took no action to satisfy the debt for over four months after the judgment was entered--even past the sale date:

> The failure of a party to take the required steps necessary to protect its own interests, cannot, standing alone, be grounds to vacate judicially authorized acts to the detriment of other innocent parties. The law requires certain diligence of those subject to it, and this diligence cannot be lightly excused. The mere assertion by a party to a lawsuit that he does not comprehend the legal obligations attendant to [the pending legal action] does not create a sufficient showing of mistake, inadvertence, surprise or excusable neglect to warrant the vacating of a final judgment.

John Crescent, Inc. v. Schwartz, 382 So. 2d 383, 385-86 (Fla. 4th DCA 1980).

We [*4] therefore reverse the order granting Chery's emergency motion to set aside foreclosure sale and remand with directions to reinstate the final judgment of foreclosure and certificate of sale and thereafter issue a certificate of title in favor of the bona fide purchaser.

We recognize the harsh result produced by this opinion but the law simply does not authorize the setting aside of the final judgment and certificate of sale under the facts of this case.

Reversed and remanded with instructions.

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

LEXSEE 35 SO. 3D 189

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

No. 4D09-1340

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

35 So. 3d 189; 2010 Fla. App. LEXIS 8183; 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; Ronald J. Rothschild, Judge; L.T. Case No. 08-45895 (08).

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

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

No appearance for other appellees.

JUDGES: GERBER, J. POLEN and LEVINE, JJ., concur.

OPINION BY: GERBER

OPINION

[*189] GERBER, J.

We reverse the circuit court's final summary judgment of foreclosure against Stelian Lazuran (the "defendant"). Citimortgage's complaint alleged that all conditions precedent to the mortgage note's acceleration had been fulfilled, and Citimortgage's affidavit in support of its motion for summary judgment stated "[t]hat each and every allegation in the Complaint is true." Such a conclusory allegation is insufficient to refute the defendant's affirmative defense [*190] that Citimortgage failed to provide him with notice of the acceleration pursuant to the procedures specified in paragraph 22 of the mortgage. Therefore, reversal is required. *See Frost v. Regions Bank, 15 So. 3d 905, 906-07 (Fla. 4th DCA 2009)* ("Because the bank did not meet its burden to refute the Frosts' lack of notice and opportunity to [**2] cure defense, the bank is not entitled to final final summary judgment of foreclosure.").

Reversed.

POLEN and LEVINE, JJ., concur.

1 of 29 DOCUMENTS

EVIE KONTOS, Appellant, v. AMERICAN HOME MORTGAGE SERVICING, INC., Appellee.

CASE NO. 1D09-2803

COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

2010 Fla. App. LEXIS 11698*; *35 Fla. L. Weekly D 1798

August 10, 2010, Opinion Filed

NOTICE:

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

PRIOR HISTORY: [*1]

An appeal from the Circuit Court for Walton County. Kelvin C. Wells, Judge.

COUNSEL: Matthew W. Burns, Destin, for Appellant.

Katherine E. Giddings and Nancy M. Wallace of Akerman Senterfitt, Tallahassee, and William P. Heller, Akerman Senterfitt, Fort Lauderdale, for Appellee.

JUDGES: HAWKES, C. J., KAHN and WEBSTER, JJ., CONCUR.

OPINION

PER CURIAM.

In this mortgage foreclosure action, appellee, American Home Mortgage Servicing, Inc., obtained a final summary judgment. This judgment relies in part upon appellee's allegation that it is the assignee of the original holders of the mortgage and note executed by appellant. As all parties acknowledge, however, the uncontested facts of record do not establish that appellee is presently entitled to foreclose because the record contains no evidence of any assignment or comparable transaction. Accordingly, we VACATE the final summary judgment and REMAND this case for further proceedings.

HAWKES, C. J., KAHN and WEBSTER, JJ., CONCUR.

LexisNexis®

TATYANA NUDEL, Petitioner, v. FLAGSTAR BANK, FSB, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR FLAGSTAR BANK, FSB, PALM BEACH COUNTY, and ADORNO & YOSS, LLP, Respondents. RICHARD J. DAVIS and NANCY DAVIS, Petitioners, v. HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE, FOR SEQUOIA 2007-3, Respondent.

No. 4D10-641, No. 4D10-1842

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

2010 Fla. App. LEXIS 11742

August 11, 2010, Decided

NOTICE:

NOT FINAL UNTIL DISPOSITION OF TIMELY FILED MOTION FOR REHEARING.

PRIOR HISTORY: [*1]

Consolidated petitions for writ of prohibition to the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Meenu T. Sasser, Judge; L.T. Case Nos. 2009CA023221XXXXMB and 2009CA040226XXXXMB.

COUNSEL: Thomas E. Ice of Ice Legal, P.A., West Palm Beach, for petitioners Tatyana Nudel, Richard J. Davis and Nancy Davis.

No response required for respondents.

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

OPINION

PER CURIAM.

In these two cases, which we have consolidated for purposes of this opinion, the law firm of Ice Legal, P.A. (Ice), seeks, under the guise of disqualifying the judge, to exclude itself from proceeding before Judge Sasser, who presides over the foreclosure division of the Palm Beach circuit court. [1] These petitions for writ of prohibition represent the seventh and eighth petitions that this law firm has filed in this court seeking the same relief. [2] All the prior petitions were carefully reviewed and denied on the merits.

1 The foreclosure division, which attempts to streamline scheduling procedures, was created to handle the extraordinary backlog of foreclosure cases. *See Administrative Order 3.302, Fifteenth Judicial Circuit.* At the time the petition was filed, an estimated [*2] 55,000 foreclosure cases were pending in that court. This number has likely increased since that time.

2 *Feith v. Indy Mac Fed. Bank*, 4D09-5070; *Sandomingo v. Washington Mut. Bank*, 4D09-5000; *Vidal v. U.S. Nat'l Bank Ass'n*, 4D10-397; *Glarum v. Lasalle Bank*, 4D10-603; *Brown v. Wachovia Bank*, 4D10-130; *Brown v. Wachovia*, 4D10-642.

As in the prior petitions and motions to disqualify filed by the firm, Ice attempts to pyramid a host of unrelated matters, which were not raised within the ten-day time limit of *Florida Rule of Judicial Administration 2.330(e)*, to achieve its goal. The repetitive claims have been reviewed *de novo* on numerous occasions and rejected on the merits. None of these issues, alone or together, provide Ice's clients with any objectively reasonable basis to fear that the judge is biased.

In addition to re-raising these issues, the Ice firm raised new arguments alleging that *ex parte* communication between opposing counsel and the judge requires disqualification. The communications involved a recurring scheduling dispute involving Ice. The Ice firm has insisted on specially-set hearings on its motions even though the judge, through her judicial assistant (JA), had expressed [*3] that the types of motions at issue should be set for ten-minute hearings on the uniform motion calendar. Ice has complained that it needs at least fifteen minutes to be heard and demanded specially-set hearings.

In one of these cases, aware of Ice's persistent objections to their motion being set on the uniform motion calendar, the plaintiff bank scheduled a hearing on Ice's motion to dismiss during a time reserved for summary judgment motions. The judge phoned the bank's counsel advising that the hearing needed to be scheduled on the uniform motion calendar and that twenty minutes was not necessary to argue the motion. The bank's attorney immediately informed Ice and tried to coordinate a convenient time for the hearing. The next day, the judge entered a written order requiring the bank to schedule the hearing on the motion calendar within ten days.

In the second case, an administrative employee for the bank's counsel attempted to coordinate scheduling of Ice's motions on the uniform motion calendar. Ice continued to object to the scheduling, maintaining its position that it needed fifteen minutes instead of ten. [3] Another administrative employee for the bank's counsel contacted the [*4] judge's JA to inform her that the Ice firm was again objecting to having their motions heard at the uniform motion calendar. Another judge, sitting in Judge Sasser's absence, signed orders scheduling the hearing on the uniform motion calendar. The above incident led Ice to request all emails between the law firm's staff and the JA. Ice contends the emails show that the law firm's administrative staff has been engaged in *ex parte* communications with the judicial assistant.

> 3 A specially-set hearing would not be available until much later in time, whereas the motions could be heard sooner if set on the uniform motion calendar. Ice made no attempt to schedule its motions for hearing nor has it provided any explanation why its motions-which do not involve evidentiary matters-required any additional time for oral argument. As noted by the judge, at a hearing where the policy was explained to Ice, the judge had read the motions-which raised similar issues Ice has repeated in many of its cases-and additional time for oral argument was unnecessary.

> We are aware of no rule or law that requires a trial court to hear oral argument on a pretrial, non-evidentiary motion. *See Gaspar, Inc. v. Naples Fed. Sav. & Loan Ass'n, 546 So. 2d 764, 766 (Fla. 5th DCA 1989)* [*5] ("Judicial consideration and determination of a non-evidentiary motion on the basis of memoranda of law rather than oral argument by counsel at a noticed hearing does not constitute an ex parte hearing or a denial of due process"); *First City Dev. of Fla., Inc. v. Allmark of Hollywood Condo. Ass'n, 545 So. 2d 502, 503 (Fla. 4th DCA 1989)* ("There is no rule of procedure or law that requires the trial court to have oral argument as to [objections to discovery]"). *See also Fla. R. App. P. 9.320* ("Oral argument *may* be permitted in any proceeding") (emphasis supplied); *In re Proposed Florida Appellate Rules, 351 So. 2d 981, 1011 (Fla. 1977)* ("[T]here is no right to oral argument" in appellate proceedings).

Based on these allegedly improper *ex parte* communications, Ice seeks to disqualify the judge from all of its cases. In all of its prior petitions, Ice has sought what amounts to firm-wide disqualification which would effectively exclude Ice from proceeding in the foreclosure division. Judge Sasser is presently the only judge presiding in the foreclosure division.

We review *de novo* the legal sufficiency of the motions to disqualify that were filed below. *See Edwards v. State, 976 So. 2d 1177, 1178 (Fla. 4th DCA 2008).*

Ex [*6] *parte* communications regarding purely administrative, non-substantive matters, such as scheduling, do not require disqualification. *See Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992)* ("[A] judge should not engage in *any* conversation about a pending case with only one of the parties participating in that conversation. Obviously, . . . this would not include *strictly* administrative matters not dealing in any way with the merits of the case."). *See Rodriguez v. State, 919 So. 2d 1252, 1274-75 (Fla. 2006)* (*ex parte* discussion of an administrative matter, the nature of a scheduled hearing, did not require disqualification); *Randolph v. State, 853 So. 2d 1051, 1064 (Fla. 2003)* (*ex parte* conversation about ministerial matter-wording of a sentence in an order-was insufficient to disqualify); *Arbelaez v. State, 775 So. 2d 909, 916 (Fla. 2000)* (holding that an *ex parte* communication between the judge and the state attorney in a death penalty case did not require disqualification where the communication related to purely administrative matters, including the amount of time the state would be provided to respond to defendant's postconviction motion and the scheduling of hearings).

The *ex parte* [*7] communications in the present cases all involved purely administrative, non-substantive matters regarding the scheduling of motions, not the merits of the case. The judge, who had read and was familiar with Ice's motions, did not exhibit any objectively reasonable basis for Ice's clients to fear bias when she indicated that the motions did not require additional time.

As to the communications between the administrative personnel of the bank's law firm and the JA, neither the *ex parte* communications, nor the alleged animosity that has developed between the JA and one of Ice's employees, provides an objectively reasonable basis for Ice's clients to fear that the judge will not be fair and impartial. *See Leone v. F.J.M. Constr., 911 So. 2d 1285, 1285-86 (Fla. 1st DCA 2005)* (holding that a judicial assistant's disparaging comments to a party's attorney, made after a scheduling dispute, did not provide any reasonable basis to fear that the judge would not be fair). As noted in *Leone*, scheduling of hearings is typically a matter delegated by judges to judicial assistants. This is particularly necessary in the foreclosure division which has an extraordinary backlog of cases. Judge Sasser cannot [*8] be expected to hold hearings *regarding the length of upcoming hearings* in order to settle insignificant disputes about whether an additional five minutes is necessary for oral argument on a motion.

Contrary to Ice's accusations, Judge Sasser did not violate *Canon 3(B)(7) of the Florida Code of Judicial Conduct*, which expressly exempts communications relating to scheduling and other administrative matters from its prohibition on *ex parte* communications. The judge's *ex parte* communication with the bank's counsel regarding the bank's improperly-scheduled motion was immediately brought to Ice's attention. Ice has had abundant opportunity to respond but never specified any reason why fifteen minutes was required to hear its motions.

Ice's repetitive attempts at disqualification in these cases appear designed, not to ensure that the proceedings against their clients are presided over by a neutral and fair tribunal, but to achieve a strategic advantage and/or frustrate the efficient function of the foreclosure division. As we suggested in *Nassetta v. Kaplan, 557 So. 2d 919, 921 (Fla. 4th DCA 1990)*, this tactic is an improper use of the disqualification procedure.

The petitions are denied on [*9] the merits.

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

that person is legally detained.' " *St. James*, 903 So. 2d at 1004 (alteration in original) (quoting *D.G.*, 661 So. 2d at 76); *see also Fournier*, 731 So. 2d at 76.

In this case, Detective Doty was engaged in the lawful execution of a legal duty because she was investigating the lewd battery. *See V.L. v. State*, 790 So. 2d 1140, 1142 (Fla. 5th DCA 2001); *Francis v. State*, 736 So. 2d 97, 99 n. 1 (Fla. 4th DCA 1999). However, pursuant to this court's holding in *St. James*, Sauz was not lawfully detained and, therefore, his provision of the false name and date of birth did not constitute the crime of resisting an officer without violence.

In *St. James*, an officer was investigating the theft of a bicycle and when he arrived on scene, there was a group of men standing nearby. 903 So. 2d at 1004. Although the officer asked the men whether they had seen St. James, he [the officer] did not explain why he was looking for St. James or even that he was conducting an investigation. *Id.* Even though the officer had probable cause to arrest St. James at that time, the officer did not convey that information to the group of men and there was no showing that St. James knew the officer intended to detain him. *Id.* St. James denied knowing anyone by that name. *Id.* Despite the fact that St. James provided patently false information to the officer, this court determined that such conduct did not amount to obstruction because St. James was not legally detained at the time. *Id.*

In this case, while Sauz provided patently false information to Detective Doty, he did so at a time when he was not lawfully detained or subject to a *Terry* stop. Much like the facts of *St. James*, Detective Doty testified that she was investigating the lewd battery and merely went to Sauz's home to see if he would cooperate with the investigation. Detective Doty further admitted that she did not intend to detain Sauz and did not explain why she was there. In addition, there is no indication that Sauz thought he was being detained by Detective Doty.

Although the State asks this court to consider receding from *St. James*, we decline to do so. Instead, we apply *St. James* and hold that the State failed to provide sufficient evidence that Sauz committed the crime of resisting an officer without violence and further that the trial court erred by denying Sauz's motion for judgment of acquittal. We therefore reverse Sauz's conviction for resisting an officer without violence and remand for proceedings in conformance with this opinion.[2]

Affirmed in part, reversed in part, and remanded. (DAVIS and WALLACE, JJ., Concur.)

[1]*Terry v. Ohio*, 392 U.S. 1 (1968).

[2]Because we are reversing this conviction on the basis that Sauz's conduct did not amount to resisting an officer without violence, it is unnecessary to address Sauz's other argument that the State failed to prove the date on which the offense occurred.

