section 95.281(1)(a), Fla. Stat. (2010); *American Bankers Life Assurance Co. of Fla. v. 2275 West Corp.*, 905 So. 2d 189, 191 (Fla. 3d DCA 2005).

(i) Failure to pay documentary stamps – Section 201.08, Fla. Stat. precludes enforcement of notes and mortgages absent the payment of documentary stamps. *WRJ Dev., Inc. v. North Ring Limited,* 979 So. 2d 1046, 1047 (Fla. 3d DCA 2008). However, failure to pay doc stamps may not render the note forever unenforceable. The doc stamps may be paid during the litigation and enforcement on the note can then proceed. See, *Glenn Wright Homes (Delray) LLC v. Lowy,* 18 so 3d at 693 (Fla. 4 DCA 2009), which holds that documentary stamps are not necessarily required prior to an action to enforce certain notes. However *Glen Wright Homes* has been certified as conflicting with holdings in several District Courts of Appeal, and the issue remains unresolved.

(1) This is a limitation on judicial authority; not a genuine affirmative defense.

(j) Truth in Lending (TILA) violations – Technical violations of TILA do not impose liability on lender or defeat foreclosure. *Kasket v. Chase Manhattan Mortgage Corp.*, 759 So. 2d 726 (Fla. 4th DCA 2000); 15 U.S.C.A. § 1600. Exception to TILA one year statute of limitations applies to defenses raised in foreclosure. *Dailey v. Leshin,* 792 So. 2d 527, 532 (Fla. 4th DCA 2001); 15 U. S. C. A. § 1640(e).

TILA issues include:

(1) Improper adjustments to interest rates (ARMS);

(2) Borrower must be given 2 copies of notice of rescission rights. Written acknowledgement of receipt is only a rebuttable presumption. *Cintron v. Bankers Trust Co.*, 682 So. 2d 616 (Fla. 2d DCA 1996).

(3) TILA rescission for up to 3 years after the transaction for failure to make

material disclosures to borrower. Such as, APR of loan, amount financed, total payment and payment schedule. Rescission relieves borrower only for payment of interest. Must be within three years of closing. 15 U. S. C. § 1601-166 (1994); *Beach v. Great Western Bank,* 692 So. 2d 146, 153 (Fla. 1997).

(a) Wife's homestead interest in mortgaged property gives her right to TILA disclosure. *Gancedo v. DelCarpio,* 17 So. 3d 843, 844 (Fla. 4th DCA 2009).

(k) Res judicata – Foreclosure and acceleration based on the same default bars a subsequent action unless predicated upon separate, different defaults. *Singleton v. Greymar Assoc.,* 882 So. 2d 1004, 1007 (Fla. 2004).

Additional cases: *Limehouse v. Smith,* 797 So. 2d 15 (Fla. 4th DCA 2001), (mistake); *O'Brien v. Fed. Trust Bank, F. S. B.,* 727 So. 2d 296 (Fla. 5th DCA 1999), (fraud, RICO and duress); *Biondo v. Powers,* 743 So. 2d 161 (Fla. 4th DCA 1999), (usury); *Heimmermann v. First Union Mortgage Corp.,* 305 F. 23d 1257 (11th Circ. 2002), (Real Estate Settlement Procedures Act (RESPA) violations.

Summary Judgment Hearing

1. Plaintiff must file the original note and mortgage at or before the summary judgment hearing. Since the promissory note is negotiable, it must be surrendered in the foreclosure proceeding so that it does not remain in the stream of commerce. *Perry v. Fairbanks Capital Corp.,* 888 So. 2d 725, 726 (Fla. 5th DCA 2001). Copies are sufficient with the exception that the note must be reestablished. *Id.* Best practice is for judge to cancel the signed note upon entry of summary judgment.

(a) Failure to produce note - can preclude entry of summary judgment. *Nat'l. Loan Investors, L. P. v. Joymar Assoc.,* 767 So. 2d 549, 550 (Fla. 3d DCA 2000).

Final Judgment

1. Section 45.031, Fla. Stat. (2010) governs the contents of the final judgment. Final Judgment Form 1.996, Fla. R. Civ. P. (2010).

2. Amounts due - Plaintiff's recovery limited to items pled in complaint or affidavit or based on a mortgage provision.

3. Court may award costs agreed at inception of contractual relationship; costs must be reasonable. *Nemours Found. v. Gauldin,* 601 So. 2d 574, 576 (Fla. 5th DCA 1992), (assessed costs consistent with mortgage provision rather than prevailing party statute); *Maw v. Abinales,* 463 So. 2d 1245, 1247 (Fla. 2d DCA 1985), (award of costs governed by mortgage provision).

4. Checklist for Final Summary Judgment

(a) Final Judgment:

(1) Check service, defaults, dropped parties.

(2) Check for evidence of ownership of note.

(3) Check affidavits – signed and correct case number/parties.

(4) Amounts due and costs should match affidavits filed. If interest has increased due to resets a daily interest rate should be indicated so you can verify it.

(5) Check principal, rate & calculation of interest through date of judgment.

(6) Late fees – pre-acceleration is recoverable; post acceleration is not. *Fowler v. First Fed. Sav. & Loan Assoc. of Defuniak Springs,* 643 So. 2d 30, 33 (Fla. 1st DCA 1994).

(7) All expenses and costs, such as service of process should be reasonable, market rates. Items related to protection of security interest, such as fencing and boarding up property are recoverable if reasonable.

(8) Beware - hidden charges & fees for default letters, correspondence related to workout efforts. Court's discretion to deny recovery.

(9) Attorney fees must not exceed contract rate with client and be supported by an affidavit as to reasonableness. Attorney fee cannot exceed 3% of principal owed. § 702.065(2), Fla. Stat. (2010). Beware – add-ons for litigation fees – make sure that they are not double-billing flat fee.

(10) Bankruptcy fees not recoverable - Correct forum is bankruptcy court. *Martinez v. Giacobbe,* 951 So. 2d 902, 904 (Fla. 3d DCA 2007); *Dvorak v. First Family Bank,* 639 So. 2d 1076, 1077 (Fla. 5th DCA 1994). Bankruptcy costs incurred to obtain stay relief - recoverable. *Nemours,* 601 So. 2d at 575.

(11) Sale date – may not be set in less than 20 days or more than 35 days, unless parties agree. § 45.031(1)(a), Fla. Stat. (2010), *JRBL Dev., Inc. v. Maiello,* 872 So. 2d 362, 363 (Fla. 2d DCA 2004).

5. If summary judgment denied, foreclosure action proceeds to trial on contested issues.

(a) Trial is before the court without a jury. § 702.01, Fla. Stat. (2010).

6. Motion for rehearing – abuse of discretion to deny rehearing where multiple legal issues, including prepayment penalties and usury, remain unresolved by the trial court. *Bonilla v. Yale Mortgage Corporation,* 15 So. 3d 943, 945 (Fla. 3d DCA 2009).

7. After entry of final judgment and expiration of time to file a motion for rehearing or for a new trial, the trial court loses jurisdiction of the case. *Ross v. Damas,* 2010 WL 532812 (Fla. 3d DCA Feb. 17, 2010); 459 So. 2d 435 (Fla. 3d DCA 1984). Exception: when the trial court reserves in the final judgment the jurisdiction of post judgment matters, such as deficiency judgments. *Id.*

Right of Redemption

1. Mortgagor may exercise his right of redemption at any time prior to the issuance of the certificate of sale. § 45.0315, Fla. Stat. (2010).