* * *

Mortgage foreclosure—Summary judgment for plaintiff in mortgage foreclosure action was premature where plaintiff had failed to establish standing to foreclose—Plaintiff moving for summary judgment before an answer is filed must establish that defendant could not raise any genuine issues of material fact if defendant were permitted to answer complaint—Because exhibit to plaintiff's complaint conflicts with allegations concerning standing and exhibit does not show that plaintiff has standing to foreclose mortgage, plaintiff did not establish entitlement to foreclose mortgage—Incomplete, unsigned, and unauthenticated assignment attached as exhibit to plaintiff's response to defendant's motion to dismiss did not constitute admissible evidence establishing standing to foreclose note and mortgage

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. 2nd District. Case No. 2D08-3553. Opinion filed February 12, 2010. 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.

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

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

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

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

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

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

The summary judgment standard is well-established. "A movant is entitled to summary judgment 'if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Estate of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Care Ctr., Inc.*, 928 So. 2d 1272, 1274 (Fla. 2d DCA 2006) (quoting Fla. R. Civ. P. 1.510(c)). When a plaintiff moves for summary judgment before the defendant has filed an answer, "the burden is upon the plaintiff to make it appear to a certainty that no answer which the defendant might properly serve could present a genuine issue of fact." *Settecasi v. Bd. of Pub. Instruction of Pinellas County*, 156 So. 2d 652, 654 (Fla. 2d DCA 1963); *see also W. Fla. Cmty. Builders, Inc. v. Mitchell*, 528 So. 2d 979, 980 (Fla. 2d DCA 1988) (holding that when plaintiffs move for summary judgment before the defendant files an answer, "it [is] incumbent upon them to establish that no answer that [the defendant] could properly serve or affirmative defense it might raise" could present an issue of material fact); *E.J. Assocs., Inc. v. John E. & Aliese*

Price Found., Inc., 515 So. 2d 763, 764 (Fla. 2d DCA 1987) (holding that when a plaintiff moves for summary judgment before the defendant files an answer, "the plaintiff must conclusively show that the defendant cannot plead a genuine issue of material fact"). As these cases show, a plaintiff moving for summary judgment before an answer is filed must not only establish that no genuine issue of material fact is present in the record as it stands, but also that the defendant could not raise any genuine issues of material fact if the defendant were permitted to answer the complaint.

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

Moreover, while U.S. Bank subsequently filed the original note, the note did not identify U.S. Bank as the lender or holder. U.S. Bank also did not attach an assignment or any other evidence to establish that it had purchased the note and mortgage. Further, it did not file any supporting affidavits or deposition testimony to establish that it owns and holds the note and mortgage. Accordingly, the documents before the trial court at the summary judgment hearing did not establish U.S. Bank's standing to foreclose the note and mortgage, and thus, at this point, U.S. Bank was not entitled to summary judgment in its favor.

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

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

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

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

Reversed and remanded for further proceedings. (ALTENBERND and SILBERMAN, JJ., Concur.)

* * *

Criminal law—Plea—Withdrawal—Pro se motion by defendant represented by counsel

QUEEN ELIZABETH COLLINS, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 2D08-3691. Opinion filed February 12, 2010. Appeal from the Circuit Court for Pinellas County; Joseph A. Bulone, Judge. Counsel: James Marion Moorman, Public Defender, and William L. Sharwell, Assistant Public Defender, Bartow, for Appellant. Bill McCollum, Attorney General, Tallahassee, and Jonathan P. Hurley, Assistant Attorney General, Tampa, for Appellee.

ON REMAND FROM THE SUPREME COURT OF FLORIDA

(SILBERMAN, Judge.) In *Collins v. State*, 34 Fla. L. Weekly S658 (Fla. Dec. 3, 2009), the Supreme Court of Florida quashed this court's decision in *Collins v. State*, 12 So. 3d 227 (Fla. 2d DCA 2009), and directed this court on remand to reconsider the matter in light of the supreme court's decision in *Sheppard v. State*, 17 So. 3d 275 (Fla. 2009). This court had relied upon its opinion in *Sheppard v. State*, 988 So. 2d 74 (Fla. 2d DCA 2008), *quashed*, 17 So. 3d 275 (Fla. 2009), when it affirmed Collins' judgment and sentence and the denial of her pro se motion to withdraw plea which was made pursuant to Florida Rule of Criminal Procedure 3.170(*l*).

In her pro se motion Collins argued that she had not been properly represented. Collins also asserted that counsel had told her she could change her mind up until the very last minute and that she was exercising her right to do so. The court denied the motion without exploring Collins' claims that she had been misrepresented. However, pursuant to the supreme court's opinion in *Sheppard*, the court should not have denied Collins' motion in this manner. *See Sheppard*, 17 So. 3d at 286. In this situation, the supreme court explained that the trial court should proceed as follows:

> [T]he trial court should hold a limited hearing at which the defendant, defense counsel, and the State are present. If it appears to the trial court that an adversarial relationship between counsel and the defendant has arisen and the defendant's allegations are not conclusively refuted by the record, the court should either permit counsel to withdraw or discharge counsel and appoint conflict-free counsel to represent the defendant.

16TH CIR 00308

This case demonstrates many of the symptoms of a dissolution proceeding suffering from *Wrona*'s disease. *See Kasm v. Lynnel*, 975 So. 2d 560, 565 n.2 (Fla. 2d DCA 2008) (citing *Wrona v. Wrona*, 592 So. 2d 694, 696-97 (Fla. 2d DCA 1991)). The dissolution proceeding between Mr. and Mrs. George has been pending in circuit court for less than two years. In that time, this is the third appellate proceeding.[1] Mr. George has also filed a bankruptcy petition that has delayed payment of an earlier award of temporary attorney's fees.

Because this appeal is pending from a nonfinal order, our record is limited to an appendix. We do not have the majority of the pleadings in our record, and we do not know the length of the marriage or the age of the parties. We know that Mr. George is a pharmacist earning in excess of $100,000 per year. Mrs. George has or had a clerical job earning less than $21,000. The record does not suggest that this case involves any minor children. The primary asset to escape Mr. George's bankruptcy was a $95,000 retirement account.[2] The record suggests Mr. George has withdrawn from that account without permission from the trial court, paying his grandmother $24,000 for an outstanding debt from 1987 that apparently was not discharged in the bankruptcy. In this court's record, he does not, or cannot, account for the remaining $71,000 that was withdrawn from the retirement account.

Mr. George has relocated to Georgia where he has rented a three-bedroom home for himself and his unemployed girlfriend. The additional bedrooms are needed to allow the girlfriend's children from a prior marriage to visit. He pays $2200 in rent.

Meanwhile, Mrs. George has rented a $1600 per month apartment where she lives alone. She is spending nearly $700 per month for psychological counseling and another $200 per month for grooming. Because her husband changed jobs when he moved to Georgia, she now is paying for COBRA medical insurance coverage. In January 2009, she was diagnosed with a serious illness. She expected that she would be required to undergo a series of treatments that would prevent her from working at least for a period of time.

When Mrs. George discovered her medical condition, she filed an emergency motion to increase her temporary support. The court conducted a hearing on the motion on March 25, 2009. Mr. George did not, or could not, attend the hearing telephonically. Mrs. George attended the hearing telephonically because she was involved in training at work that could not be postponed. The two lawyers attended the hearing in person. Animosity between the lawyers is evident even from the transcript of the hearing. The trial court did its best to maintain decorum and receive evidence over the telephone to permit a resolution of the emergency motion.

Assuming that events have played out over the last eight months as predicted at this hearing, Mrs. George has been required to take a temporary leave of absence from her employment, and that leave of absence should have come, or will soon be coming, to an end. If her treatment has been successful, it is likely that the temporary alimony could be reduced to a lesser amount for a short period before this case is resolved at final hearing. If Mrs. George was not required to take a leave of absence or her earnings and expense projections for the last few months were in error, the trial court can consider these matters at the final hearing.

Our explanation for this affirmance has already been provided in *Ghay v. Ghay*, 954 So. 2d 1186, 1189-90 (Fla. 2d DCA 2007):

> A temporary support order is often required at the beginning of the dissolution action, before the parties have had an opportunity to complete discovery. Given the urgency of some of these matters, the order is often based upon an abbreviated hearing and limited evidence. Temporary support issues cannot always await full discovery or the preparation of an expert's opinion.
>
> In addition, temporary support orders are, obviously, temporary. They do not create vested rights, and they can be modified or vacated at any time by the circuit court while the litigation proceeds. If further discovery reveals that a temporary support order is inequitable or based upon improper calculations, any inequity can usually be resolved in the final judgment, after a full and fair opportunity to be heard.

(Internal quotations and citations omitted.)

As we did in the last two appellate proceedings, we remand Mrs. George's motion for attorney's fees. If she establishes her entitlement pursuant to section 61.16, Florida Statutes (2008), the trial court is authorized to award her all or a portion of the reasonable appellate attorney's fees. The merit of the respective positions of the parties in this appeal is not a factor that the trial court need consider. *See Rados v. Rados*, 791 So. 2d 1130 (Fla. 2d DCA 2001).

Affirmed. (WHATLEY and LaROSE, JJ., Concur.)

---

[1] *George v. George*, 13 So. 3d 473 (Fla. 2d DCA 2009); *George v. George*, 12 So. 3d 909 (Fla. 2d DCA 2009);

[2] His financial affidavit claims it is a $45,000 account, but that number is apparently incorrect.

* * *

Mortgage foreclosure—Foreclosing mortgagee's liability for unpaid homeowners association assessments—Trial court properly found that mortgagee was not liable for mortgagors' unpaid assessments that will have accrued by the time title may be transferred to mortgagee—Because Declaration of Covenants and Restrictions contains plain and unambiguous language subordinating any claim for unpaid assessments to a first mortgagee's claim upon foreclosure, it controls and absolves first mortgagee from liability for any assessments accruing before it acquires property—Mortgagee is a third party beneficiary of Declaration which is a contract between homeowners association and its members, and application of statutory amendment that would impose liability for unpaid assessments on mortgagee would impair mortgagee's contractual rights

CORAL LAKES COMMUNITY ASSOCIATION, INC., Appellant, v. BUSEY BANK, N.A.; SCOTT HALEY; RUTH HALEY; and RIVERSIDE BANK OF THE GULF COAST, Appellees. 2nd District. Case No. 2D08-5062. Opinion filed February 19, 2010. Appeal from the Circuit Court for Lee County; Michael T. McHugh, Judge. Counsel: Ashley D. Lupo and Christopher D. Donovan of Roetzel & Andress, LPA, Naples, for Appellant. Gordon R. Duncan of Duncan & Associates, P.A., Fort Myers, for Appellee Busey Bank, N.A. No appearance for Appellees Scott Haley, Ruth Haley, and Riverside Bank of the Gulf Coast.

(CASANUEVA, Chief Judge.) Coral Lakes Community Association, Inc. (the "HOA"), appeals a final summary judgment of foreclosure awarded to Busey Bank, N.A. (the "Bank"). The final judgment determined that the Bank had no liability to the HOA for past due HOA assessments that the HOA claimed pursuant to section 720.3085(2), Florida Statutes (2008). The disposition of this case is determined by the HOA's Declaration of Covenants and Restrictions vis-à-vis the relevant regulatory statutes. As one would expect, these two competing parties possess diametrically opposed legal positions regarding whether the Bank should be liable for the mortgagors' unpaid HOA assessments that will have accrued by the time title may be transferred to the Bank. For the reasons explained below, we conclude the Bank is not required to pay those delinquent assessments and affirm the summary judgment in foreclosure.

Background

The facts are undisputed. In May 2006, appellees Scott and Ruth Haley ("the homeowners") executed a note and mortgage in favor of the Bank for $252,255.80 to purchase property located in the Coral Lakes community. The community's governing document at this time, the Declaration of Covenants and Restrictions of Coral Lakes, provided the following:[1]

> 9.1.6 Subordination of Lien. Where any person obtains title to a LOT pursuant to the foreclosure of a first mortgage of record, or where the holder of a first mortgage accepts a deed to a LOT in lieu of foreclosure of the first mortgage of record of such lender, such acquirer of title, its successors and assigns, shall not be liable for any ASSESSMENTS or for other moneys owed to Coral Lakes which are chargeable to the former OWNER of the LOT and which became due prior to acquisition of title as a result of the foreclosure or deed in lieu thereof, unless the payment of such funds is secured by a claim of lien recorded prior to the recording of the foreclosed or underlying mortgage.

By January 2008, the homeowners were in arrears on both their mortgage payments due the Bank and assessments due the HOA. On June 3, 2008, the Bank instituted a foreclosure action against the homeowners, adding the HOA as a party defendant because of the accrued unpaid assessments.[2] On June 24, 2008, the HOA answered and claimed as its first affirmative defense that pursuant to section 720.3085, Florida Statutes (2007),[3] the Bank's mortgage was subordinate to all of the mortgaged premises' unpaid common expenses which accrued or came due during the time period preceding the Bank's acquisition of title at foreclosure sale or by deed in lieu of foreclosure.[4] As its second affirmative defense, the HOA claimed that if a purchaser, including the Bank and its successors or assigns, purchases the mortgaged premises, including but not limited to, at a foreclosure sale, then this purchaser shall be jointly and severally liable with the previous owner to pay twelve months' assessments which accrued preceding transfer of title or one percent of the original mortgage debt, whichever is less.

The lawsuit proceeded quickly and as a fairly routine foreclosure action. On July 23, 2008, the Bank filed a motion for summary judgment of foreclosure, claiming the execution of the note and mortgage was not disputed, the failure to timely pay the note was not contested, the priority of the note and mortgage was not disputed, and the only matters of law to be argued were the general law of notes, mortgages, and negotiable instruments and the Bank's entitlement to attorney's fees and costs. The Bank also claimed that, as a matter of law, the statutory changes to section 720.3085[5] should not be applied retroactively to its note and mortgage that predated the statutory change.

At the hearing on the motion for summary judgment, the only contentious issue was whether the Bank was excused from paying the unpaid HOA assessments that had accrued. The Bank argued that at the time of the execution of its note and mortgage in 2006, the HOA's Declaration gave its lien a distinct and very advantageous priority position over any HOA lien for unpaid assessments. Moreover, the Bank, by virtue of being an intended third-party beneficiary of this paragraph of the Declaration, could not have this benefit removed by operation of the statute, which was not in existence at the time it entered into its contract with the homeowners. Further, the Bank argued, citing to *City of Sanford v. McClelland*, 163 So. 513 (Fla. 1935), applying the new statutory language would impair the Bank's contractual right, i.e., its vested lien priority. *See id.* at 514-15 ("A vested right has been defined as 'an immediate, fixed right of present or future enjoyment' and also as 'an immediate right of present enjoyment, or a present, fixed right of future enjoyment.' " (quoting *Pearsall v. Great N. Ry. Co.*, 161 U.S. 646, 673 (1896))).

The HOA countered that the issue was not retroactive application of the amended statute because the Bank had not yet taken title to the parcel; therefore, assuming that the Bank would take title at a future foreclosure sale, it would be constrained to follow the dictates of the amended 2008 version of the statute at that time. *Cf. LR5A-JV, LP v. Little House, LLC*, 998 So. 2d 1173, 1175 (Fla. 5th DCA 2008) (holding section 720.3085(2), Florida Statutes (2007), inapplicable because the appellant/mortgagee was not yet at the time of the suit the subsequent parcel owner; however, in dictum, the court stated that "[f]urthermore, there is nothing in the plain language of section 720.3085 that can reasonably be construed to give the Association's lien priority over [the lender's] mortgage").

The trial court agreed with the Bank, noting that *City of Sanford* would control to preclude impairment of vested rights by a statutory change. On September 22, 2008, the trial court entered a final judgment in foreclosure with the following language specifically addressing the lien priority/unpaid assessments issue:

> 8. Upon filing the certificate of sale, the purchaser at the sale shall be let into possession of the property and the Defendants and all persons claiming under or against them since the filing of the Notice of Lis Pendens shall be fore-closed of all estate or claim in the property except that any purchaser other than Plaintiff [the Bank] shall be liable for unpaid assessments due [the HOA] pursuant to the provision of Section 720.3085, Florida Statutes.

Analysis

We conclude that because of the Declaration's plain and unambiguous language subordinating any claim for unpaid HOA assessments to a first mortgagee's claim upon foreclosure or deed in lieu of foreclosure, it controls and absolves the Bank, as first mortgagee, from liability for any assessments accruing before it acquires the parcel. "Restrictions found within a Declaration are afforded a strong presumption of validity, and a reasonable unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary meaning of its terms. . . ." *Shields v. Andros Isle Prop. Owners Ass'n*, 872 So. 2d 1003, 1005-06 (Fla. 4th DCA 2004) (quoting *Emerald Estates Cmty. Ass'n v. Gorodetzer*, 819 So. 2d 190, 193 (Fla. 4th DCA 2002)). In this case, the restriction in the Declaration disadvantages the HOA, which the drafter had every right to do, and benefits all first mortgagees of homes in the community. First mortgagees in this community, although not parties to the Declaration that is the contract between the HOA and its members, are clearly third-party beneficiaries of this contract. *See Greenacre Props., Inc. v. Rao*, 933 So. 2d 19, 23 (Fla. 2d DCA 2006) (explaining that to enforce rights under a contract like a declaration, "[a] third party must establish that the contract either expressly creates rights for them as a third party or that the provisions of the contract primarily and directly benefit the third party or a class of persons of which the third party is a member"). The HOA could have protected itself if, in drafting its Declaration, it had included language that its lien for unpaid assessments related back to the date the Declaration was recorded or that it otherwise had lien superiority over intervening mortgages. *See LR5A-JV*, 998 So. 2d at 1175 n.2. However, the HOA took the opposite tack to entice lenders to finance purchases in its community. The statutory change in section 720.3085 cannot disturb that prior, established contractual relationship.

To hold otherwise would implicate constitutional concerns about impairment of vested contractual rights. *See* art. I, § 10, Fla. Const. ("No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."). In this state, it is a "well-accepted principle that virtually no degree of contract impairment is tolerable." *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 780 (Fla. 1979) (citing *Yamaha Parts Distribs., Inc. v. Ehrman*, 316 So. 2d 557 (Fla. 1975)). To avoid this longstanding principle, the HOA argues that even if applying section 720.3085 to this case would impair the Bank's contractual rights, such impairment is constitutionally reasonable or minimal. We do not agree.

The facts of this case are similar to those in *Sarasota County v. Andrews*, 573 So. 2d 113 (Fla. 2d DCA 1991). There, Sarasota County passed an ordinance declaring that a fine imposed by the county on property, when recorded, becomes a lien against the property that is superior to all other liens except a lien for taxes. Pursuant to this ordinance, the county imposed a fine on a property for operation of an illegal landfill and recorded it as a lien. The property at issue in the case was subject to a prior mortgage in favor of Coast Federal Savings & Loan Association. Sarasota County filed suit against the property owner to foreclose its claim of lien, added the mortgagee Coast Federal as a defendant, and sought a declaration that Coast Federal's lien was inferior to the county's lien. The trial court entered a final summary judgment

finding Coast Federal's lien superior because it found that the portion of the ordinance making the county's lien superior to all nontax liens was unconstitutional, as applied. We affirmed the summary judgment, saying:

> We think the priority provision of the County's ordinance substantially impairs Coast Federal's prior mortgage lien by subordinating it to the County's lien. If by operation of the County's ordinance, Coast Federal's lien can be relegated to a secondary position, it is obviously of less value than the first-priority lien for which Coast Federal had contracted. Thus, the ordinance retrospectively impairs Coast Federal's contractual position.

Id. at 115.

Much like the county's argument in *Sarasota County v. Andrews*, the HOA here argues that any impairment is permissible as minimal. We disagreed with this argument in *Sarasota County v. Andrews* and disagree with it here:

> [T]he priority provision [of the ordinance] has worked an immediate impairment on Coast Federal's preexisting mortgage lien. The nature of priority is such that Coast Federal is automatically at a substantially greater risk of losing its investment if it has only a second, as opposed to a first, priority lien. Furthermore, mortgages held by commercial institutions are frequently sold on the secondary market, and the subordination of Coast Federal's lien impairs the marketability of its mortgage. This immediate diminishment in the value of Coast Federal's contract is repugnant to our constitutions.

Id.

More recently, this court reviewed an impairment challenge in *Lee County v. Brown*, 929 So. 2d 1202 (Fla. 2d DCA 2006). There, homebuilders challenged the validity of a local ordinance imposing a school impact fee on those applying for a building permit. This court recognized that *Pomponio* required the application of a balancing test which "weighs the degree of impairment against the source of authority under which the law is enacted and the 'evil' the law is intended to remedy." 929 So. 2d at 1208 (citing *Pomponio*, 378 So. 2d at 780). However, the *Pomponio* balancing test is not required under *Sarasota County v. Andrews* where the statutory enactment "results in an immediate diminishment in the value of the contract." 929 So. 2d at 1208-09 (citing *Sarasota County v. Andrews*, 573 So. 2d at 115). Impairment, in this context has been defined, in part, as "to make worse; to diminish in quantity, value, excellency or strength[.]" *Id.* at 1208 (quoting *Pomponio*, 378 So. 2d at 781 n.41). If we were to apply the amended statute in this instance, the economic value of the Bank's mortgage would be lessened as well as the power of its priority position.

Alternatively, were it appropriate to apply the balancing test, the HOA's argument would still fail. While the law may deal with the economic problem facing homeowners' associations in general, its application here would place the economic burden not on the homeowner, the root of the problem of the unpaid assessments, but on the entity that previously made the construction or purchase of the home possible. Moreover, the Declaration of Covenants and Restrictions was never altered to place a lender on notice that its economic position would be subordinate to the HOA's claims. When balanced in this factual circumstance, the statute would operate to severely, permanently, and immediately change the parties' economic relationship retroactively, a circumstance not supportable under the law.

Conclusion

The HOA yielded any right to claim it had a superior lien position to the Bank's preexisting mortgage by virtue of the plain and unambiguous language of its Declaration,[6] which the Bank had every right to rely upon when deciding to finance the homeowners' home in the Coral Lakes community. The trial court did not err in finding the Bank's first mortgage lien superior to the HOA's claim for unpaid assessments notwithstanding section 720.3085.

Affirmed. (DAVIS, J., Concurs. WALLACE, J., Concurs in result only.)

---

[1]This provision clearly favors potential first mortgage holders who generally bu the properties upon which they foreclose. We make this observation because th remaining, unquoted portion of this section does not exclude other types of buyers c homes with delinquent fees from payment of those fees. This section was likely adde to the Declaration to induce lenders to aid homeowners in purchasing property in th community by awarding them priority over the HOA's claims for unpaid assessment

[2]Riverside Bank of the Gulf Coast is apparently the holder of another, inferior lie but has not appeared in this appeal.

[3]At the time of the filing of the foreclosure suit and the HOA's answer an affirmative defenses, section 720.3085, Florida Statutes (2007), provided in part:

> (1) A parcel owner, regardless of how his or her title to property has bee acquired, including by purchase at a foreclosure sale or by deed in lieu o foreclosure, is liable for all assessments that come due while he or she is the parce owner. The parcel owner's liability for assessments may not be avoided by waive or suspension of the use or enjoyment of any common area or by abandonment o the parcel upon which the assessments are made.
>
> (2) A parcel owner is jointly and severally liable with the previous parcel owne for all unpaid assessments that came due up to the time of transfer of title. This liability is without prejudice to any right the present parcel owner may have to recover any amounts paid by the present owner from the previous owner.

This was the initial enactment of this section, effective July 1, 2007. *See* ch. 2007-183, §§ 1-2, at 1603-05, Laws of Fla. On July 1, 2008, after the foreclosure complaint and the answer and affirmative defenses were filed, the newly amended version of the statute became effective. A new subsection (1) was added (not at issue here); former subsection (1) was renumbered subsection (2)(a); former subsection (2) was renumbered subsection (2)(b); and new language was inserted, numbered subsection (2)(c), as follows:

> (c) Notwithstanding anything to the contrary contained in this section, the liability of a first mortgagee, or its successor or assignee as a subsequent holder of the first mortgage who acquires title to a parcel by foreclosure or by deed in lieu of foreclosure for the unpaid assessments that became due before the mortgagee's acquisition of title, shall be the lesser of:
>
> 1. The parcel's unpaid common expenses and regular periodic or special assessments that accrued or came due during the 12 months immediately preceding the acquisition of title and for which payment in full has not been received by the association; or
>
> 2. One percent of the original mortgage debt. The limitations on first mortgagee liability provided by this paragraph apply only if the first mortgagee filed suit against the parcel owner and initially joined the association as a defendant in the mortgagee foreclosure action. Joinder of the association is not required if, on the date the complaint is filed, the association was dissolved or did not maintain an office or agent for service of process at a location that was known to or reasonably discoverable by the mortgagee.

Ch. 2008-175, § 1-2, at 2034-35, Laws of Fla.

Thus, instead of being jointly and severally responsible for all unpaid assessments of a foreclosed homeowner, as of July 1, 2008, the first mortgagee who holds title now has limited liability, either the prior twelve months' worth of unpaid assessments or one percent of the original mortgage debt, whichever is less.

[4]We note that at the time the HOA filed its answer and affirmative defenses, the homeowners were still the record titleholders of the property as there had not yet been a judgment of foreclosure, a foreclosure sale, or a certificate of sale filed. Subsequent to filing the notice of appeal in this case, the Bank bought the home at the foreclosure sale and its certificate of title was recorded on December 24, 2008.

[5]*See* footnote 2, above.

[6]We make no comment on the HOA's argument that the Florida Legislature effectively rewrote section 9.1.6 of its Declaration when it enacted or amended section 720.3085 because that was not the basis of the trial court's summary judgment.

* * *

LUIS A. CHACON Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 3D09-3156. L.T. Case Nos. 03-10398. Opinion filed February 17, 2010. An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, David Miller, Judge. Luis A. Chacon, in proper person. Bill McCollum, Attorney General, for Appellee.

(Before RAMIREZ, C.J., and COPE, and SALTER, JJ.)

(PER CURIAM.) Affirmed.

(COPE, J. (concurring).) I concur in affirming the denial of the appellant's motion to correct illegal sentence under Florida Rule of Criminal Procedure 3.800(a) because the issue the appellant raises on appeal is completely different from the issue the appellant raised in his motion dated September 3, 2009. The trial court erred in denying the motion as being "successive," because as the Florida Supreme Court has explained, there is no "successiveness" bar in rule 3.800(a). *State v. McBride*, 848 So. 2d 287, 290 (Fla. 2003). Instead, the question is

Criminal law—Post conviction relief—Timeliness of motion—Where last day of two-year period for filing timely motion fell on a legal holiday, motion filed on the next day was timely

RONALD SZEWCZYK, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 2D09-5684. Opinion filed April 14, 2010. Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Charlotte County; Alane C. Laboda, Judge.

(CRENSHAW, Judge.) Ronald Szewczyk challenges the postconviction court's order dismissing as untimely his postconviction motion filed pursuant to Florida Rule of Criminal Procedure 3.850(b). We reverse.

Rule 3.850(b) provides that in a noncapital case, a motion for postconviction relief is timely if filed within the two-year period following the date on which the judgment and sentence become final. If the last day of the period ends on a legal holiday, "the period shall run until the end of the next day that is neither a Saturday, Sunday, nor legal holiday." Fla. R. Crim. P. 3.040; *see also* Fla. R. App. P. 9.420(f).

This court per curiam affirmed Mr. Szewczyk's direct appeal, and the mandate issued on September 7, 2007. *See Szewczyk v. State*, 963 So. 2d 239 (Fla. 2d DCA 2007) (table decision). Mr. Szewczyk had until September 7, 2009, to file his motion for postconviction relief. However, since the two-year period ended on Labor Day, a legal holiday, he had until the next day to file his motion. Thus Mr. Szewczyk's motion for postconviction relief, filed on September 8, 2009, was timely.

Accordingly, we reverse the postconviction court's order and remand for the court to consider the timely filed motion. (DAVIS and WALLACE, JJ., Concur.)

* * *

Mortgage foreclosure—Trial court erred in granting condominium association's motion to compel mortgagee to pay monthly assessments due to association after seven months had passed with no record activity in mortgage foreclosure suit based on finding that it was fair and equitable for mortgage holder to pay these assessments if there was extended delay in foreclosure proceeding for no good reason

DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE, Under the Pooling and Servicing Agreement Relating to IMPAC SECURED ASSETS CORP. MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-5, Appellant, v. CORAL KEY CONDOMINIUM ASSOCIATION (at Carolina), INC., and DARIO LUNA, Appellees. 4th District. Case No. 4D09-3392. April 14, 2010. Appeal of a non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Ronald J. Rothschild, Judge; L.T. Case No. 08-21500 CACE 08. Counsel: Jack R. Reiter and Jordan S. Kosches of Adorno & Yoss LLP, Miami, for appellant. Steven A. Fein and Shelley J. Murray of Fein & Meloni, Esqs., Plantation, for appellee Coral Key Condominium Association (at Carolina), Inc.

(STEVENSON J.) On May 12, 2008, Deutsche Bank National Trust Company filed a mortgage foreclosure complaint, naming the unit owner, Dario Luna, as well as the Coral Key Condominium Association (at Carolina), Inc., as defendants. After seven months of no record activity, the Association filed a motion to compel Deutsche to proceed with the foreclosure sale or pay monthly assessments due to the Association. The trial court granted the motion, explaining that it was fair and equitable for the mortgage holder to pay monthly assessments due to the Association if there is an extended period of delay in the foreclosure proceeding for no good reason. We reverse.

After the trial court entered the order appealed, the Third District issued *U.S. Bank National Ass'n v. Tadmore*, 23 So. 3d 822 (Fla. 3d DCA 2009), which addressed this precise issue. In *Tadmore*, the court rejected the notion that equity and fairness support an order requiring a bank to pay condominium assessments while foreclosure proceedings are pending since section 718.116(1)(b), Florida Statutes (2009), makes it clear that the first mortgagee is required to pay assessments only after acquiring title, and equity follows the law. *Id.* at 823-24. We agree with *Tadmore* and reverse.

Reversed and remanded. (GROSS, C.J., and POLEN, J., concur.)

* * *

Mortgage foreclosure—Jurisdiction—Non-residents—Allegation that non-resident defendant owned property in state was sufficient to give rise to personal jurisdiction under long-arm statute—Trial court erred in finding that it lacked personal jurisdiction necessary to enter deficiency judgment—Default—Plaintiff failed to meet its burden of establishing error with respect to trial court's order vacating default and affording property owner the opportunity to file an answer

KRISTY S. HOLT, Appellant, v. WELLS FARGO BANK, N.A., Appellee. 4th District. Case No. 4D09-3015. April 14, 2010. Appeal and cross-appeal of a non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Peter M. Weinstein, Judge; L.T. Case No. 08-19406 CA 12. Counsel: Philippe Symonovicz of the Law Offices of Philippe Symonovicz, and Jerome R. Schechter, Fort Lauderdale, for appellant. Dean A. Morande and Michael K. Winston of Carlton Fields, P.A., West Palm Beach, for appellee.