(a) Court approval is not needed to redeem. *Indian River Farms v. YBF Partners,* 777 So. 2d 1096, 1100 (Fla. 4th DCA 2001); *Saidi v. Wasko,* 687 So. 2d 10, 13 (Fla. 5th DCA 1996).

(b) Court of equity may extend time to redeem. *Perez v. Kossow,* 602 So. 2d 1372 (Fla. 3d DCA 1992).

2. To redeem, mortgagor must pay the entire mortgage debt, including costs of foreclosure and attorney fees. *CSB Realty, Inc. v. Eurobuilding Corp.*, 625 So. 2d 1275, 1276 (Fla. 3d DCA 1993); §45.0315, Fla. Stat. (2008).

3. Right to redeem is incident to every mortgage and can be assigned by anyone claiming under him. *VOSR Indus., Inc. v. Martin Properties, Inc.*, 919 So. 2d 554, 556 (Fla. 4th DCA 2006). There is no statutory prohibition against the assignment, including the assignment of bid at sale.

(a) Right of redemption extends to holders of subordinate interests. Junior mortgage has an absolute right to redeem from senior mortgage. *Marina Funding Group, Inc. v. Peninsula Prop. Holdings, Inc.*, 950 So. 2d 428, 429 (Fla. 4th DCA 2007); *Quinn Plumbing Co. v. New Miami Shores Corp.*, 129 So. 690, 694 (Fla. 1930).

4. Fed. right of redemption – United States has 120 days following the foreclosure sale to redeem the property if its interest is based on an IRS tax lien. For any other interest, the Fed. government has one year to redeem the property. 11 U. S. C. § 541, 28 U. S. C. § 959.

Judicial Sale

Scheduling the judicial sale

1. The statutory proscribed time frame for scheduling a sale is "not less than 20 days or more than 35 days after the date" of the order or judgment. § 45.031(1) (a), Fla. Stat. (2010). The statute applies unless agreed otherwise.

2. Cancellations, continuances and postponements are within the discretion of the trial court. Movant must have reasons. Judicial action based on benevolence or compassion constitutes an abuse of discretion. *Republic Federal Bank v. Doyle*, 2009 WL 3102130 (Fla. 3d DCA 2009), (Appellate court reversed trial court's continuance of sale based on compassion to homeowners claiming they needed additional time to sell the home). There should be no across the board policy. But see, *Wells Fargo v. Lupica*, 2010 WL 2218584 (Fla. 5th DCA 6/4/10) – denial of lender's unopposed motion to cancel and subsequent motion to vacate sale reversed. Counsel alleged a loan modification agreement had been reached. Court rejected asking for evidence of

agreement. The Fifth District Court ruled, "There was no basis for the trial court to reject Wells Fargo's counsels representation, as an officer of the court, that an agreement had been reached." *Id.* Look at language in motions, "HAMP Review" and "loss mitigation" do not constitute an agreement. Include language in the order indicating the court's rationale, even if you have a form order. Ask counsel to make a personal representation as an "officer of the court." See also, *Chemical Mortgage v. Dickson,* 651 So. 2d 1275, 1276 (Fla. 4th DCA 1995). Error not to cancel sale and reschedule where plaintiff did not receive bidding instructions on a federally-guaranteed mortgage. However, this case found "no extraordinary circumstances" preventing rescheduling. Suggestion: we live in extraordinary times.

Notice of sale

1. Notice of sale must be published once a week, for 2 consecutive weeks in a publication of general circulation. § 45.031(1), Fla. Stat. (2010). The second publication shall be at least five days before the sale. § 45.031(2), Fla. Stat. (2010).

(a) Notice must include: property description; time and place of sale; case style; clerk's name and a statement that sale will be conducted in accordance with final judgment.

(b) Defective notice can constitute grounds to set aside sale. *Richardson v. Chase Manhattan Bank,* 941 So. 2d 435, 438 (Fla. 3d DCA 2006); *Ingorvaia v. Horton,* 816 So. 2d 1256 (Fla. 2d DCA 2002).

Judicial sale procedure

1. Judicial sale is public, anyone can bid. *Heilman v. Suburban Coastal Corp.,* 506 So. 2d 1088 (Fla. 4th DCA 1987). Property is sold to the highest bidder.

2. Plaintiff is entitled to a credit bid in the amount due under final judgment, plus interest and costs through the date of sale. *Robinson v. Phillips,* 171 So. 2d 197, 198 (Fla. 3d DCA 1965).

3. Amount bid is conclusively presumed sufficient consideration. § 45.031(8), Fla. Stat. (2010).

Certificate of sale

1. Upon sale completion - certificate of sale must be served on all parties not defaulted. The right of redemption for all parties is extinguished upon issuance of certificate of sale. §45.0315, Fla. Stat. (2008).

2. Documentary stamps must be paid on the sale. §201.02(9), Fla. Stat. (2010). The amount of tax is based on the highest and best bid at the foreclosure sale. *Id.*

(a) Assignment of successful bid at foreclosure sale - is a transfer of an interest in realty subject to the documentary stamp tax. Fla. Admin. Code Rule 12B-4.013(25). (Rule 12B-4.013(3) provides that the tax is also applicable to the certificate of title issued by the clerk of court to the holder of the successful foreclosure bid, resulting in a double stamp tax if the bid is assigned and the assignee receives the certificate of title.)

(b) Assignment prior to foreclosure sale - holder of a mortgage foreclosure judgment that needs to transfer title to a different entity and anticipates that the new entity would be the highest bidder, should assign prior to the foreclosure sale to avoid double tax.

(c) Documentary stamps are due only if consideration or an exchange of value takes place. *Crescent Miami Center, LLC. v. Fla. Dept. of Revenue,* 903 So. 2d 913, 918 (Fla. 2005), (Transfer of unencumbered realty between a grantor and wholly-owned grantee, absent consideration and a purchaser, not subject to documentary stamp tax); *Dept. of Revenue v. Mesmer,* 345 So. 2d 384, 386 (Fla. 1st DCA 1977), (based on assignment of interest and tender of payment, documentary stamps should have been paid).

(d) Exempt governmental agencies, which do not pay documentary stamps include: Fannie Mae, Freddie Mac, Fed. Home Administration and the Veteran's Administration. Fla. Admin. Code Rules 12B-4.014(9)-(11); 1961 Op. Atty. Gen. 061-137, Sept. 1, 1961.

Objection to sale

1. Any party may file a verified objection to the amount of bid within 10 days. § 45.031(8), Fla. Stat. (2010). The court may hold a hearing – within judicial discretion.

Hearing must be noticed to everyone, including third party purchasers. *Shlishey the Best v. Citifinancial Equity Services, Inc.,* 14 So. 3d 1271 (Fla. 2d DCA 2009).

2. Court has broad discretion to set aside sale. *Long Beach Mortgage Corp. v. Bebble,* 985 So. 2d 611, 614 (Fla. 4th DCA 2008), (appellate court reversed sale - unilateral mistake resulted in outrageous windfall to buyer who made *de minimis* bid). The court may consider a settlement agreement in considering whether to vacate a sale. *JRBL Development, Inc. v. Maiello,* 872 So. 2d 362, 363 (Fla. 2d DCA 2004).

3. **Test**: sale may be set aside if:

(1) bid was grossly or startlingly inadequate; and (2) inadequacy of bid resulted from some mistake, fraud, or other irregularity of sale. *Blue Star Invs., Inc. v. Johnson,* 801 So. 2d 218 (Fla. 4th DCA 2001); *Mody v. Calif. Fed. Bank,* 747 So. 2d 1016, 1017 (Fla. 3d DCA 1999). Mere inadequacy of price is not enough. *Arlt v. Buchanan,* 190 So. 2d 575, 577 (Fla. 1960). Burden on party seeking to vacate sale.