(STEVENSON, J.) In this mortgage foreclosure case, the bank filed a complaint seeking to foreclose on a mortgage on real property located in Broward County, Florida. Holt, the out-of-state owner of the real property, was personally served with process at her California home and, when she failed to file an answer, a default was entered. Several months later, the non-resident property owner filed a motion to quash service of process and vacate the default, asserting the complaint did not allege facts that would support the exercise of personal jurisdiction under Florida's long-arm statute. The trial court accepted the property owner's argument and found that it lacked the personal jurisdiction necessary to enter a deficiency judgment, but refused to quash service of process as it had *in rem* jurisdiction over the Florida real property. The court vacated the default and afforded the property owner the opportunity to file an answer. Both parties have challenged the trial court's July 13, 2009 order. We affirm the order appealed in all respects, save the trial court's finding that it lacked personal jurisdiction over the non-resident property owner and write primarily to address that issue.

Prior to 1993, section 48.193(1)(c), Florida Statutes, provided that "[o]wning, using, or possessing any real property within this state" was sufficient to give rise to personal jurisdiction provided the cause of action arose from such ownership, use, or possession. Ownership of real property in Florida was thus held sufficient to establish personal jurisdiction where the cause of action arose from such ownership. *See Nichols v. Paulucci*, 652 So. 2d 389, 392 n.5 (Fla. 5th DCA 1995); *cf. Damoth v. Reinitz*, 485 So. 2d 881, 883 (Fla. 2d DCA 1986).

In 1993, the legislature amended subsection (1)(c), adding the words "holding a mortgage or other lien on," such that the statute now provides "[o]wning, using, possessing, or holding a mortgage or other lien on any real property within this state" gives rise to personal jurisdiction. Despite the appellant's argument to the contrary, we do not believe that the amendment eliminated the ownership of real property as a basis for the establishment of personal jurisdiction and the exercise of long-arm jurisdiction. In context, the amended statute is more reasonably read as *extending* personal long-arm jurisdiction to those "holding a mortgage or other lien on" real property in Florida, rather than *eliminating* the long-standing jurisdictional basis for those "owning . . . real property within this state." The complaint in this case alleged Holt's ownership of Florida real property and thus the trial court erred in ruling it lacked the personal jurisdiction necessary to support the entry of a deficiency judgment.

As for that portion of the trial court's order which vacates the default, we find that the bank failed to meet its burden of establishing error. The instant case is remanded to the trial court for further proceedings consistent with this opinion.

Affirmed in part; Reversed in part; and Remanded. (GROSS, C.J., and POLEN, J., concur.)

* * *

324 So.2d 638
(Cite as: 324 So.2d 638)

C

District Court of Appeal of Florida, Third District.

ELECTRO MECHANICAL PRODUCTS, INC., a Florida Corporation, et al., Appellants,

v.

James S. BORONA, Appellee.

No. 75-1230.

Jan. 13, 1976.

Appeal was taken from an order of the Circuit Court, Dade County, Francis J. Christie, J., which appointed a receiver. The District Court of Appeal held that where the property involved was not susceptible to deterioration and a receiver was not necessary for the preservation of the property, the trial court should not have appointed a receiver.

Reversed.

West Headnotes

[1] Receivers 323 ⚿14

323 Receivers
323I Nature and Grounds of Receivership
323I(B) Grounds of Appointment of Receiver
323k14 k. Preservation and Protection of Property in General. Most Cited Cases
Trial court should not have appointed receiver where property involved was not susceptible to deterioration and receiver was not necessary for preservation of property.

[2] Receivers 323 ⚿1

323 Receivers
323I Nature and Grounds of Receivership
323I(A) Nature and Subjects of Remedy
323k1 k. Nature and Purpose of Remedy. Most Cited Cases
Appointment of receiver is drastic matter in that it constitutes taking of property, and therefore, it should not be used by courts except in cases of necessity.

*638 Chonin & Levey and Stephen T. Maher, Miami, for appellants.

Preddy, Hadded, Kutner, Hardy & Josephs and Lewis N. Jack, Jr., Miami, for appellee.

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

PER CURIAM.

[1][2] We are presented with an appeal from an order appointing a receiver. It appears from the pleading that certain property of a corporation was appropriated by the plaintiff upon the theory that possession of the property was necessary to protect his rights as a corporation stockholder. The trial court apparently felt that there was some danger in allowing the corporation to hold the property without restriction pending the litigation; therefore, upon the motion of the plaintiff, he appointed a receiver to hold the property. There is no showing in the record that the property is susceptible to deterioration; nor does it appear that a receiver is necessary for the preservation of the property. *639 Under these circumstances, the trial court should not have appointed a receiver because the purposes sought to be accomplished could have been achieved in other ways. The appointment of a receiver is a drastic matter in that it constitutes a taking of property and, therefore, should not be used by the courts except in cases of necessity. See Recarey v. Rader, Fla.App.1975, 320 So.2d 28.

We think that it is important to point out that the Recarey v. Rader case had not yet been released and was, therefore, unavailable at the time the trial court made its decision in this case. Accordingly, the order appointing a receiver is reversed.

Reversed.

Fla.App. 1976.

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Sandy
FN1

Westlaw

--- So.3d ----, 2010 WL 3893972 (Fla.App. 3 Dist.)
(Cite as: 2010 WL 3893972 (Fla.App. 3 Dist.))

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida,
Third District.
Kenneth FARAH, Appellant,
v.
IBERIA BANK, Appellee.
No. 3D09-2524.

Oct. 6, 2010.

An Appeal from the Circuit Court for Monroe County, David J. **Audlin**, Jr., Judge.
Julio F. Margalli (Key West), for appellant.

Carlton Fields, Natalie J. Carlos and Cristina Alonso; Carlton Fields and Andrew D. Manko (Tallahassee), for appellee.

Before COPE and CORTIÑAS, JJ., and SCHWARTZ, Senior Judge.

SCHWARTZ, Senior Judge.

***1** The final judgment of mortgage foreclosure on appeal unauthorizedly and contrary to Form 1.996, promulgated by the Florida Supreme Court for such actions, provides "for let execution issue," upon the amounts due on the underlying debt. As in *American General Finance, Inc. v. Graves,* 621 So.2d 585 (Fla. 5th DCA 1993),[FN1] those words are stricken from the judgment under review, which is otherwise affirmed.

FN1. *American General Finance, Inc.,* 621 So.2d at 585, states in its entirety:

> We delete the words "for which let execution issue" from the final judgment of mortgage foreclosure which is otherwise affirmed as modified.
>
> AFFIRMED as modified.

The effect and purpose of this ruling is to prevent the circumvention of the process required to establish the right to a deficiency judgment, which prominently includes a valuation of the mortgaged property. *See Century Group, Inc. v. Premier Fin. Servs. East, L.P.,* 724 So.2d 661 (Fla. 2d DCA 1999). In other words, we disapprove any effort-including those already undertaken by the appellee in this case-to reach the personal assets of the mortgagor until, unless, and only to the extent that a deficiency judgment is rendered after an appropriate exercise of the trial court's discretion in accordance with applicable principles of law and equity. *See Wilson v. Adams & Fusselle, Inc.,* 467 So.2d 345, 346 (Fla. 2d DCA 1985), and cases cited therein; see also *Fulton v.. R.K. Cooper Constr. Co.,* 208 So.2d 863 (Fla. 3d DCA 1967), writ dismissed, 216 So.2d 11 (Fla.1968). Moreover, the trial court must also consider the claim that the appellee specifically waived the right to a deficiency in the proceedings below, in which case no such judgment may be entered. *See Taylor v. Kenco Chem. & Mfg. Corp.,* 465 So.2d 581, 584 (Fla. 1st DCA 1985); *Capital Bank v. Needle,* 596 So.2d 1134, 1136 (Fla. 4th DCA 1992).

Affirmed in part, reversed in part and remanded in part.

Fla.App. 3 Dist.,2010.
Farah v. Iberia Bank
--- So.3d ----, 2010 WL 3893972 (Fla.App. 3 Dist.)

END OF DOCUMENT

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

Effective: July 1, 2001

West's Florida Statutes Annotated Currentness
Title XL. Real and Personal Property (Chapters 689-724)
Chapter 702. Foreclosure of Mortgages, Agreements for Deeds, and Statutory Liens (Refs & Annos)
→ 702. 10. Order to show cause; entry of final judgment of foreclosure; payment during foreclosure

(1) After a complaint in a foreclosure proceeding has been filed, the mortgagee may request an order to show cause for the entry of final judgment and the court shall immediately review the complaint. If, upon examination of the complaint, the court finds that the complaint is verified and alleges a cause of action to foreclose on real property, the court shall promptly issue an order directed to the defendant to show cause why a final judgment of foreclosure should not be entered.

(a) The order shall:

1. Set the date and time for hearing on the order to show cause. However, the date for the hearing may not be set sooner than 20 days after the service of the order. When service is obtained by publication, the date for the hearing may not be set sooner than 30 days after the first publication. The hearing must be held within 60 days after the date of service. Failure to hold the hearing within such time does not affect the validity of the order to show cause or the jurisdiction of the court to issue subsequent orders.

2. Direct the time within which service of the order to show cause and the complaint must be made upon the defendant.

3. State that the filing of defenses by a motion or by a verified or sworn answer at or before the hearing to show cause constitutes cause for the court not to enter the attached final judgment.

4. State that the defendant has the right to file affidavits or other papers at the time of the hearing and may appear personally or by way of an attorney at the hearing.

5. State that, if the defendant files defenses by a motion, the hearing time may be used to hear the defendant's motion.

6. State that, if the defendant fails to appear at the hearing to show cause or fails to file defenses by a motion or by a verified or sworn answer or files an answer not contesting the foreclosure, the defendant may be considered to have waived the right to a hearing and in such case the court may enter a final judgment of foreclosure ordering the clerk of the court to conduct a foreclosure sale.

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

16TH CIR 00315

In this case, unlike *Linn*, the state presented evidence that was inconsistent with appellee's explanation. Appellee claimed he informed the teller he was concerned about whether the check was real and asked the teller to verify it. The teller testified that appellee did not tell her he was concerned about the validity of the check and had not asked her to verify its validity. Here, the teller's testimony directly contradicted the appellee's testimony, creating an issue of fact.

Where there is contradictory, conflicting testimony, "the weight of the evidence and the witnesses' credibility are questions solely for the jury," and "the force of such conflicting testimony should not be determined on a motion for judgment of acquittal." *State v. Shearod*, 992 So. 2d 900, 903 (Fla. 2d DCA 2008) (quoting *Fitzpatrick v. State*, 900 So. 2d 495, 508 (Fla. 2005), and citing *Darling v. State*, 808 So. 2d 145, 155 (Fla. 2002)). Accordingly, we reverse the order granting the judgment of acquittal and remand with directions to reinstate the jury's verdict, enter judgment, and sentence the appellee.

Reversed and Remanded with directions. (DAMOORGIAN and GERBER, JJ., concur.)

---

[1]Section 831.02, Florida Statutes (2008), titled "Uttering forged instruments," states as follows:

> Whoever utters and publishes as true a false, forged or altered record, deed, instrument or other writing mentioned in s. 831.01 knowing the same to be false, altered, forged or counterfeited, with intent to injure or defraud any person, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

* * *

Mortgage foreclosure—Sale—Trial court abused discretion in granting continuance of sale on ground of benevolence and compassion for those who are losing their houses—In view of fact that postponed sale is due to take place shortly, petition for writ of certiorari is denied

REPUBLIC FEDERAL BANK, N.A., Petitioner, vs. JOSEPH M. DOYLE and BLANCA ALICIA DOYLE, Respondents. 3rd District. Case No. 3D09-2405. L.T. Case No. 08-7159. Opinion filed September 30, 2009. On Petition for Writ of Certiorari to the Circuit Court for Miami-Dade County, Valerie Manno Schurr, Judge. Counsel: Carlton Fields and Matthew J. Conigliaro (St. Petersburg) and Charles M. Rosenberg, for Petitioner. Barry L. Simons, for Respondents.

(Before GERSTEN and LAGOA, JJ., and SCHWARTZ, Senior Judge.)

(SCHWARTZ, Senior Judge.) We treat the petition for writ of mandamus as one for certiorari and deny the petition.

Following a November 4, 2008 final judgment of foreclosure, and after several delays—caused in part by the filing and the dismissal of a frivolous bankruptcy petition on the eve of a previous sale and a foul-up or two in the clerk's office—the trial court on July 29, 2009, entered an order fixing August 27, 2009, as the date of the sale. On motion of the defendants, however, apparently on the basis that in the case, like this one, of the foreclosure of a residence she routinely grants continuances of the sale rather than see "anybody lose their house," the trial judge granted a continuance until October 1, 2009.[1] The mortgagee now challenges this ruling. We deny its petition.

Although granting continuances and postponements are, generally speaking, within the discretion of the trial court, the "ground" of benevolence and compassion[2] (or the claim asserted below that the defendants might be able to arrange a sale of the property during the extended period until the sale) does not constitute a lawful, cognizable basis for granting relief to one side to the detriment of the other, and thus cannot support the order below: no judicial action of any kind can rest on such a foundation. This is particularly true here because the order contravenes the terms of the statute that a sale is to be conducted "not less than 20 days or more than 35 days after the date" of the order or judgment. § 45.031(1)(a), Fla. Stat. (2008). See also Kosoy Kendall Assocs., LLC v. Los Latinos Restaurant, Inc., 10 So. 3d 1168 (Fla. 3d DCA 2009); Comcoa, Inc. v. Coe, 587 So. 2d 474 (Fla. 3d DCA 1991).

The continuance thus constitutes an abuse of discretion in the most basic sense of that term. As the Court stated in Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980):

> The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness. In this regard, we note the cautionary words of Justice Cardozo concerning the discretionary power of judges:
>
> > The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.
> >
> > B. Cardozo, The Nature of the Judicial Process 141 (1921).

See Storm v. Allied Universal Corp., 842 So. 2d 245, 246 n.2 (Fla. 3d DCA 2003) (trial judge refused to preclude plaintiff, who misled and deceived the defendants, the jury and the trial court, from further litigation "to give the Plaintiff the break of his life"); Arango v. Arango, 450 So. 2d 583 (Fla. 3d DCA 1984) (trial judge reduced attorney's fee award to spouse of attorney on ground of "professional courtesy"). See also Flagler v. Flagler, 94 So. 2d 592, 594 (Fla. 1957) ("[C]ourts of equity have [no] right or power under the law of Florida to issue such order it considers to be in the best interest of 'social justice' at the particular moment without regard to established law."); Nordberg v. Green, 638 So. 2d 91 (Fla. 3d DCA 1994) (trial court may not decline to follow controlling law on ground it considers its application "inequitable" in particular case), review denied, 649 So. 2d 233 (Fla. 1994).

Although we thus thoroughly disapprove of the order, in view of the fact that the postponed sale is due to take place within a short time of this decision, no useful purpose will be served by formally quashing the order or ordering the sale to take place on an earlier date with all the procedural complications which would then result. For that reason alone, relief will be denied. We do emphasize that there are to be no further postponements of the sale.

Petition denied.

---

[1]The court's remarks on the issue included the following:

> I was trying to make everybody happy.
>
> ....
>
> We have so many foreclosures here and I give continuances on these sales. I just do.
>
> ....
>
> Unless it is so abundantly clear to me that it is just an abuse of the process, I give extensions on these because I don't want anybody to lose their house. If there is any chance that he can do this deal, get the money and try to save this home, you know, people are having a hard time now. They are having a difficult time. Everybody knows it. Businesses are failing. People are losing money in the stock market. You know, unemployment is high. It's just everybody knows that we are in a bad time right now and I hate to see anybody lose their home.

[2]See also the term referred to in Cooper v. Brickell Bayview Real Estate, Inc. 711 So. 2d 258, 258 n.1 (Fla. 3d DCA 1998).

* * *

Criminal law—Kidnapping—Defendant was properly convicted of kidnapping where defendant and codefendant jumped into a pickup truck left running by its driver and drove away with a two-year-old child asleep in the truck, seat-belted into the back seat—It is reasonable to infer from evidence that defendant became aware that the child was confined in the truck in the course of removing the radio from the truck and stealing other items from the truck—Confinement of child continued through theft of items within truck, and continued confinement of child was essential to defendant's attempt to avoid apprehension for theft of vehicle and its contents

ROGELIO DELGADO, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 3D08-1008. L.T. Case No. 06-16959. Opinion filed September 30,

16TH CIR 00316

Mortgage foreclosure—Intervention—Assignee of second mortgage—Trial court abused its discretion in granting motion to intervene filed by assignee of second mortgage after final judgment of foreclosure of first mortgage and sale of property to owner of first mortgage and note, and in directing the clerk of court to issue certificate of title to assignee, despite assignment's erroneous reference to public records book and page number of the first mortgage instead of the correct second mortgage book and page number—Assignee received only the rights it would have had under the assignment of mortgage it received from assignor, and assignor only possessed rights of a second mortgage holder—It was error to grant post judgment motion to intervene where granting of motion injuriously affected original parties

U.S. BANK NATIONAL ASSOCIATION, as trustee, on behalf of the holders of the Home Equity Asset Equity Pass-Through Certificates, Series 2005-2, Appellant, vs. DAVID TAYLOR, a/k/a David M. Taylor, et al., Appellees. 3rd District. Case No. 3D09-694. L. T. Case No. 2006CA711-K. Opinion filed February 10, 2010. An Appeal of a non-final order from the Circuit Court for Monroe County, Mark H. Jones, Judge. Counsel: Lapin & Leichtling and Jonathan R. Rosenn and Jeffrey S. Lapin, for appellant. John L. Penson (Bay Harbor Islands), for appellees.

(Before RAMIREZ, C.J., GERSTEN and SUAREZ, JJ.)

(SUAREZ, J.) U.S. Bank National Association ("U.S. Bank") appeals a non-final order granting a post-judgment motion to intervene. After final judgment of foreclosure and sale of property to U.S. Bank, the owner of the first mortgage and note, the trial court granted Northview Equities, LLC's ("Northview") motion to intervene and ordered the clerk of the court to issue title to Northview. We reverse the grant of Northview's motion to intervene and the direction to the clerk to issue the certificate of title to Northview, as Northview was assigned a second mortgage and not the first mortgage, which was owned by U.S. Bank.

FACTS

This case arises out of a residential foreclosure of a first mortgage brought by U.S. Bank, the owner of the note and first mortgage. The first mortgage referenced a note in the amount of $518,000.00 and an identification number ending in 6895. U.S. Bank's loan servicer executed a second mortgage, which stated that it was "subordinate to an existing first lien of record" and was referenced by an identification number ending in 6903. U.S. Bank obtained a final judgment of foreclosure against the borrower, David Taylor, based upon the note and first mortgage. The second mortgage was assigned to Asset Management Holdings, Inc. ("Asset"), and referenced the identification number ending in 6903. Asset then assigned the same mortgage to Northview.[1] Northview claimed title to the property based on the fact that, when U.S. Bank's loan servicer assigned the second mortgage to Asset, although the assignment itself referenced the correct identification number of the second mortgage, 6903, and the second mortgage stated that it was "subordinate to an existing first lien of record," the assignment was erroneously filled out by incorrectly substituting the Monroe County official records book and page number of the first mortgage instead of the correct second mortgage book and page number. Asset's execution of the assignment, referencing the incorrect book and page number of the first mortgage, to Northview is the basis of Northview's claim.

TRIAL COURT PROCEDURE

After the property was foreclosed upon, the owner of the first mortgage, U.S. Bank, bought the property at the foreclosure sale. Almost eight months after final judgment of foreclosure had been entered in favor of U.S. Bank and after the purchase by U.S. Bank at the foreclosure sale, but prior to the issuance of the certificate of title, Northview moved to intervene. Northview's theory was that the assignment it received from Asset was an assignment of the first mortgage because the document showed the Monroe County official records book and page number of the first mortgage giving it priority in title over U.S. Bank. The trial court allowed Northview to intervene and the trial court directed the clerk of the court to issue the certificate of title to Northview. U.S. Bank filed this interlocutory appeal. We find that the trial court abused its discretion in granting the motion to intervene and directing the clerk of the court to issue the certificate of title to Northview.

ANALYSIS

The trial court's order granting Northview's motion to intervene is reviewed for an abuse of discretion. *Barnhill v. Fla. Microsoft Anti-Trust Lit.*, 905 So. 2d 195 (Fla. 3d DCA 2005). The portion of the trial court's order which directs the clerk to issue the certificate of title to Northview is reviewed *de novo* since it involves questions of law and the construction of written instruments. *Aronson v. Aronson*, 930 So. 2d 766 (Fla. 3d DCA 2006).

The general law is that an assignee of a mortgage receives only those rights and benefits which are available to its assignor. *Dubbin v. Capital Nat'l Bank*, 264 So. 2d 1 (Fla. 1972). Under the facts before us, the assignee, Northview, received only the rights it would have had under the assignment of mortgage it received from Asset. Asset only possessed the rights of a second mortgage holder, as referenced by the amount of $148,000.00 "subordinate to an existing first lien of record" and identification number 6903. The facts that the second mortgage, held by Asset and assigned to Northview, had a different identification number than the first mortgage, and the second mortgage referenced $148,000, "subordinate to an existing first lien of record," serve to corroborate the conclusion that Northview received a second mortgage and not a first mortgage despite the erroneous book and page numbers. Had Northview executed a diligent search of the public records, barring the fact that the book and page numbers on the two mortgages were reversed, it would have become aware that there was a second mortgage on the property which was subordinate to the first. *See Graham v. Commonweath Life Ins. Co.*, 154 So. 335 (Fla. 1934) (holding that where a purchase money mortgage stated it was second mortgage, but incorrectly designated the first mortgagee, and the assignee had actual and constructive notice of a subordination agreement, the mortgagee of the building construction loan was entitled to priority over the assignee of the purchase money mortgage); *see also Crenshaw v. Holzberg*, 503 So. 2d 1275, 1277 (Fla. 2d DCA 1987) ("[A]n instrument of record is notice not only of its own existence and contents, but also of other facts that would have been learned from the record if it had been examined and that inquiry suggested by it would have disclosed."). Northview's argument that it was a bona fide purchaser fails because "[a]n assignee is not protected as against the equities of third persons if the assignment was . . . after the maturity of the debt secured." *Hulet v. Denison*, 1 So. 2d 467, 482 (Fla. 1941); *see Vance v. Fields*, 172 So. 2d 613 (Fla. 1st DCA 1965) (holding that purported assignee of mortgage without assignment of note creates no right in plaintiffs and recording gives no priority as against subsequent sale and delivery of note).

The trial court abused its discretion in granting Northview's motion to intervene. A post judgment motion to intervene is rarely, if ever, granted and only if the intervention will not injuriously affect the original litigants. In this case, the trial court abused its discretion since the granting of the post judgment motion to intervene did injuriously affect the original parties. *See Dickinson v. Segal*, 219 So. 2d 435 (Fla. 1969) (post-judgment intervention not permitted once litigation has resulted in final judgment); *see also Svadbik v. Svadbik*, 776 So. 2d 968 (Fla. 3d DCA 2000) (affirming denial of motion to intervene post-judgment); *Idacon, Inc. v. Hawes*, 432 So. 2d 759 (Fla. 1st DCA 1983) (reversing order granting motion to intervene after final judgment of foreclosure had been entered and after judicial sale); *Lewis v. Turlington*, 499 So. 2d 905 (Fla. 1st DCA 1986) (trial court abused its discretion in allowing third parties to intervene after entry of final order).

We reverse the trial court's grant of Northview's motion to intervene and the direction to the clerk to issue title in Northview's name. We remand to the trial court to issue title in the name of U.S.

16TH CIR 00317

Bank.

Reversed and remanded with directions.

[1]The note was never delivered.

* * *

Criminal law—Juveniles—Probation revocation—No error in finding that juvenile willfully violated probation by failing to abide by curfew and appear for scheduled intake at Dade Marine Institute—Error to find juvenile violated probation by failing to live with mother and failing to regularly attend school where juvenile was not advised of those conditions—Where juvenile was given form order of probation, and some of the conditions were checked off while others were not, it was, at best, unclear that juvenile was required to comply with unchecked conditions—Because failure to report to Dade Marine Institute was substantial violation of probation, and this violation alone was sufficient to sustain revocation, remand for reconsideration by trial court is not necessary

E.J., a juvenile, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 3D09-1597. L. T. Case Nos. 07-4252-B, 07-7628, 07-7390-C, 07-7473-A, 07-7474-B. Opinion filed February 10, 2010. An Appeal from the Circuit Court for Miami-Dade County, Spencer Eig, Judge. Counsel: Carlos J. Martinez, Public Defender, and Howard K. Blumberg, Assistant Public Defender, for appellant. Bill McCollum, Attorney General, and Forrest L. Andrews, Jr., Assistant Attorney General, for appellee.

(Before SHEPHERD, SUAREZ, and ROTHENBERG, JJ.)

(ROTHENBERG, J.) The appellant, E.J., entered a plea of nolo contendere and an adjudication of delinquency was withheld on June 24, 2008, to burglary in Case No. J07-4252(B), grand theft in Case No. J07-7628, burglary of an unoccupied structure as a lesser included offense of burglary of a dwelling in Case No. J07-7611(C), grand theft of a firearm in Case No. J07-7473(A), criminal mischief in Case No. J07-7390(C), and burglary of an unoccupied structure as a lesser included offense of burglary of a dwelling in Case No. J07-7474(B). Based upon E.J.'s plea, the State nolle prossed numerous other counts including armed burglary (punishable by up to life in prison), and he was placed on probation.

On or about October 29, 2008, a probation affidavit was filed, alleging that E.J. violated his probation by: failing to reside in the home of his mother; violating his curfew; failing to attend school; and failing to appear for his scheduled intake at the Dade Marine Institute. The trial court conducted a probation violation hearing and found that the State proved by a preponderance of the evidence each of the violations alleged in the affidavit, and adjudicated E.J. delinquent. Although we conclude that the trial court erred in finding that E.J. violated his probation for failing to reside with his mother or to attend school, we affirm the remainder of the order under review and the finding that E.J. willfully violated his probation by failing to abide by his curfew and appear for his scheduled intake at the Dade Marine Institute.

A review of the orders placing E.J. on probation reflects that E.J. was not advised that as a condition of his probation he must live with his mother or regularly attend school. The probation order specifies that E.J. live and reside in the home of "parent(s)." E.J. testified that he lived and resided with his father when he did not live with or reside with his mother. Because his testimony was unrefuted and the probation order did not require that he live with and reside in only his mother's home, we conclude that the trial court erred when it included this ground as one of the conditions of probation E.J. violated.

Likewise, while the probation order specifically lists attending school every day as a condition of probation, this condition, unlike the other listed conditions of probation contained in the order, was not checked off, thereby inferring that the trial court did not intend to make school attendance a condition of E.J.'s probation. We recognize that general conditions of probation explicitly authorized or mandated by Florida Statutes need not be orally pronounced at sentencing. *See State v. Hart*, 668 So. 2d 589, 592 (Fla. 1996) (stating that " 'general conditions' of probation are those contained within the statutes. . . [and] may be imposed and included in a written order of probation even if not orally pronounced at sentencing"); *D.P.B. v. State*, 877 So. 2d 770, 772 (Fla. 4th DCA 2004) (holding that so long as a condition of probation is explicitly authorized or mandated by Florida Statutes, it is not mandatory that the trial court orally advise the defendant of the condition). However, where, as here, a juvenile probationer is given a form order of probation and some of the conditions are checked off and others are not, we conclude it was unclear, at best, that the probationer was being required to comply with the unchecked conditions.

Although we conclude that the trial court erred by finding that E.J. violated his probation by failing to reside in his mother's home and by not regularly attending school, we affirm the portion of the trial court's order finding that E.J. willfully violated his probation by failing to comply with his curfew and by failing to attend the scheduled intake appointment for the Dade Marine Institute. E.J.'s probation officer testified that he personally visited the Dade Marine Institute and determined that E.J. never appeared for his intake as ordered and E.J. admitted under oath at the probation violation hearing that he did not appear for his intake or attend the Dade Marine Institute. E.J.'s probation officer additionally testified that according to E.J.'s mother, E.J. violated his curfew on four occasions.

Because E.J.'s remaining violations were not based solely on hearsay, *see Crawford v. State*, 982 So. 2d 1, 2 (Fla. 2d DCA 2008) (reversing the trial court's order finding the defendant in violation of his probation based solely on hearsay testimony), and these violations were proven by a preponderance of the evidence, we affirm the findings by the trial court as to those violations. *See E.P. v. State*, 901 So. 2d 193, 195 (Fla. 4th DCA 2005) (holding that the State need only establish a violation by a preponderance of the evidence); *Wilson v. State*, 781 So. 2d 1185, 1187 (Fla. 4th DCA 2001) (noting that whether a violation of probation is willful and substantial is a factual issue that cannot be overturned on appeal unless there is no evidence to support it); *Alvarez v. State*, 638 So. 2d 992, 993 (Fla. 3d DCA 1994) (affirming the revocation of the defendant's probation for failing to attend her first probation appointment and making no attempt thereafter to schedule a meeting with her probation officer).

Because failure to report to the Dade Marine Institute is a substantial violation of E.J.'s probation, and this violation alone is sufficient to sustain a revocation of his probation, remand for reconsideration by the trial court is not required. *See Matos v. State*, 956 So. 2d 1240, 1240 (Fla. 4th DCA 2007) (affirming revocation of community control after striking some of the violations but finding other violations were supported by the evidence); *Butler v. State*, 932 So. 2d 306, 307 (Fla. 2d DCA 2006) (recognizing that when an appellate court reverses on a finding regarding one of the conditions of community control, remand is not required if the remaining violation or violations are substantial); *Rawlins v. State*, 711 So. 2d 137, 137 (Fla. 5th DCA 1998) (finding unexcused absences from a treatment program, standing alone, may constitute a material violation); *Johnson v. State*, 667 So. 2d 475, 475 (Fla. 3d DCA 1996) (finding that the defendant's failure to attend G.E.D. classes, standing alone, was sufficient to revoke his probation).

In conclusion, because there are other substantial violations remaining, and they are supported by competent substantial evidence, we affirm the trial court's order revoking E.J.'s probation.