(a) Plaintiff's delay in providing payoff information cannot be sole basis for setting aside sale. *Action Realty & Invs., Inc. v. Grandison,* 930 So. 2d 674, 676 (Fla. 4th DCA 2006).

(b) Stranger to foreclosure action does not have standing to complain of defects in the absence of fraud. *REO Properties Corp. v. Binder,* 946 So. 2d 572, 574 (Fla. 2d DCA 2006).

(c) Sale may be set aside if plaintiff misses sale, based on appropriate showing. *Wells Fargo Fin. System Fla., Inc. v. GRP Fin. Services Corp.,* 890 So. 2d 383 (Fla. 2d DCA 2004).

(d) Court may refuse to set aside sale where objection is beyond statutory period. *Ryan v. Countrywide Home Loans, Inc.,* 7453 So. 2d 36, 38 (Fla. 2d DCA 1999), (untimely motion filed 60 days following the sale).

Sale vacated

1. If sale vacated – mortgage and lien "relieved with all effects" from foreclosure and returned to their original status. §702.08, Fla. Stat. (2010).

(a) Upon readvertisement and resale, a mortgagor's lost redemptive rights temporarily revest. *YEMC Const. & Development, Inc., v. Inter Ser, U. S. A., Inc.,* 884 So. 2d 446, 448 (Fla. 3d DCA 2004).

Post Sale Issues

Certificate of title

1. No objections to sale -- Sale is confirmed by the Clerk's issuance of the certificate of title to purchaser. Title passes to the purchaser subject to parties whose interests were not extinguished by foreclosure, such as omitted parties.

(a) Plaintiff may reforeclose or sue to compel an omitted junior lien holder to redeem within a reasonable time. *Quinn,* 129 So. 2d at 694.

(b) Foreclosure is void if titleholder omitted. *England v. Bankers Trust Co. of Calif., N. A.,* 895 So. 2d 1120, 1121 (Fla. 4th DCA 2005).

Right of possession

1. Purchaser has a right to possess the property - upon the issuance of the certificate of title, provided the interest holder was properly joined in the foreclosure.

2. Right of possession enforced through writ of possession. Rule 1.580, Fla. R. Civ. P. (2010)

3. **Summary writ of possession procedure:**

(a) Purchaser of property moves for writ of possession;

(b) The writ can be issued against any party who had actual or constructive knowledge of the foreclosure proceedings and adjudication; *Redding v. Stockton, Whatley, Davin & Co.,* 488 So. 2d 548, 549 (Fla. 5th DCA 1986);

(c) Best practice is to require notice and a hearing before issuance of a writ.

(1) Protecting Tenants at Foreclosure Act of 2009 provides for a 90 day pre-eviction notice applicable to bona fide tenants. (See following section)

(d) At hearing, judge orders immediate issuance of writ of possession unless a person in possession raises defenses which warrant the issuance of a writ of possession for a date certain;

(e) The order for writ of possession is executed by the sheriff and personal property removed to the property line.

Protecting Tenants at Foreclosure Act of 2009

1. Federal legislation, known as Senate Bill 896, P. L. 111-22, provides for a nationwide 90 day pre-eviction notice requirement for bona fide tenants in foreclosed properties.

2. The application of the new law is restricted to any dwelling or residential property that is being foreclosed under a federally-related mortgage loan as defined by Section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U. S. C. 2602). In short, the originating lender must be the Federal National Mortgage Association (FNMA), the Government National Mortgage Association (GNMA), the Federal Home Loan Mortgage Corporation or a financial institution insured by the Federal Government.

2. Three prerequisites must be satisfied to qualify as a bona fide tenant under the new Act:

(1) The tenant cannot be the mortgagor or a member of his immediate family;

(2) The tenancy must be an arms length transaction; and

(3) The lease or tenancy requires the receipt of rent that is not substantially lower than the fair market rent for the property.

4. The buyer or successor in interest after foreclosure sale must provide bona fide tenants:

(a) With leases – the right to occupy the property until the expiration of the lease term. The exception is if the buyer intends to occupy the property as a primary residence, in which case he must give 90 days notice.

(b) Without leases – the new buyer must give the tenant 90 days notice prior to lease termination.

5. The single other exception to the foregoing is Section 8 Housing. In this case, the buyer assumes the interest of the prior owner and the lease contract. The buyer cannot terminate in the absence of "good cause."

6. This provisions of the new law went into effect on May 20, 2009. The bill sunsets on 12/31/2012.

Disbursement of Sale Proceeds

Surplus

1. Surplus - the remaining funds after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements. § 45.032(1)(c), Fla. Stat. (2010). Disbursement of surplus funds is governed by Section 45.031, Fla. Stat. (2010).

2. Entitlement to surplus is determined by priority; in order of time in which they became liens. *Household Fin. Services, Inc. v. Bank of Am., N. A.,* 883 So. 2d 346, 347 (Fla. 4th DCA 2004). It is the duty of the court to prioritize the interests of the competing junior lien holders and the amounts due each. *Citibank v. PNC Mortgage Corp. of America,* 718 So. 2d 300, 301 (Fla. 2d DCA 1998).

(a) Default does not waive lienholder's rights to surplus funds. *Golindano v. Wells Fargo Bank,* 913 So. 2d 614 (Fla. 3d DCA 2005). A junior lienholder has priority over the property holder for surplus funds. *Id.,* 615.

(b) A senior lienholder is not entitled to share in surplus funds. *Garcia v. Stewart,* 906 So. 2d 1117, 1121 (Fla. 4th DCA 2005), (senior lienholder liens unaffected; improper party to junior lienholder foreclosure).

(c) Entitlement to balance of surplus after payment of priority interests - payable to the record owner as of the date of the filing of the lis pendens. *Suarez v. Edgehill,* 2009 WL 3271350 (Fla. App. 3d DCA Oct. 14, 2009).

Deficiency Judgment

1. Deficiency – is the difference between the fair market value of the security received and the amount of the debt. *Mandell v. Fortenberry,* 290 So. 2d 3, 6 (Fla. 1974); *Grace v. Hendricks,* 140 So. 790 (Fla. 1932).

2. A deficiency can be obtained only if a request for that relief is made in the pleadings and if personal jurisdiction has been obtained over the defendant or defendants against whom the deficiency is sought. *Bank of Florida in South Florida v. Keenan,* 519 So. 2d 51, 52 (Fla. 3d DCA 1988). The granting of a deficiency judgment is the rule rather than the exception. *Thomas v. Premier Capital, Inc.,* 906 So. 2d 1139, 1140 (Fla. 3d DCA 2005).

(a) Deficiency judgment not allowable if based on constructive service of process.

(b) New service of process on defendant was not required for deficiency judgment where personal jurisdiction had been originally conferred by service of foreclosure complaint. *L. A. D. Property Ventures, Inc. v. First Bank,* 2009 WL 3270846 (Fla. App. 2d DCA Oct. 14, 2009). "The law contemplates a continuance of the proceedings for entry of a deficiency judgment as a means of avoiding the expense and inconvenience of an additional suit at law to obtain the balance of the obligation owed by a debtor." *Id.*

3. Trial court has discretion to enter deficiency decree. § 702.06, Fla. Stat. (2008); *Thomas,* 906 So. 2d at 1140. The court needs to hold an evidentiary hearing. *Merrill v. Nuzum,* 471 So. 2d 128, 129 (Fla. 3d DCA 1985). The court can enter a default judgment provided the defendant was properly noticed. *Semlar v. Savings of Florida,* 541 So 2d 1369, 1370 (Fla. 4th DCA 1989).

(a) The exercise of discretion in denial of a deficiency decree must be supported by disclosed equitable considerations which constitute sound and sufficient reasons for such action. *Larsen v. Allocca,* 187 So. 2d 903, 904 (Fla. 3d DCA 1966).

4. A cause of action for deficiency cannot accrue until after entry of final judgment and a sale of the assets to be applied to the satisfaction of the judgment. *Chrestensen v. Eurogest, Inc.,* 906 So. 2d 343, 345 (Fla. 4th DCA 2005). The amount of deficiency is determined at the time of the foreclosure sale. *Estepa v. Jordan,* 678 So. 2d 878 (Fla. 5th DCA 1996). The amount bid art foreclosure sale is not conclusive evidence of the property's market value. *Century Group, Inc. v. Premier Financial Services,* 724 So. 2d 661, (Fla. 2d DCA 1999).

(a) The appraisal determining the fair market value must be properly admitted into evidence and be based on the sale date. *Flagship State Bank of Jacksonville v. Drew Equipment Company, 392 So. 2d 609, 610 (Fla. 5th DCA 1981).*

(b) The formula to calculate a deficiency judgment is the final judgment of foreclosure total debt minus the fair market value of the property. *Morgan v. Kelly,* 642 So. 2d 1117 (Fla. 3d DCA 1994).

(c) The amount paid by a mortgage assignee for a debt is "legally irrelevant" to the issue of whether the assignee is entitled to a deficiency award after a foreclosure sale. *Thomas,* 906 So. 2d at 1141.

4. Burden: The secured party has the burden to prove that the fair market value of the collateral is less than the amount of the debt. *Chidnese v. McCollem,* 695 So. 2d 936, 938 (Fla. 4th DCA 1997), *Estepa* 678 So. 2d at 878. However, the Third District Court has held that the burden is on the mortgagor resisting a deficiency judgment to demonstrate that the mortgagee obtained property in foreclosure worth more than the bid price at the foreclosure sale. *Addison Mortgage Co. v. Weit,* 613 So.2d 104 (Fla. 3d DCA 1993). See also, *Thunderbird, Ltd. v. Great American Ins. Co.,* 566 So. 2d 1296, 1299 (Fla. 1st DCA 1990), (court held that introduction of the certificate of sale from the foreclosure sale showing that the bid amount at the foreclosure sale was less than the amount of the debt shifted the burden to the mortgagee to go forward with other evidence concerning the fair market value of the property.)

5. Denial of deficiency decree in foreclosure suit for jurisdictional reasons, as distinguished from equitable grounds, is not res judicata so as to bar an action for deficiency. *Frumkes v. Mortgage Guarantee Corp.,* 173 So. 2d 738, 740 (Fla. 3d DCA 1965); *Klondike, Inc. v. Blair,* 211 So. 2d 41, 42 (Fla. 4th DCA 1968).

6. Reservation of jurisdiction in the final judgment of foreclosure – If jurisdiction is reserved, new or additional service of process on defendant is not required. *Estepa,* 678 So. 2d at 878. The motion and the notice of hearing must be sent to the attorney of record for the mortgagor. *Id., NCNB Nat'l. Bank of Fla. v. Pyramid Corp.,* 497 So. 2d 1353, 1355 (Fla. 4th DCA 1986), (defaulted defendant entitled to notice of

deficiency hearing). However, the motion for deficiency must be timely filed. If untimely, the deficiency claim could be barred upon appropriate motion by the defendant under Rule 1.420(e), Fla. R. Civ. P. (2010), *Frohman v. Bar-Or,* 660 So. 2d 633, 636 (Fla. 1995); *Steketee v. Ballance.* Homes, Inc., 376 So. 2d 873, 875 (Fla. 2d DCA 1979).

(a) No reservation of jurisdiction in the final judgment - motion for deficiency must be made within ten (10) days of issuance of title. *Frumkes,* 173 at 740.

(b) The lender can file a separate action for post-foreclosure deficiency. Section 702.06, Fla. Stat (2010). In a separate action, the defendant has the right to demand a trial by jury. *Hobbs v. Florida First Nat.'l Bank of Jacksonville,* 480 So. 2d 153, 156 (Fla. 1st DCA 1985); *Bradberry v. Atlantic Bank of St. Augustine,* 336 So. 2d 1248, 1250 (Fla. 1st DCA 1976), (no jury trial right within foreclosure action). Section 55.01(2), Fla. Stat. (2010) mandates that final judgments in a separate action for deficiency contain the address and social security number of the judgment debtor, if known. This requirement is not imposed in a mortgage foreclosure action, in which an *in rem* judgment is sought.

7. Statute of limitations –

(a) A deficiency judgment or decree is barred when an action on the debt secured by the mortgage is barred. *Barnes v. Escambia County Employees Credit Union,* 488 So. 2d 879, 880 (Fla. 1st DCA 1986), abrogated on other grounds.

(b) Section 95.11, Fla. Stat. (2010) imposes a five-year statute of limitations for a foreclosure deficiency judgment.

(c) "A cause of action for deficiency does not accrue, and thus the statute of limitations does not begin to run, until the final judgment of foreclosure and subsequent foreclosure sale." *Chrestensen,* 906 So. 2d at 345.

8. There are statutory limitations imposed on a deficiency judgment when a purchase money mortgage is being foreclosed. Section 702.06, Fla. Stat. (2010) includes language that impairs the entitlement to a deficiency judgment with respect to a purchase money mortgage, when the mortgagee becomes the purchaser at foreclosure sale. Specifically, this statutory limitation provides: "the complainant shall

also have the right to sue at common law to recover such deficiency, provided no suit at law to recover such deficiency shall be maintained against the original mortgagor in cases where the mortgage is for the purchase price of the property involved and where the original mortgagee becomes the purchaser thereof at foreclosure sale and also is granted a deficiency decree against the original mortgagor." Essentially, if the lender purchases the subject property he has not incurred the damages and in fact may recoup or profit at a later sale. See also, *United Postal Savings Ass'n v. Nagelbush,* 553 So. 2d 189(Fla. 3d DCA 1989), *Taylor v. Prine,* 132 So. 2d 464, 465 (Fla. 1931).

(a) One Florida court ruled in a case where the purchase money mortgagee was also the purchaser that the "all important distinction" in the case was that "the purchaser at the foreclosure sale was not the mortgagee but... an utter stranger to the parties," a third party purchaser, warranting reversal of the trial court's denial of deficiency judgment. *Lloyd v. Cannon,* 399 So. 2d 1095, 1096 (Fla. 1st DCA 1981).

Bankruptcy

1. The automatic stay provisions of 11 U. S. C. §362 enjoins proceedings against the debtor and against property of the bankruptcy estate.

(a) To apply, the subject real property must be listed in the bankruptcy schedules as part of the estate. 11 U. S. C. § 541.

2. Foreclosure cannot proceed until the automatic stay is lifted or terminated. If property ceases to be property of the bankruptcy estate, the stay is terminated.

(a) The automatic stay in a second case filed within one year of dismissal of a prior Chapter 7, 11 or 13 automatically terminates 30 days after the second filing, unless good faith is demonstrated. 11 U. S. C. § 362(c)(3).

(b) The third filing within one year of dismissal of the second bankruptcy case, lacks entitlement to the automatic stay and any party in interest may request an order confirming the inapplicability of the automatic stay.