Affirmed.

* * *

PT: what have you done to comply

5/26/09 eff. date

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

CASE NO:

Sign after proof of comp., cert no TS

BANK,

Plaintiff

Vs.

HOMEOWNER,

Defendant

_____/

AFFIDAVIT OF COMPLIANCE WITH
PROTECTING TENANTS AT FORECLOSURE ACT OF 2009

Plaintiff herein hereby files its Affidavit of Compliance with Protecting Tenants at Foreclosure Act of 2009, and states as follows:

1. The subject property _____is _____ is not tenant occupied.

2. There is a lease on the property: _____ in writing, for a specified term which ends on _____; _____unwritten, or month-to-month; _____ There is no lease on the property.

3. Any existing lease on the property ____ will remain in effect; ____ will be terminated as follows: _____ end of lease term on _____;
_____ 90 day notice by purchaser who will occupy as primary residence.
_____ 90 day notice to tenants without a lease or with lease terminable at will.

A COPY OF ALL NOTICES MUCH BE ATTACHED.

I CERTIFY that the above information has been verified through sworn discovery responses from the Defendant, or by _____
_____.

SUBSCRIBED AND SWORN TO this ____ day of _____, 2009.

_____
Plaintiff/Authorized Representative

_____
Notary Public
My Commission Expires:_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to all persons on the attached service list, and upon all tenants resident in the named property this ____ day of _____, 2009.

_____
Plaintiff/Authorized Representative

This case demonstrates many of the symptoms of a dissolution proceeding suffering from *Wrona*'s disease. *See Kasm v. Lynnel*, 975 So. 2d 560, 565 n.2 (Fla. 2d DCA 2008) (citing *Wrona v. Wrona*, 592 So. 2d 694, 696-97 (Fla. 2d DCA 1991)). The dissolution proceeding between Mr. and Mrs. George has been pending in circuit court for less than two years. In that time, this is the third appellate proceeding.[1] Mr. George has also filed a bankruptcy petition that has delayed payment of an earlier award of temporary attorney's fees.

Because this appeal is pending from a nonfinal order, our record is limited to an appendix. We do not have the majority of the pleadings in our record, and we do not know the length of the marriage or the age of the parties. We know that Mr. George is a pharmacist earning in excess of $100,000 per year. Mrs. George has or had a clerical job earning less than $21,000. The record does not suggest that this case involves any minor children. The primary asset to escape Mr. George's bankruptcy was a $95,000 retirement account.[2] The record suggests Mr. George has withdrawn from that account without permission from the trial court, paying his grandmother $24,000 for an outstanding debt from 1987 that apparently was not discharged in the bankruptcy. In this court's record, he does not, or cannot, account for the remaining $71,000 that was withdrawn from the retirement account.

Mr. George has relocated to Georgia where he has rented a three-bedroom home for himself and his unemployed girlfriend. The additional bedrooms are needed to allow the girlfriend's children from a prior marriage to visit. He pays $2200 in rent.

Meanwhile, Mrs. George has rented a $1600 per month apartment where she lives alone. She is spending nearly $700 per month for psychological counseling and another $200 per month for grooming. Because her husband changed jobs when he moved to Georgia, she now is paying for COBRA medical insurance coverage. In January 2009, she was diagnosed with a serious illness. She expected that she would be required to undergo a series of treatments that would prevent her from working at least for a period of time.

When Mrs. George discovered her medical condition, she filed an emergency motion to increase her temporary support. The court conducted a hearing on the motion on March 25, 2009. Mr. George did not, or could not, attend the hearing telephonically. Mrs. George attended the hearing telephonically because she was involved in training at work that could not be postponed. The two lawyers attended the hearing in person. Animosity between the lawyers is evident even from the transcript of the hearing. The trial court did its best to maintain decorum and receive evidence over the telephone to permit a resolution of the emergency motion.

Assuming that events have played out over the last eight months as predicted at this hearing, Mrs. George has been required to take a temporary leave of absence from her employment, and that leave of absence should have come, or will soon be coming, to an end. If her treatment has been successful, it is likely that the temporary alimony could be reduced to a lesser amount for a short period before this case is resolved at final hearing. If Mrs. George was not required to take a leave of absence or her earnings and expense projections for the last few months were in error, the trial court can consider these matters at the final hearing.

Our explanation for this affirmance has already been provided in *Ghay v. Ghay*, 954 So. 2d 1186, 1189-90 (Fla. 2d DCA 2007):

> A temporary support order is often required at the beginning of the dissolution action, before the parties have had an opportunity to complete discovery. Given the urgency of some of these matters, the order is often based upon an abbreviated hearing and limited evidence. Temporary support issues cannot always await full discovery or the preparation of an expert's opinion.
>
> In addition, temporary support orders are, obviously, temporary. They do not create vested rights, and they can be modified or vacated at any time by the circuit court while the litigation proceeds. If further discovery reveals that a temporary support order is inequitable or based upon improper calculations, any inequity can usually be resolved in the final judgment, after a full and fair opportunity to be heard.

(Internal quotations and citations omitted.)

As we did in the last two appellate proceedings, we remand Mrs. George's motion for attorney's fees. If she establishes her entitlement pursuant to section 61.16, Florida Statutes (2008), the trial court is authorized to award her all or a portion of the reasonable appellate attorney's fees. The merit of the respective positions of the parties in this appeal is not a factor that the trial court need consider. *See Rados v. Rados*, 791 So. 2d 1130 (Fla. 2d DCA 2001).

Affirmed. (WHATLEY and LaROSE, JJ., Concur.)

---

[1]*George v. George*, 13 So. 3d 473 (Fla. 2d DCA 2009); *George v. George*, 12 So. 3d 909 (Fla. 2d DCA 2009);

[2]His financial affidavit claims it is a $45,000 account, but that number is apparently incorrect.

* * *

Mortgage foreclosure—Foreclosing mortgagee's liability for unpaid homeowners association assessments—Trial court properly found that mortgagee was not liable for mortgagors' unpaid assessments that will have accrued by the time title may be transferred to mortgagee—Because Declaration of Covenants and Restrictions contains plain and unambiguous language subordinating any claim for unpaid assessments to a first mortgagee's claim upon foreclosure, it controls and absolves first mortgagee from liability for any assessments accruing before it acquires property—Mortgagee is a third party beneficiary of Declaration which is a contract between homeowners association and its members, and application of statutory amendment that would impose liability for unpaid assessments on mortgagee would impair mortgagee's contractual rights

CORAL LAKES COMMUNITY ASSOCIATION, INC., Appellant, v. BUSEY BANK, N.A.; SCOTT HALEY; RUTH HALEY; and RIVERSIDE BANK OF THE GULF COAST, Appellees. 2nd District. Case No. 2D08-5062. Opinion filed February 19, 2010. Appeal from the Circuit Court for Lee County; Michael T. McHugh, Judge. Counsel: Ashley D. Lupo and Christopher D. Donovan of Roetzel & Andress, LPA, Naples, for Appellant. Gordon R. Duncan of Duncan & Associates, P.A., Fort Myers, for Appellee Busey Bank, N.A. No appearance for Appellees Scott Haley, Ruth Haley, and Riverside Bank of the Gulf Coast.

(CASANUEVA, Chief Judge.) Coral Lakes Community Association, Inc. (the "HOA"), appeals a final summary judgment of foreclosure awarded to Busey Bank, N.A. (the "Bank"). The final judgment determined that the Bank had no liability to the HOA for past due HOA assessments that the HOA claimed pursuant to section 720.3085(2), Florida Statutes (2008). The disposition of this case is determined by the HOA's Declaration of Covenants and Restrictions vis-à-vis the relevant regulatory statutes. As one would expect, these two competing parties possess diametrically opposed legal positions regarding whether the Bank should be liable for the mortgagors' unpaid HOA assessments that will have accrued by the time title may be transferred to the Bank. For the reasons explained below, we conclude the Bank is not required to pay those delinquent assessments and affirm the summary judgment in foreclosure.

Background

The facts are undisputed. In May 2006, appellees Scott and Ruth Haley ("the homeowners") executed a note and mortgage in favor of the Bank for $252,255.80 to purchase property located in the Coral Lakes community. The community's governing document at this time, the Declaration of Covenants and Restrictions of Coral Lakes, provided the following:[1]

9.1.6 Subordination of Lien. Where any person obtains title to a LOT pursuant to the foreclosure of a first mortgage of record, or where the holder of a first mortgage accepts a deed to a LOT in lieu of foreclosure of the first mortgage of record of such lender, such acquirer of title, its successors and assigns, shall not be liable for any ASSESSMENTS or for other moneys owed to Coral Lakes which are chargeable to the former OWNER of the LOT and which became due prior to acquisition of title as a result of the foreclosure or deed in lieu thereof, unless the payment of such funds is secured by a claim of lien recorded prior to the recording of the foreclosed or underlying mortgage.

By January 2008, the homeowners were in arrears on both their mortgage payments due the Bank and assessments due the HOA. On June 3, 2008, the Bank instituted a foreclosure action against the homeowners, adding the HOA as a party defendant because of the accrued unpaid assessments.[2] On June 24, 2008, the HOA answered and claimed as its first affirmative defense that pursuant to section 720.3085, Florida Statutes (2007),[3] the Bank's mortgage was subordinate to all of the mortgaged premises' unpaid common expenses which accrued or came due during the time period preceding the Bank's acquisition of title at foreclosure sale or by deed in lieu of foreclosure.[4] As its second affirmative defense, the HOA claimed that if a purchaser, including the Bank and its successors or assigns, purchases the mortgaged premises, including but not limited to, at a foreclosure sale, then this purchaser shall be jointly and severally liable with the previous owner to pay twelve months' assessments which accrued preceding transfer of title or one percent of the original mortgage debt, whichever is less.

The lawsuit proceeded quickly and as a fairly routine foreclosure action. On July 23, 2008, the Bank filed a motion for summary judgment of foreclosure, claiming the execution of the note and mortgage was not disputed, the failure to timely pay the note was not disputed, the priority of the note and mortgage was not disputed, and the only matters of law to be argued were the general law of notes, mortgages, and negotiable instruments and the Bank's entitlement to attorney's fees and costs. The Bank also claimed that, as a matter of law, the statutory changes to section 720.3085[5] should not be applied retroactively to its note and mortgage that predated the statutory change.

At the hearing on the motion for summary judgment, the only contentious issue was whether the Bank was excused from paying the unpaid HOA assessments that had accrued. The Bank argued that at the time of the execution of its note and mortgage in 2006, the HOA's Declaration gave its lien a distinct and very advantageous priority position over any HOA lien for unpaid assessments. Moreover, the Bank, by virtue of being an intended third-party beneficiary of this paragraph of the Declaration, could not have this benefit removed by operation of the statute, which was not in existence at the time it entered into its contract with the homeowners. Further, the Bank argued, citing to *City of Sanford v. McClelland*, 163 So. 513 (Fla. 1935), applying the new statutory language would impair the Bank's contractual right, i.e., its vested lien priority. *See id.* at 514-15 ("A vested right has been defined as 'an immediate, fixed right of present or future enjoyment' and also as 'an immediate right of present enjoyment, or a present, fixed right of future enjoyment.' " (quoting *Pearsall v. Great N. Ry. Co.*, 161 U.S. 646, 673 (1896))).

The HOA countered that the issue was not retroactive application of the amended statute because the Bank had not yet taken title to the parcel; therefore, assuming that the Bank would take title at a future foreclosure sale, it would be constrained to follow the dictates of the amended 2008 version of the statute at that time. *Cf. LR5A-JV, LP v. Little House, LLC*, 998 So. 2d 1173, 1175 (Fla. 5th DCA 2008) (holding section 720.3085(2), Florida Statutes (2007), inapplicable because the appellant/mortgagee was not yet at the time of the suit the subsequent parcel owner; however, in dictum, the court stated that "[f]urthermore, there is nothing in the plain language of section 720.3085 that can reasonably be construed to give the Association's lien priority over [the lender's] mortgage").

The trial court agreed with the Bank, noting that *City of Sanford* would control to preclude impairment of vested rights by a statutory change. On September 22, 2008, the trial court entered a final judgment in foreclosure with the following language specifically addressing the lien priority/unpaid assessments issue:

8. Upon filing the certificate of sale, the purchaser at the sale shall be let into possession of the property and the Defendants and all persons claiming under or against them since the filing of the Notice of Lis Pendens shall be fore-closed of all estate or claim in the property except that any purchaser other than Plaintiff [the Bank] shall be liable for unpaid assessments due [the HOA] pursuant to the provision of Section 720.3085, Florida Statutes.

Analysis

We conclude that because of the Declaration's plain and unambiguous language subordinating any claim for unpaid HOA assessments to a first mortgagee's claim upon foreclosure or deed in lieu of foreclosure, it controls and absolves the Bank, as first mortgagee, from liability for any assessments accruing before it acquires the parcel. "Restrictions found within a Declaration are afforded a strong presumption of validity, and a reasonable unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary meaning of its terms. . . ." *Shields v. Andros Isle Prop. Owners Ass'n*, 872 So. 2d 1003, 1005-06 (Fla. 4th DCA 2004) (quoting *Emerald Estates Cmty. Ass'n v. Gorodetzer*, 819 So. 2d 190, 193 (Fla. 4th DCA 2002)). In this case, the restriction in the Declaration disadvantages the HOA, which the drafter had every right to do, and benefits all first mortgagees of homes in the community. First mortgagees in this community, although not parties to the Declaration that is the contract between the HOA and its members, are clearly third-party beneficiaries of this contract. *See Greenacre Props., Inc. v. Rao*, 933 So. 2d 19, 23 (Fla. 2d DCA 2006) (explaining that to enforce rights under a contract like a declaration, "[a] third party must establish that the contract either expressly creates rights for them as a third party or that the provisions of the contract primarily and directly benefit the third party or a class of persons of which the third party is a member"). The HOA could have protected itself if, in drafting its Declaration, it had included language that its lien for unpaid assessments related back to the date the Declaration was recorded or that it otherwise had lien superiority over intervening mortgages. *See LR5A-JV*, 998 So. 2d at 1175 n.2. However, the HOA took the opposite tack to entice lenders to finance purchases in its community. The statutory change in section 720.3085 cannot disturb that prior, established contractual relationship.

To hold otherwise would implicate constitutional concerns about impairment of vested contractual rights. *See* art. I, § 10, Fla. Const. ("No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."). In this state, it is a "well-accepted principle that virtually no degree of contract impairment is tolerable." *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 780 (Fla. 1979) (citing *Yamaha Parts Distribs., Inc. v. Ehrman*, 316 So. 2d 557 (Fla. 1975)). To avoid this longstanding principle, the HOA argues that even if applying section 720.3085 to this case would impair the Bank's contractual rights, such impairment is constitutionally reasonable or minimal. We do not agree.