(c) Multiple bankruptcy filings where the bankruptcy court has determined that the debtor has attempted to delay, hinder or defraud a creditor may result in the

imposition of an order for relief from stay in subsequent cases over a two year period. 11 U. S. C. §362(d)(4).

3. Debtor's discharge in bankruptcy only protects the subject property to the extent that it is part of the bankruptcy estate.

4. Foreclosure cannot proceed until relief from automatic stay is obtained or otherwise terminated, or upon dismissal of the bankruptcy case.

Florida's Expedited Foreclosure Statute

1. Enacted by § 702.10, Fla. Stat. (2010).

2. Upon filing of verified complaint, plaintiff moves for immediate review of foreclosure by an order to show cause. (These complaints are easily distinguishable from the usual foreclosure by the order to show cause).

(a) The failure to file defenses or to appear at the show cause hearing "presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard." *Id.*

3. Not the standard practice among foreclosure practitioners, due to limitations:

(a) Statute does not foreclose junior liens;

(b) Procedures differ as to residential and commercial properties; and

(c) Statute only provides for entry of an *in rem* judgment; a judgment on the note or a deficiency judgment cannot be entered under the show cause procedure.

Common Procedural Errors

1. Incorrect legal description contained in the:

(a) Original mortgage – requires a count for reformation. An error in the legal description of the deed requires the joinder of the original parties as necessary parties to the reformation proceedings. *Chanrai Inv., Inc., v. Clement,* 566 So. 2d 838, 840 (Fla. 5th DCA 1990).

(b) Complaint and lis pendens – requires amendment.

(c) Judgment – Rule 1.540 (a), Fla. R. Civ. P. (2010) governs. For example, an incorrect judgment amount which omitted the undisputed payment of real estate

taxes could be amended. *LPP Mortgage Ltd. v. Bank of America,* 826 So. 2d 462, 463 (Fla. 3d DCA 2002).

(d) Notice of Sale – requires vacating the sale and subsequent resale of property. *Hyte Development Corp. v. General Electric Credit Corp.,* 356 So. 2d 1254 (Fla. 3d DCA 1978).

(e) Certificate of title – a "genuine" scrivener's error in the certificate of title can be amended. However, there is no statutory basis for the court to direct the clerk to amend the certificate of title based on post judgment transfers of title, faulty assignments of bid or errors in vesting title instructions.

(1) An error in the certificate of title which originates in the mortgage and is repeated in the deed and notice of sale requires the cancellation of the certificate of title and setting aside of the final judgment. *Lucas v. Barnett Bank of Lee County,* 705 So. 2d 115 (Fla. 2d DCA 1998). (For example, plaintiff's omission of a mobile home and its vehicle identification number (VIN) included in the mortgage legal description, but overlooked throughout the pleadings, judgment and notice of sale, cannot be the amended in the certificate of title.) Due process issues concerning the mobile home require the vacating of the sale and judgment.

Mortgage Workout Options

1. Reinstatement: Repayment of the total amount in default or payments behind and restoration to current status on the note and mortgage.
2. Forbearance: The temporary reduction or suspension of mortgage payments.
3. Repayment Plan: Agreement between the parties whereby the homeowner repays the regularly scheduled monthly payments, plus an additional amount over time to reduce arrears.
4. Loan Modification: Agreement between the parties whereby one or more of the mortgage terms are permanently changed.
5. Short Sale: Sale of real property for less than the total amount owed on the note and mortgage.

(a) If the lender agrees to the short sale, the remaining portion of the mortgage debt, (the difference between the sale price of the property and mortgage balance, the deficiency), may be forgiven by the lender.

(1) Formerly, the amount of debt forgiven was considered income imputed to the seller and taxable as a capital gain by the IRS. *Parker Delaney,* 186 F. 2d 455, 459 (1st Cir. 1950). However, federal legislation has temporarily suspended imputation of income upon the cancellation of debt.

6. Deed-in-lieu of Foreclosure: The homeowner's voluntary transfer of the home's title in exchange for the lender's agreement not to file a foreclosure action.

Revised 6/10/10

Recent Foreclosure Cases

Lizio v. McCullom – Ptf must prove that it owns and holds note & mortgage in order to obtain foreclosure F.J.

Verizzo v. Bank of N.Y., 28 So. 3rd 976 (2d 2010) – Ptf must serve supporting documents at least 20 days before summary judgment hearing

Taylor v. Deutsche Bk., 5th DCA, 8/6/10 – MERS had valid assignment

LaSalle Bk v. Alicea, 35 So. 3d 986 (5th 2010) – M/Cancel sale should be considered by trial judge.

Wells Fargo v. Lupica, 36 So. 3d 875 (2d 2010) – abuse of discretion not to grant m/cancel sale

Riggs v. Aurora Loan Services, 36 So. 3rd 932 (4th 2010) – endorsement in blank Ok for Ptf's summary Judgment, cf., BAC Funding v. Jean-Jacques, 28 So. 3rd 936 (2d 2010), no assignment & proof of purchase or transfer of mortage & note

Kontos v. Am Home Mort., 1st DCA 8/10/20 – no summary judgment for Ptf because no evidence of assignment

Lazuran v. Citimortgage, 35 So. 3rd 189 (4th 2010) – no summary judgment where Def alleged he didn't get notice of acceleration & Ptf swore generally that it satisfied all conditions precedent

Aegis v. Avalon, 37 So. 3d 960 (4th 2010) – don't set aside sale where Def says she didn't understand FJ.

Nudel v. Flagstar – 4th DCA 8/11/10 – hearing not required on foreclosure motions; disqualification not required when counsel calls to set hrgs.

STEPHEN E. LIZIO, Appellant, v. KEVIN A. McCULLOM and WAYNA M. McCULLOM, Appellees.

No. 4D09-1149

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

36 So. 3d 927; 2010 Fla. App. LEXIS 8199; 35 Fla. L. Weekly D 1292

June 9, 2010, Decided

PRIOR HISTORY: [**1]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Richard D. Eade, Judge; L.T. Case No. 07-28849 05.

COUNSEL: Robert P. Bissonnette, of Robert P. Bissonnette, P.A., Fort Lauderdale, for appellant.

Jerome R. Schechter, of Jerome R. Schechter, P.A., Fort Lauderdale, for appellees.

JUDGES: LEVINE, J. GROSS, CJ., and POLEN J., concur.

OPINION BY: LEVINE

OPINION

[*928] LEVINE, J.

The issue presented is whether the trial court erred in granting appellees' motion to dismiss on the basis that appellant's production of the original note and mortgage, along with a valid written assignment of the note and mortgage from the estate of the original mortgagee, was insufficient to establish "current" ownership of the mortgage. We find that the production of the original note, mortgage, and assignment did constitute prima facie evidence of ownership, and the trial court's dismissal was reversible error.

Appellees executed a mortgage and a promissory note for $ 200,000 in favor of John Haner to purchase property in Wilton Manors in 2003. Subsequently, Haner died, and his estate assigned his interest in the note and mortgage to appellant. At some point, appellant filed a foreclosure action against appellees, claiming [**2] appellees failed to make required payments on the mortgage. The trial court denied appellant's motion for summary judgment, and this case proceeded to trial. [1]

[1] Appellant's initial motion for summary judgment was granted and then summarily vacated for reasons unspecified. We find the appellant's objection to the court's vacatur of the summary judgment to be without merit and affirm the trial court on this issue.

At trial, the personal representative for Haner's estate, Jeffrey Selzer, testified that the original note and mortgage were executed by appellees in 2003. Selzer stated that he executed an assignment of the mortgage to appellant in October 2007; the assignment was recorded a few days later. Selzer also testified that he received the original note and mortgage [*929] from Haner prior to his death, and the mortgage presented at trial was identical to the mortgage the decedent gave Selzer. Finally, Selzer concluded from reviewing Haner's documents that appellees defaulted on the note in January 2006. Appellant did not testify on his own behalf. Prior to resting, appellant offered into evidence original copies of the assignment, note, and mortgage.

Appellees moved to involuntarily dismiss [**3] the case. The trial court granted appellees' motion, finding that the assignment of the mortgage and note to appellant did not constitute prima facie evidence that appellant is the *current* owner and holder of the mortgage and note.

This court reviews the trial court's order on a motion to dismiss de novo. *Brundage v. Bank of Am., 996 So. 2d 877, 881 (Fla. 4th DCA 2008).* "An involuntary dismis-

sal is properly entered only where the evidence considered in the light most favorable to the non-moving party fails to establish a prima facie case" for which relief may be granted. *Perez v. Perez, 973 So. 2d 1227, 1231 (Fla. 4th DCA 2008)*. Thus, we must determine if appellant established a "prima facie case" requiring the trial court to deny the motion to dismiss.

The party seeking foreclosure must present evidence that it owns and holds the note and mortgage in question in order to proceed with a foreclosure action. *Verizzo v. Bank of N.Y., 28 So. 3d 976, 978 (Fla. 2d DCA 2010)*; *Philogene v. ABN Amro Mortgage Group Inc., 948 So. 2d 45, 46 (Fla. 4th DCA 2006)*. Where the defendant denies that the party seeking foreclosure has an ownership interest in the mortgage, the issue of ownership becomes [**4] an issue the plaintiff must prove. *Carapezza v. Pate, 143 So. 2d 346, 347 (Fla. 3d DCA 1962)*.

In the present case, appellant possessed the original note, mortgage, and assignment executed by the personal representative of Haner's estate. The note was payable to the late John Haner, and the assignment granted Haner's rights under the note and mortgage to appellant. Thus, appellant "held" the note, which granted him standing to seek foreclosure of the mortgage. *Mortgage Elec. Registration Sys., Inc. v. Revoredo, 955 So. 2d 33, 34 n.2 (Fla. 3d DCA 2007)*. [2]

> 2 Pursuant to *section 701.01, Florida Statutes (2008)*, "Any mortgagee may assign and transfer any mortgage made to her or him . . . and that person . . . may lawfully have, take and pursue the same means and remedies which the mortgagee may lawfully have, take or pursue for the foreclosure of a mortgage."

Appellees argued that the testimony of the personal representative demonstrated only that the note and mortgage was assigned by the estate of Haner but that Selzer's testimony did not foreclose the possibility that appellant, who did not testify, may have executed a subsequent assignment of that same note and mortgage. Although appellees [**5] raise a point that the trial court may consider as part of appellees' defense, we find, nonetheless, that the trial court erred in granting appellees' motion for involuntary dismissal at that particular juncture. Appellant met his burden of providing a "prima facie case"; therefore we reverse and remand for further proceedings.

Reversed in part, affirmed in part, and remanded.

GROSS, CJ., and POLEN J., concur.

LEXSEE 35 SO. 3D 986

LASALLE BANK NATIONAL ASSOCIATION, ETC., Appellant, v. DAISY E. ALICEA A/K/A DAISY ALICEA, ETC., Appellee.

Case No. 5D09-2129

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

35 So. 3d 986; 2010 Fla. App. LEXIS 7017; 35 Fla. L. Weekly D 1136

May 21, 2010, Opinion Filed

SUBSEQUENT HISTORY: Released for Publication June 9, 2010.

PRIOR HISTORY: [**1]
Non-Final Appeal from the Circuit Court for Volusia County, John V. Doyle, Judge.

COUNSEL: Dana Marie Opitz and Charles P. Gufford, of Butler & Hosch, P.A., Orlando, for Appellant.

Harlan L. Paul, of Paul & Elkind, P.A., DeLand, for Appellee.

JUDGES: GRIFFIN, J. SAWAYA and LAWSON, JJ., concur.

OPINION BY: GRIFFIN

OPINION

[*987] GRIFFIN, J.

LaSalle Bank National Association, as Trustee for Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-3 ["LaSalle"] appeals the trial court's non-final order denying its objection to sale and emergency motion to vacate summary final judgment and to vacate foreclosure sale and to return funds to the third party purchaser. [1]

1 Hill & Beckman, Inc. and Tamco Corporation of Volusia County ["Third Party Purchasers"] have been granted leave to join as a party appellee in the instant appeal.

On December 4, 2008, LaSalle filed a complaint to foreclose a mortgage on real property owned by Daisy E. Alicea a/k/a Daisy Alicea ["Alicea"] that she had purchased in 2007 for $ 225,000. Thereafter, in March 2009, LaSalle filed a motion for summary final judgment and notice of a hearing to be held on April 14, 2009. On that date, the trial court entered its summary [**2] final judgment of foreclosure, finding that $ 201,019.00 was due and owing to LaSalle and scheduling the foreclosure sale for May 14, 2009. On May 12, 2009, LaSalle filed a motion to cancel/vacate foreclosure sale, stating: "Since the date of the entry of the Final Judgment of Foreclosure and the notice of sale, the borrowers have entered into a Non-FNMA Home Affordable Modification Program in an effort to retain their home and avoid the sale of their home." The trial court denied the motion without a hearing, using a "DENIED" stamp with a handwritten date of May 13, 2009. LaSalle then filed a renewed motion to cancel/vacate foreclosure sale, providing: "Since the date of the entry of the Final Judgment of Foreclosure and the notice of sale, the borrowers have entered into arrangements with the Plaintiff for a short sale of the property, which sale is scheduled to take place on May 20, 2009." A docket entry indicates that the trial court denied the renewed motion.

[*988] On May 14, 2009, the foreclosure sale took place as scheduled, at which "Equitable Gain Inc." purchased the property for a bid of $ 8,000.00. "Equitable Gain Inc." provided proof of publication on May 15, 2009.

LaSalle filed [**3] an objection to the sale and an emergency motion to vacate summary final judgment and to vacate foreclosure sale and to return funds to the

third party purchaser. It asserted that the judicial sale of the property should be set aside because the sale price was grossly inadequate. LaSalle stated that Alicea "purchased the property for the amount of $ 225,000.00 on 03/28/2007" and that the current tax appraisal value was $ 160,644.00. LaSalle noted other irregularities: that the affidavits filed in support of its motion for summary final judgment were not in compliance with the time requirements of *Florida Rule of Civil Procedure 1.510(c)*, and the sale should not have taken place because proof of publication of the notice of sale had not been filed with the Clerk prior to the sale date. The trial court again denied LaSalle's objection and motion without a hearing, using the "DENIED" stamp with a handwritten date of May 20, 2009. On May 27, 2009, the Clerk filed a certificate of title, which showed that the property was sold to Third Party Purchasers as follows: "HILL & BECKMAN INC 2/3, AND TAMCO CORP OF VOLUSIA COUNTY 1/3 . . . ."

LaSalle filed a motion for rehearing or in the alternative [**4] motion to vacate certificates of sale and title. It asserted in part:

> 16. Plaintiff timely filed an Objection to Sale and Emergency Motion to Vacate Summary Final Judgment and to Vacate Foreclosure Sale and To Return Funds to Third-Party Purchasers, objecting to the sale on the grounds set forth hereinabove.
>
> 17. The Court held no hearing on the Objection to sale and made no written ruling on same, and on May 27, 2009, the Court entered the Certificate of Title to the third-party purchaser.