The facts of this case are similar to those in *Sarasota County v. Andrews*, 573 So. 2d 113 (Fla. 2d DCA 1991). There, Sarasota County passed an ordinance declaring that a fine imposed by the county on property, when recorded, becomes a lien against the property that is superior to all other liens except a lien for taxes. Pursuant to this ordinance, the county imposed a fine on a property for operation of an illegal landfill and recorded it as a lien. The property at issue in the case was subject to a prior mortgage in favor of Coast Federal Savings & Loan Association. Sarasota County filed suit against the property owner to foreclose its claim of lien, added the mortgagee Coast Federal as a defendant, and sought a declaration that Coast Federal's lien was inferior to the county's lien. The trial court entered a final summary judgment

finding Coast Federal's lien superior because it found that the portion of the ordinance making the county's lien superior to all nontax liens was unconstitutional, as applied. We affirmed the summary judgment, saying:

> We think the priority provision of the County's ordinance substantially impairs Coast Federal's prior mortgage lien by subordinating it to the County's lien. If by operation of the County's ordinance, Coast Federal's lien can be relegated to a secondary position, it is obviously of less value than the first-priority lien for which Coast Federal had contracted. Thus, the ordinance retrospectively impairs Coast Federal's contractual position.

Id. at 115.

Much like the county's argument in *Sarasota County v. Andrews*, the HOA here argues that any impairment is permissible as minimal. We disagreed with this argument in *Sarasota County v. Andrews* and disagree with it here:

> [T]he priority provision [of the ordinance] has worked an immediate impairment on Coast Federal's preexisting mortgage lien. The nature of priority is such that Coast Federal is automatically at a substantially greater risk of losing its investment if it has only a second, as opposed to a first, priority lien. Furthermore, mortgages held by commercial institutions are frequently sold on the secondary market, and the subordination of Coast Federal's lien impairs the marketability of its mortgage. This immediate diminishment in the value of Coast Federal's contract is repugnant to our constitutions.

Id.

More recently, this court reviewed an impairment challenge in *Lee County v. Brown*, 929 So. 2d 1202 (Fla. 2d DCA 2006). There, homebuilders challenged the validity of a local ordinance imposing a school impact fee on those applying for a building permit. This court recognized that *Pomponio* required the application of a balancing test which "weighs the degree of impairment against the source of authority under which the law is enacted and the 'evil' the law is intended to remedy." 929 So. 2d at 1208 (citing *Pomponio*, 378 So. 2d at 780). However, the *Pomponio* balancing test is not required under *Sarasota County v. Andrews* where the statutory enactment "results in an immediate diminishment in the value of the contract." 929 So. 2d at 1208-09 (citing *Sarasota County v. Andrews*, 573 So. 2d at 115). Impairment, in this context has been defined, in part, as "to make worse; to diminish in quantity, value, excellency or strength[.]" *Id.* at 1208 (quoting *Pomponio*, 378 So. 2d at 781 n.41). If we were to apply the amended statute in this instance, the economic value of the Bank's mortgage would be lessened as well as the power of its priority position.

Alternatively, were it appropriate to apply the balancing test, the HOA's argument would still fail. While the law may deal with the economic problem facing homeowners' associations in general, its application here would place the economic burden not on the homeowner, the root of the problem of the unpaid assessments, but on the entity that previously made the construction or purchase of the home possible. Moreover, the Declaration of Covenants and Restrictions was never altered to place a lender on notice that its economic position would be subordinate to the HOA's claims. When balanced in this factual circumstance, the statute would operate to severely, permanently, and immediately change the parties' economic relationship retroactively, a circumstance not supportable under the law.

Conclusion

The HOA yielded any right to claim it had a superior lien position to the Bank's preexisting mortgage by virtue of the plain and unambiguous language of its Declaration,[6] which the Bank had every right to rely upon when deciding to finance the homeowners' home in the Coral Lakes community. The trial court did not err in finding the Bank's first mortgage lien superior to the HOA's claim for unpaid assessments notwithstanding section 720.3085.

Affirmed. (DAVIS, J., Concurs. WALLACE, J., Concurs in result only.)

---

[1]This provision clearly favors potential first mortgage holders who generally the properties upon which they foreclose. We make this observation because remaining, unquoted portion of this section does not exclude other types of buyer homes with delinquent fees from payment of those fees. This section was likely ad to the Declaration to induce lenders to aid homeowners in purchasing property in community by awarding them priority over the HOA's claims for unpaid assessme

[2]Riverside Bank of the Gulf Coast is apparently the holder of another, inferior but has not appeared in this appeal.

[3]At the time of the filing of the foreclosure suit and the HOA's answer affirmative defenses, section 720.3085, Florida Statutes (2007), provided in part:

> (1) A parcel owner, regardless of how his or her title to property has b acquired, including by purchase at a foreclosure sale or by deed in lieu foreclosure, is liable for all assessments that come due while he or she is the par owner. The parcel owner's liability for assessments may not be avoided by wai or suspension of the use or enjoyment of any common area or by abandonment the parcel upon which the assessments are made.
>
> (2) A parcel owner is jointly and severally liable with the previous parcel owi for all unpaid assessments that came due up to the time of transfer of title. Tl liability is without prejudice to any right the present parcel owner may have recover any amounts paid by the present owner from the previous owner.

This was the initial enactment of this section, effective July 1, 2007. *See* ch. 200 183, §§ 1-2, at 1603-05, Laws of Fla. On July 1, 2008, after the foreclosure complai and the answer and affirmative defenses were filed, the newly amended version of tl statute became effective. A new subsection (1) was added (not at issue here); form subsection (1) was renumbered subsection (2)(a); former subsection (2) w renumbered subsection (2)(b); and new language was inserted, numbered subsectic (2)(c), as follows:

> (c) Notwithstanding anything to the contrary contained in this section, the liabilit of a first mortgagee, or its successor or assignee as a subsequent holder of the fir mortgage who acquires title to a parcel by foreclosure or by deed in lieu c foreclosure for the unpaid assessments that became due before the mortgagee' acquisition of title, shall be the lesser of:
>
> 1. The parcel's unpaid common expenses and regular periodic or specia assessments that accrued or came due during the 12 months immediately precedin the acquisition of title and for which payment in full has not been received by th association; or
>
> 2. One percent of the original mortgage debt. The limitations on first mortgage liability provided by this paragraph apply only if the first mortgagee filed sui against the parcel owner and initially joined the association as a defendant in th mortgagee foreclosure action. Joinder of the association is not required if, on th date the complaint is filed, the association was dissolved or did not maintain ar office or agent for service of process at a location that was known to or reasonably discoverable by the mortgagee.

Ch. 2008-175, § 1-2, at 2034-35, Laws of Fla.

Thus, instead of being jointly and severally responsible for all unpaid assessments of a foreclosed homeowner, as of July 1, 2008, the first mortgagee who holds title now has limited liability, either the prior twelve months' worth of unpaid assessments or one percent of the original mortgage debt, whichever is less.

[4]We note that at the time the HOA filed its answer and affirmative defenses, the homeowners were still the record titleholders of the property as there had not yet been a judgment of foreclosure, a foreclosure sale, or a certificate of sale filed. Subsequent to filing the notice of appeal in this case, the Bank bought the home at the foreclosure sale and its certificate of title was recorded on December 24, 2008.

[5]*See* footnote 2, above.

[6]We make no comment on the HOA's argument that the Florida Legislature effectively rewrote section 9.1.6 of its Declaration when it enacted or amended section 720.3085 because that was not the basis of the trial court's summary judgment.

* * *

LUIS A. CHACON Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 3D09-3156. L.T. Case Nos. 03-10398. Opinion filed February 17, 2010. An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, David Miller, Judge. Luis A. Chacon, in proper person. Bill McCollum, Attorney General, for Appellee.

(Before RAMIREZ, C.J., and COPE, and SALTER, JJ.)

(PER CURIAM.) Affirmed.

(COPE, J. (concurring).) I concur in affirming the denial of the appellant's motion to correct illegal sentence under Florida Rule of Criminal Procedure 3.800(a) because the issue the appellant raises on appeal is completely different from the issue the appellant raised in his motion dated September 3, 2009. The trial court erred in denying the motion as being "successive," because as the Florida Supreme Court has explained, there is no "successiveness" bar in rule 3.800(a). *State v. McBride*, 848 So. 2d 287, 290 (Fla. 2003). Instead, the question is

increased his aggregate sentence length from sixty years to seventy years. The trial court denied the claim on the theory that it had been previously adjudicated. The defendant has appealed.

By way of background, in 1997, the defendant had sixteen pending criminal cases in the trial court. Pursuant to a plea agreement, the defendant was sentenced to concurrent sixty year sentences in a number of the cases, and shorter concurrent sentences in the remaining cases.

Thereafter the defendant filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850, and in 2000, the trial court granted partial relief. In three of the trial court cases, there had never been a notice of habitualization. As a result, the trial court resentenced the defendant to ten year sentences under the sentencing guidelines in those cases. The judge's oral pronouncement made clear that the defendant's aggregate sentence would remain sixty years.

Thereafter the Department of Corrections recalculated the defendant's tentative release date. The Department concluded that as a result of the resentencing, the defendant's aggregate sentence is now seventy years. The Department's explanation to the defendant was that in two of the resentenced cases, the ten year sentences were now running consecutive, rather than concurrent.

The State's response filed in this court acknowledges that this is a claim which the defendant has not previously raised and that the trial court erred in concluding that this particular claim had been previously adjudicated. The claim here is that the written sentencing order deviates from the court's oral pronouncement. Such a claim is cognizable under rule 3.800(a). *Williams v. State*, 957 So. 2d 600, 601 (Fla. 2007). We therefore reverse the order now before us on this issue and remand for consideration of the merits of the claim.*

We affirm with regard to claims two and three.

Affirmed in part, reversed in part, and remanded for further proceedings consistent herewith.

*Because the sentencing structure in this case is complicated, counsel shall be appointed for the proceedings on remand.

* * *

Mortgage foreclosure—It was a gross abuse of discretion to grant mortgagors' motion to set aside foreclosure judgment and vacate foreclosure sale on the ground that the trial judge did not think it was fair—Foreclosure judgment could not properly be reversed on ground that copy of final default judgment was served to mortgagors at the wrong address

PHOENIX HOLDING, LLC, Appellant, vs. ARMANDO N. MARTINEZ, LUMINADA MARTINEZ AND THE BANK OF NEW YORK, on behalf of Cumortgage Loan Trust, Appellees. 3rd District. Case No. 3D09-3365. L.T. Case No. 08-58360. Opinion filed February 17, 2010. An Appeal from the Circuit Court for Miami-Dade County, Peter Adrien, Judge. Counsel: Arnaldo Velez, for Appellant. Shapiro and Fishman and Heidi J. Weinzetl; Dania S. Fernandez and Monica Amador, for Appellees.

(Before RAMIREZ, C.J., and CORTIÑAS J., and SCHWARTZ, Senior Judge.)

(CORTIÑAS, J.) Phoenix Holding, LLC, the successful bidder at a foreclosure sale, appeals an order denying its motion for a writ of possession and granting the mortgagors' motion to vacate the sale and the judgment upon which it was based. The mortgagors had provided no true defense to the foreclosure but had merely pled their victimhood in various ways.[1] The trial court, agreeing with the notion that they had received no court notices because of a clerical error sending the notices to the wrong address, set aside the summary judgment of foreclosure "[i]n terms of fairness and due process." We find this to be a gross abuse of discretion and therefore reverse.

"Whether the complaining party has made the showing necessary to set aside a [foreclosure] sale is a discretionary decision by the trial court, which may be reversed only when the court has grossly abused its discretion." *United Cos. Lending Corp. v. Abercrombie*, 713 So. 2d 1017, 1018 (Fla. 2d DCA 1998). "When analyzing a trial court's exercise of its discretion, the appellate court is to determine whether 'reasonable persons could differ as to the propriety of the action taken by the trial court.' " *Ingorvaia v. Horton*, 816 So. 2d 1256, 1259 (Fla. 2d DCA 2002) (quoting *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)). "If reasonable persons could differ, then the court's action was not an abuse of discretion." *Id.*

"It is established that a judicial sale may be set aside on the grounds of gross inadequacy of consideration, surprise, accident, mistake, or irregularity in the conduct of the sale." *U-M Pub., Inc. v. Home News Pub. Co.*, 279 So. 2d 379, 381 (Fla. 3d DCA 1973) (citing *Moran-Alleen Co. v. Brown*, 123 So. 561 (Fla. 1929)). "However, even though a judicial sale will not be set aside due to 'slight defects,' or for 'merely technical, formal, and unimportant irregularities,' we must view the proceedings in their totality." *Id.* (internal citations omitted). In their motion to set aside foreclosure sale, the mortgagors cite Rule 1.540(b), Florida Rules of Civil Procedure, for the proposition that a court may relieve a party from a final judgment, but they neglect to assert the presence any of the required elements: mistake, excusable neglect, newly discovered evidence, or fraud.

For the first time on appeal, the mortgagors argue that because Rule 1.080(h)(2), Florida Rules of Civil Procedure, gives a mortgagor against whom a default judgment has been entered the right to be served with a copy of the judgment, and because the final judgment in this case was served to them at the wrong address, it was correctly reversed. However, Rule 1.080(h)(3) notes that subdivision (h) "is directory and a failure to comply with it does not affect the order or judgment or its finality or any proceedings arising in the action." *See also Bennett v. Ward*, 667 So. 2d 378, 381 (Fla. 1st DCA 1995) (quoting *Subsaro v. Van Heusden*, 191 So. 2d 569, 570 (Fla. 3d DCA 1966)) ("The 'failure of the judgment debtor to receive . . . notice' does not automatically require that a judicial sale be set aside.").

The two cases the mortgagors cite in which a foreclosure judgment is reversed are distinguishable because, in both cases, neither the debtors nor their attorneys received notice. *See Ingorvaia*, 816 So. 2d at 1257; *Bennett*, 667 So. 2d at 380-81. Here, the mortgagors were undisputedly served at their correct address, and it is apparent from their filing of both an answer[2] and a motion to deny summary judgment that they were aware of what was occurring in the action. In addition, the mortgagors' counsel clearly knew about the final judgment and notice of sale, as reflected in a letter to mortgagors dated seven weeks before the sale.

With no valid reason, the trial judge set aside the judgment and sale solely because he did not "think it [was] fair." Unfortunately, neither the ground of fairness nor "the 'ground' of beneyolence and compassion . . . constitute[s] a lawful, cognizable basis for granting relief to one side to the detriment of the other, and thus cannot support the order below: no judicial action of any kind can rest on such a foundation." *Republic Fed. Bank, N.A. v. Doyle*, 19 So. 3d 1053, 1054 (Fla. 3d DCA 2009). Although the trial judge might believe otherwise, "[w]e cannot agree that courts of equity have any right or power under the law of Florida to issue such order it considers to be in the best interest of 'social justice' at the particular moment without regard to established law." *Flagler v. Flagler*, 94 So. 2d 592, 594 (Fla. 1957). Accordingly, we reverse and remand with instructions to reinstate the final judgment and sale of the foreclosed property.

Reversed and remanded.

[1]Among other excuses, the mortgagors asserted that they had lost their second jobs, they were not given salary raises, their mortgage payment increased, they were not credit-worthy, they were defrauded by loan modification companies, and they had separated.

[2]The mortgagors included the wrong return address in their answer.

* * *

T: what have you done to comply

5/26/09 eff. date

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

CASE NO:

Sign after proof of comp!, cert no Ts

BANK,

Plaintiff

Vs.

HOMEOWNER,

Defendant

_____/

AFFIDAVIT OF COMPLIANCE WITH PROTECTING TENANTS AT FORECLOSURE ACT OF 2009

Plaintiff herein hereby files its Affidavit of Compliance with Protecting Tenants at Foreclosure Act of 2009, and states as follows:

1. The subject property _____is _____ is not tenant occupied.

2. There is a lease on the property: _____ in writing, for a specified term which ends on _____; _____unwritten, or month-to-month; _____ There is no lease on the property.