In support of its motion, LaSalle filed the affidavit of Charles P. Gufford, an attorney with Butler & Hosch, P.A., who was primarily responsible for representing LaSalle. The following statements were among those sworn to in the affidavit:

> 7. Prior to the 05/14/2009 sale, the undersigned counsel filed two (2) separate motions to cancel the sale (on 05/12/20[0]9 and 05/13/2009, respectively), as the borrower and lender had entered into a short sale, wherein the parties would equitably resolve the matter short of a judicial sale.
>
> 8. Both motions to cancel the sale were denied by the Court without providing any ruling of law as to the denials.
>
> . . . .
>
> 13. An Objection to Sale was timely filed by the Plaintiff [**5] on 05/19/2009, which is five (5) days after the sale, well within the ten (10) days in compliance with *Fla. Stat. 45.031*.
>
> 14. The Court held no hearing on the Objection to sale and on May 27, 2009, the Certificate of Title was issued to the third-party purchaser. [2]

The trial court denied the motion; the motion bears a "DENIED" stamp, with the handwritten date of June 3, 2009, and a reference to the previous order dated May 20, 2009.

> 2 On June 9, 2009, LaSalle also filed the affidavit of Alicea, confirming her agreement with LaSalle for a "short sale" of her property.

This case is virtually identical in all material respects to two other cases recently before this Court. *U.S. Bank Nat'l Ass'n v. Bjeljac, 17 So. 3d 862 (Fla. 5th DCA* [*989] *2009)* and *Wells Fargo Bank, N.A. v. Lupica, 17 So. 3d 864 (Fla. 5th DCA 2009)*. The trial judge was the same in all three of these cases and the procedure he consistently followed is the problem.

In the *U.S. Bank* case, the lender sought to cancel and to reset a scheduled foreclosure sale, which the court denied without a hearing using a "DENIED" stamp. The lender's subsequent Objection to Sale, Motion to Return Third Party Funds, to Vacate Certificate of Sale and [**6] to Set Aside Foreclosure Sale met the exact same fate. In the *Wells Fargo* case, the lender initially sought to cancel the foreclosure sale before it occurred, representing to the court that a modification agreement had been reached with the defendant homeowners. This motion was denied without a hearing, using a "DENIED" stamp. Thereafter, Wells Fargo filed a Motion to Vacate the Foreclosure Sale, again attempting to enter into a forbearance agreement with the defendant homeowner that would provide them with the opportunity to save their home. As with all the other motions, no hearing and a simple "DENIED" stamp disposed of the motion.

In this case, as in the *Wells Fargo* and *U.S. Bank* cases, there is nothing establishing that the documents bearing these executed "denied" stamps were filed with the clerk of the court or when they were filed. As with the *Wells Fargo* and *U.S. Bank* cases, these orders cannot be considered properly rendered or final. We elect to treat this matter as a premature appeal and relinquish jurisdiction to the trial court for a period of thirty days for properly rendered orders. Because the trial judge involved in these cases is no longer on the bench, the suc-

cessor [**7] judge will necessarily have to consider the motions *de novo*.

In this case, as in the *Wells Fargo* and *U.S. Bank* cases, there is also no reason we can discern why denial of the plaintiff lender's repeated motions to cancel the foreclosure sale should not have been granted, and the procedure followed by the trial judge leaves us in doubt that the motions were given any merits consideration. Accordingly, in order to enable meaningful appellate review, if the trial court again denies LaSalle's motions, it must provide reasons.

JURISDICTION RELINQUISHED.

SAWAYA and LAWSON, JJ., concur.

GREGORY TAYLOR, Appellant, v. DEUTSCHE BANK NATIONAL TRUST COMPANY, ETC., Appellee.

Case No. 5D09-4035

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

2010 Fla. App. LEXIS 11431*; *35 Fla. L. Weekly D 1770

August 6, 2010, Opinion Filed

PRIOR HISTORY: [*1]
Appeal from the Circuit Court for Brevard County, David E. Silverman, Judge.

COUNSEL: 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.

JUDGES: MONACO, C.J. LAWSON, J., and EDWARDS-STEPHENS, S., Associate Judge, concur.

OPINION BY: MONACO

OPINION

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 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 [*2] 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, 861 N.E.2d 81, 828 N.Y.S.2d 266*, 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 [*3] 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.

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 [*4] 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 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 [*5] 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, [*6] among other documents. [1] The amended answer denied that the note was assigned by MERS to Deutsche Bank and denied that the mortgage was 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.

> 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.

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 [*7] 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, 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 [*8] 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.

> 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, 119 Conn. App. 570, 989 A.2d 606 (Conn. App. Ct. 2010)*.

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 [*9] 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 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, [*10] 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 [*11] *and Note*, and also the said property unto the 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, 27 Misc. 3d 802, 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))*, [*12] 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, 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.

DAVID VERIZZO, Appellant, v. THE BANK OF NEW YORK, AS SUCCESSOR TRUSTEE UNDER NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2006-3, Appellee.

Case No. 2D08-4647

COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

28 So. 3d 976; 2010 Fla. App. LEXIS 2520; 35 Fla. L. Weekly D 494

March 3, 2010, Opinion Filed

SUBSEQUENT HISTORY: Released for Publication March 22, 2010.

PRIOR HISTORY: [**1]
Appeal from the Circuit Court for Sarasota County; Robert W. McDonald, Jr., Judge.

COUNSEL: David Verizzo, Pro se.

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

JUDGES: SILBERMAN, Judge. WHATLEY and MORRIS, JJ., Concur.

OPINION BY: SILBERMAN

OPINION

[*977] 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 [**2] 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 No-

vastar 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 [**3] 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 [*978] before the time [**4] 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 [**5] 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 [**6] MORRIS, JJ., Concur.

Analysis
As of: Aug 26, 2010

WELLS FARGO BANK, N.A. AS TRUSTEE, etc., Appellant, v. CARL T. LUPICA AND MARGARET LUPICA, Appellees.

Case No. 5D09-2902

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

36 So. 3d 875; 2010 Fla. App. LEXIS 7707; 35 Fla. L. Weekly D 1256

June 4, 2010, Opinion Filed

SUBSEQUENT HISTORY: Released for Publication June 23, 2010.

PRIOR HISTORY: [**1]

Appeal from the Circuit Court for Volusia County, John V. Doyle, Judge.

Wells Fargo Bank, N.A. v. Lupica, 17 So. 3d 864, 2009 Fla. App. LEXIS 13493 (Fla. Dist. Ct. App. 5th Dist., 2009)

COUNSEL: Richard S. McIver, of Kass, Shuler, Solomon, Spector, Foyle & Singer, P.A. Tampa, for Appellant.

No Appearance for Appellee.

JUDGES: EVANDER, J. GRIFFIN and SAWAYA, JJ., concur.

OPINION BY: EVANDER

OPINION

[*875] EVANDER, J.

Wells Fargo appeals from the denial of its unopposed motion to cancel foreclosure [*876] sale and its subsequent unopposed motion to vacate the foreclosure sale. Because we find that the denial of these motions constituted a gross abuse of discretion, we reverse.

Wells Fargo filed a mortgage foreclosure action against the Lupicas, based on their alleged failure to make due and owing monthly installment payments. No answer was filed by the Lupicas and a final summary judgment was subsequently entered in favor of Wells Fargo. Shortly prior to the scheduled foreclosure sale, Wells Fargo filed a motion to cancel sale, alleging that the parties had reached a loan modification agreement. The motion was denied by stamping the word "Denied" on the face of the motion. Wells Fargo purchased the mortgaged property at the foreclosure sale for $ 100 and then filed an unopposed motion to vacate sale, stating that the parties had reached a forbearance agreement. [**2] The trial court again denied the motion by use of a "Denied" stamp.

When Wells Fargo initially appealed the denial of these motions, we were compelled to relinquish jurisdiction to the trial court because the trial court's action did not constitute "rendition" of a final order so as to permit appellate review. *Wells Fargo Bank, N.A. v. Lupica, 17 So. 3d 864 (Fla. 5th DCA 2009).* We further directed the trial court to provide the basis for its denials of Wells Fargo's motion to cancel sale and subsequent motion to vacate sale. *Id. at 866.*

The trial court then entered a final order denying the motions. The purported basis for the denial of Wells Fargo's two unopposed motions was the failure to attach a stipulation and/or a copy of the loan modification or

forbearance agreement signed by all parties. The trial judge further suggested that the parties should have discussed the modification of the loan prior to entry of the final judgment "which could have avoided unnecessary consumption of the time of two courts."

Foreclosures are equitable proceedings under Florida law and settlements between litigants are favored. The trial court's denial of Wells Fargo's unopposed motions flies in the face [**3] of these principles. Furthermore, it was not necessary for Wells Fargo to have attached a stipulation and/or copy of a signed loan modification or forbearance agreement. [1] There was no basis for the trial court to reject Wells Fargo's counsel's representation, as an officer of the court, that an agreement had been reached between the parties -- particularly where the Lupicas never disputed such representation. The trial court's actions constituted a gross abuse of discretion. *See, e.g., Opportunity* [*877] *Funding I, LLC v. Otetchestvennyi, 909 So. 2d 361 (Fla. 4th DCA 2005).*

1 Subsequent to the trial court's entry of its final order, the Florida Supreme Court approved a form motion for the cancellation of a foreclosure sale:

> Form 1.996(b). Motion to Cancel and Reschedule Foreclosure Sale.
>
> Plaintiff moves to cancel and reschedule the mortgage foreclosure sale because:
>
> * * *
>
> (2) The sale needs to be cancelled for the following reason(s):
>
> ***
>
> (f) Plaintiff and Defendant have entered into a Forbearance Agreement.

In re Amends. to the Fla. Rules of Civil Proc., 2010 Fla. LEXIS 180, 35 Fla. L. Weekly S97 (Fla. Feb. 11, 2010). [**4] The form motion does not reference the attachment of a stipulation or copy of a forbearance agreement.

REVERSED and REMANDED.

GRIFFIN and SAWAYA, JJ., concur.

Analysis
As of: Aug 26, 2010

JERRY A. RIGGS, SR., Appellant, v. AURORA LOAN SERVICES, LLC, Appellee.

No. 4D08-4635

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

36 So. 3d 932; 2010 Fla. App. LEXIS 8652; 35 Fla. L. Weekly D 1336

June 16, 2010, Decided

PRIOR HISTORY: [**1]

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).
Riggs v. Aurora Loan Servs., LLC, 2010 Fla. App. LEXIS 5280 (Fla. Dist. Ct. App. 4th Dist., Apr. 21, 2010)

COUNSEL: 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.

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

OPINION

[*933] *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 [**2] 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.

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 [**3] 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, [**4] 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 [*934] 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.

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

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.

Case No. 2D08-3553

COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

28 So. 3d 936; 2010 Fla. App. LEXIS 1447; 35 Fla. L. Weekly D 369

February 12, 2010, Opinion Filed

SUBSEQUENT HISTORY: Released for Publication March 01, 2010. Released for Publication April 26, 2010

PRIOR HISTORY: [**1]

Appeal from the Circuit Court for Sarasota County; Robert B. Bennett, Jr., Judge.

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

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.

JUDGES: VILLANTI, Judge. ALTENBERND and SILBERMAN, JJ., Concur.

OPINION BY: VILLANTI

OPINION

[*937] 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" [**2] 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. [**3] 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)* [**4] (quoting *Fla. R. Civ. P. 1.510(c)*). When a plaintiff moves for summary [*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 [**5] 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 [**6] 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 [**7] 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 es-

tablish that it owns and holds the note [*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, [**8] 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 [**9] 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.

LEXSEE 37 SO. 3D 960

AEGIS PROPERTIES OF SOUTH FLORIDA, LLC, a limited liability company, Appellant, v. AVALON MASTER HOMEOWNER ASSOCIATION, INC., a Florida Not-for-profit corporation, and HUGUETTE CHERY, Appellees.

No. 4D09-1358

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

37 So. 3d 960; 2010 Fla. App. LEXIS 8646; 35 Fla. L. Weekly D 1334

June 16, 2010, Decided

PRIOR HISTORY: [*1]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Patti Englander Henning, Judge; L.T. Case No. 07-035003 (03) CACE.

COUNSEL: Jerome L. Tepps of Jerome L. Tepps, P.A., Plantation, for appellant.

Regine Monestime of The Monestime Firm, P.A., North Miami Beach, for appellee Huguette Chery.

JUDGES: CIKLIN, J. GROSS, C.J., and STEVENSON, J., concur.

OPINION BY: CIKLIN

OPINION

CIKLIN, J.

We reverse an order granting a motion to set aside a foreclosure sale because legally sufficient grounds to undo the sale did not exist.

A complaint was filed against Huguette Chery to foreclose on a homeowner's association lien that had attached to certain real property owned by Chery. On September 11, 2008, in the presence of Chery, the trial court entered a default final judgment against her for $ 3,639.98 plus interest and costs. A public sale of the property was set for January 13, 2009, in the event that Chery did not exercise her equitable right of redemption to cancel the sale by paying the amount owed. Chery did not remit the amount owed and her property proceeded to public sale with Aegis Properties of South Florida, LLC ("Aegis") being the successful third party bidder in the amount of $ 4,600.00. Aegis [*2] tendered the purchase price in cash to the clerk of the circuit court and was issued a certificate of sale by the clerk. On January 23, 2009, Chery filed an "emergency motion to set aside foreclosure sale," claiming she misunderstood the trial court's default judgment and that she had the funds to pay the amount owed. After a hearing, the trial court issued an order granting her motion and giving Chery thirty days to satisfy her obligation. Chery subsequently remitted the amount owed and a satisfaction of judgment was issued. Aegis filed this appeal asserting that legally sufficient grounds did not exist to warrant the trial court's action.

Foreclosure sales are reversible if there is a grossly inadequate sales price or irregularities in the sale process. *Arlt v. Buchanan, 190 So. 2d 575, 577 (Fla. 1966)*; *see also Action Realty and Invs., Inc. v. Grandison, 930 So. 2d 674, 677 (Fla. 4th DCA 2006)*; *Blue Star Invs., Inc. v. Johnson, 801 So. 2d 218, 219 (Fla. 4th DCA 2001)* ("[T]o vacate a foreclosure sale, the trial court must find '(1) that the foreclosure sale bid was grossly or startlingly inadequate; and (2) that the inadequacy of the bid resulted from some mistake, fraud or other [*3] irregularity in the sale.'" (citations omitted)). Neither of these grounds applies in the instant case.

Here, Chery attended the hearing at which the lower court entered its default judgment. The trial judge handed her a copy of the default final judgment, which clearly indicated her right of redemption. Her argument that she misunderstood her legal obligations is insufficient to overturn a foreclosure sale, along with the fact that she