3. Any existing lease on the property ____ will remain in effect; ____ will be terminated as follows: _____ end of lease term on _____;
_____ 90 day notice by purchaser who will occupy as primary residence.
_____ 90 day notice to tenants without a lease or with lease terminable at will.

A COPY OF ALL NOTICES MUCH BE ATTACHED.

I CERTIFY that the above information has been verified through sworn discovery responses from the Defendant, or by _____
_____.

SUBSCRIBED AND SWORN TO this _____ day of _____, 2009.

_____
Plaintiff/Authorized Representative

_____
Notary Public
My Commission Expires:_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to all persons on the attached service list, and upon all tenants resident in the named property this _____ day of _____, 2009.

_____
Plaintiff/Authorized Representative

(1) the murder was committed while engaged in the commission of or an attempt to commit, or flight after committing or attempt to commit, the crime of robbery or burglary; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (3) the murder was committed to disrupt or hinder the lawful exercise of government function or the enforcement of laws; and (4) the murder was especially wicked, evil, atrocious, or cruel. Numbers two and three were treated as one circumstance by the trial judge.

Id. at 840. The trial court found no mitigating circumstances. *Id.* at 846.

[3]This report by Dr. Fisher is the same report from Dr. Fisher attached by Grossman to his third successive postconviction motion, the summary denial of which is the subject of the present appeal.

[4]In his current successive motion, Grossman alleges that in addition to Dr. Fisher, Dr. Henry Dee, an expert who had evaluated Grossman, was also available to testify at an evidentiary hearing to support Grossman's allegations under claim VI of Grossman's original postconviction motion. However, claim VI does not refer to Dr. Dee. Grossman alleges that Dr. Dee is now deceased.

[5]Grossman's initial federal habeas petition was filed before his state habeas petition, but it was stricken. *Grossman*, 359 F. Supp. 2d at 1245. After he refiled the petition, the case was administratively closed pending the outcome of two Florida cases that addressed issues arising from *Ring v. Arizona*, 536 U.S. 584 (2002). *Grossman*, 359 F. Supp. 2d at 1245.

[6]To establish a *Giglio* violation, a defendant must show that: (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material. *See Guzman v. State*, 941 So. 2d 1045, 1050 (Fla. 2006). If the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. *See id.*

* * *

IN RE: AMENDMENTS TO THE FLORIDA FAMILY LAW RULES OF PROCEDURE. Supreme Court of Florida. Case No. SC09-1822. January 28, 2010. Original Proceedings—Family Law Rules Committee. Counsel: Jack A. Moring, Chair, Family Law Rules Committee, Crystal River, and John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, for Petitioner.

CORRECTED OPINION

[Original Opinion at 35 Fla. L. Weekly S76a]

[Editor's note: References to form 12.996 have been corrected to refer to form 12.998.]

* * *

Rules of Civil Procedure—Amendments—General Rules of Pleading—Verification of mortgage foreclosure complaints involving residential real property—Forms—Affidavit of diligent search and inquiry—Final judgment of foreclosure—Motion to cancel and reschedule foreclosure sale

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE. Supreme Court of Florida. Case No. SC09-1460. IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE - FORM 1.996 (FINAL JUDGMENT OF FORECLOSURE). Case No. SC09-1579. February 11, 2010. Two Cases: Original Proceeding—Florida Rules of Civil Procedure. Counsel: Mark A. Romance, Chair, Civil Procedure Rules Committee, Miami; Jennifer D. Bailey, Chair, Task Force on Residential Mortgage Foreclosure Cases, Eleventh Judicial Circuit, Miami, Florida and Alan B. Bookman, Task Force on Residential Mortgage Foreclosures, Pensacola; John F. Harkness, Jr., Executive Director, and Madelon Horwich, Bar Staff Liaison, The Florida Bar, Tallahassee, for Petitioners. Henry P. Trawick, Jr., Sarasota; Virginia Townes of Akerman, Senterfitt, Orlando, Florida on behalf of The Florida Bankers Association; Marc A. Ben-Ezra of Ben-Ezra and Katz, P.A., Fort Lauderdale; Carolina A. Lombardi, Marcia K. Cypen, and John W. McLuskey, Legal Services of Greater Miami, Inc., Miami, Kendall Coffey and Jeffrey B. Crockett of Coffey Burlington, LLP, Miami, Randall C. Berg, Jr. and Joshua A. Glickman, Florida Justice Institute, Inc., Miami, and Kent R. Spuhler, Florida Legal Services, Inc., Tallahassee; B. Elaine New, Court Counsel, on behalf of J. Thomas McGrady, Chief Judge, Sixth Judicial Circuit, St. Petersburg; Alice M. Vickers, Florida Legal Services, Inc., Tallahassee, Lynn Drysdale, Jacksonville Area Legal Aid, Inc., Jacksonville, Jeffrey Hearne, Legal Services of Greater Miami, Inc., Miami, and James R. Carr, Florida Rural Legal Services, Inc., Lakeland, on behalf of the Housing Umbrella Group and the Consumer Umbrella Group of Florida Legal Services, Inc.; Scott Manion, Tallahassee, on behalf of Legal Services of North Florida, Inc.; Edward J. Grunewald, Tallahassee, on behalf of The North Florida Center for Equal Justice, Inc.; Thomas H. Bateman, III of Messer, Caparello, and Self, P.A., Tallahassee, and Janet E. Ferris, Tallahassee; Ronald R. Wolfe, Tampa, on behalf of Florida Default Law Group, P.L.; Judge William D. Palmer, Chair, Committee on ADR Rules and Policy, Fifth District Court of Appeal, Daytona Beach, on behalf of the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy; Lisa Epstein, West Palm Beach, Responding with comments.

(PER CURIAM.) In case number SC09-1460, the Task Force on Residential Mortgage Foreclosure Cases has proposed an amendment to Florida Rule of Civil Procedure 1.110 (General Rules of Pleading) and two new Forms for Use with Rules of Civil Procedure. In case number SC09-1579, the Civil Procedure Rules Committee has proposed amendments to form 1.996 (Final Judgment of Foreclosure) of the Forms for Use with Rules of Civil Procedure. We have consolidated these cases for the purposes of this opinion. We have jurisdiction. *See* art. V, § 2(a), Fla. Const.

Case No. SC09-1460

By administrative order on March 27, 2009, the Task Force on Residential Mortgage Foreclosure Cases (Task Force) was "established to recommend to the Supreme Court policies, procedures, strategies, and methods for easing the backlog of pending residential mortgage foreclosure cases while protecting the rights of parties." *In re Task Force on Residential Mortgage Foreclosure Cases*, Fla. Admin. Order No. AOSC09-8, at 2 (March 27, 2009) (on file with Clerk of the Florida Supreme Court). The recommendations could "include mediation and other alternate dispute resolution strategies, case management techniques, and approaches to providing *pro bono* or low-cost legal assistance to homeowners." *Id.* The Task Force was also specifically asked to "examine existing court rules and propose new rules or rule changes that will facilitate early, equitable resolution of residential mortgage foreclosure cases." *Id.*

In response to this charge, the Task Force has filed a petition proposing amendments to the civil procedure rules and forms.[1] After submission to the Court, the proposals were published for comment on an expedited basis. Comments were received from Legal Services of Greater Miami, the Florida Justice Institute and Florida Legal Services, Inc; the Housing and Consumer Umbrella Groups of Florida Legal Services; Legal Services of North Florida, Inc., and North Florida Center for Equal Justice, Inc.; the Florida Bankers Association; Florida Default Law Group; Ben-Ezra & Katz, P.A.; Thomas H. Bateman III and Janet E. Ferris; Henry P. Trawick, Jr.; and Lisa Epstein. Oral argument was heard in this matter on November 4, 2009. Upon consideration of the Task Force's petition, the comments filed and responses thereto, and the presentations of the parties at oral argument, we adopt the Task Force's proposals with minor modifications as discussed below.

First, rule 1.110(b) is amended to require verification of mortgage foreclosure complaints involving residential real property. The primary purposes of this amendment are (1) to provide incentive for the plaintiff to appropriately investigate and verify its ownership of the note or right to enforce the note and ensure that the allegations in the complaint are accurate; (2) to conserve judicial resources that are currently being wasted on inappropriately pleaded "lost note" counts and inconsistent allegations; (3) to prevent the wasting of judicial resources and harm to defendants resulting from suits brought by plaintiffs not entitled to enforce the note; and (4) to give trial courts greater authority to sanction plaintiffs who make false allegations.

Next, the Task Force proposed a new form Affidavit of Diligent Search and Inquiry. In its petition, the Task Force explained that many foreclosure cases are served by publication. The new form is meant to help standardize affidavits of diligent search and inquiry and provide information to the court regarding the methods used to attempt to locate and serve the defendant. We adopt this form as new form 1.924, with several modifications.

The form, as proposed by the Task Force, provides spaces for the affiant to check off, from a list, the various actions taken to discover the current residence of the defendant and provides a "catch-all" section where the affiant can "List all additional efforts made to locate defendant." Additionally, it provides a section where the affiant can describe "Attempts to Serve Process and Results." One comment to this form, voiced by several interested parties, was that the form should be signed by the person actually performing the diligent search and inquiry, likely a process server, rather than the plaintiff as the form,

as originally proposed, provided. The Task Force agreed with this comment. Thus, we modify the form to incorporate this change.

Next, although the Task Force stated in its petition that a significant provision of the new form was the "additional criteria [sic] that if the process server serves an occupant in the property, he inquires of that occupant whether he knows the location of the borrower-defendant," the proposed form does not include this provision. The Honorable Thomas McGrady, Chief Judge of the Sixth Judicial Circuit, raised this point in his comment and suggested the following provision be added to the form: "I inquired of the occupant of the premises whether the occupant knows the location of the borrower-defendant, with the following results: _____." Again, the Task Force agreed with this suggestion, and we modify the form to incorporate it.

Finally, section 49.041, Florida Statutes (2009), sets forth the minimum requirements for an affidavit of diligent search and inquiry and states as follows:

> The sworn statement of the plaintiff, his or her agent or attorney, for service of process by publication against a natural person, shall show:
>
> (1) That diligent search and inquiry have been made to discover the name and residence of such person, and that the same is set forth in said sworn statement as particularly as is known to the affiant; and
>
> (2) Whether such person is over or under the age of 18 years, if his or her age is known, or that the person's age is unknown; and
>
> (3) In addition to the above, that the residence of such person is, either:
>
> (a) Unknown to the affiant; or
>
> (b) In some state or country other than this state, stating said residence if known; or
>
> (c) In the state, but that he or she has been absent from the state for more than 60 days next preceding the making of the sworn statement, or conceals himself or herself so that process cannot be personally served, and that affiant believes that there is no person in the state upon whom service of process would bind said absent or concealed defendant.

§ 49.041, Fla. Stat. (2009). The form as proposed by the Task Force contains the required information, except for a statement whether the person is over or under the age of eighteen or that the person's age is unknown. Thus, we modify the affidavit form to include this information.

Finally, we adopt the Task Force's proposed Motion to Cancel and Reschedule Foreclosure Sale as new form 1.996(b). The Task Force recommended adoption of this new form in which the plaintiff would provide the court with an explanation of why the foreclosure sale needs to be cancelled and request that the court reschedule the sale. As the reason for this proposal, the Task Force stated in its petition:

> Currently, many foreclosure sales set by the final judgment and handled by the clerks of court are the subject of vague last-minute motions to reset sales without giving any specific information as to why the sale is being reset. It is important to know why sales are being reset so as to determine when they can properly be reset, or whether the sales process is being abused. . . . Again, this is designed at promoting effective case management and keeping properties out of extended limbo between final judgment and sale.

We adopt this form with minor stylistic and grammatical modifications as suggested in the comments and agreed to by the Task Force.

Case No. SC09-1579

In this case, the Civil Procedure Rules Committee has filed an out-of-cycle report under Florida Rule of Judicial Administration 2.140(e), proposing amendments to Florida Rule of Civil Procedure Form 1.996 (Final Judgment of Foreclosure). The Committee proposes amendments to this form in order to bring it into conformity with current statutory provisions and requirements. The Committee's proposal also includes several changes suggested by The Florida Bar's Real Property, Probate, and Trust Law Section to improve the form's clarity and readability and better conform to prevailing practices in the courts.[2] Upon consideration, we adopt the proposed amendments to form 1.996, with one exception, as further explained below.

First, to conform to current statutory requirements, a notice to lienholders and directions to property owners as to how to claim a right to funds remaining after public auction is added to the form. *See* § 45.031(1), Fla. Stat. (2009). Additionally, to conform to current statutory provisions allowing the clerk of court to conduct judicial sales via electronic means, the form is amended to accommodate this option. *See* § 45.031(10), Fla. Stat. (2009).

Other amendments are as follows: (1) in order to provide greater clarity and prevent errors, paragraph one of the form is amended to set out amounts due in a column format; (2) paragraph two is amended to allow for the possibility that there may be more than one defendant, and out of concern for privacy interests, the lines for an address and social security number are deleted; (3) paragraph four is amended to conform to existing practice and require a successful purchaser to pay the documentary stamps on the certificate of title; (4) paragraph six is amended to accommodate the possibility that there may be multiple defendants, to adapt to the requirements of section 45.0315, Florida Statutes (2009), stating that the right of redemption expires upon the filing of the certificate of sale, unless otherwise specified in the judgment, to recognize the potential survival of certain liens after foreclosure as provided in chapter 718 (the Condominium Act) and chapter 720 (Homeowners' Association), Florida Statutes (2009), and to allow a purchaser to obtain a writ of possession from the clerk of court without further order of the court.[3] As noted, these amendments were suggested to the committee by The Florida Bar's Real Property, Probate, and Trust Law Section to improve the form's clarity and readability and better conform to prevailing practices in the courts.

However, one of the changes suggested by the Real Property, Probate, and Trust Law Section and incorporated by the committee into its proposal was the addition of a new paragraph stating that a foreclosure sale shall not begin until a representative of the plaintiff is present and that the plaintiff has the right to cancel the sale upon notice to the clerk. Obviously, including such a provision, as standard, in the final judgment of foreclosure form would be at odds with our adoption of new form 1.996(b) (Motion to Cancel and Reschedule Foreclosure Sale). Accordingly, we decline to adopt this particular amendment. Also, in light of our adoption of the Motion to Cancel and Reschedule Foreclosure Sale as new form 1.996(b), we renumber the Final Judgment of Foreclosure Form as form 1.996(a).

Conclusion

Accordingly, the Florida Rules of Civil Procedure and the Forms for Use with Rules of Civil Procedure are hereby amended as set forth in the appendix to this opinion. New language is underscored; deleted language is struck through. Committee notes are offered for explanation only and are not adopted as an official part of the rules. The amendments shall become effective immediately upon the release of this opinion. Because the amendments to form 1.996(a) (Final Judgment of Foreclosure) were not published by the Court for comment prior to their adoption, interested persons shall have sixty days from the date of this opinion in which to file comments, on those amendments only, with the Court.[4]

It is so ordered. (QUINCE, C.J., and PARIENTE, LEWIS, LABARGA, and PERRY, JJ., concur. CANADY, J., concurs in part and dissents in part with an opinion, in which POLSTON, J., concurs.)

[1]The Task Force also submitted a companion report entitled "Final Report and Recommendations on Residential Mortgage Foreclosure Cases." The report urges the adoption of the proposed rule amendments and also contains administrative recommendations. The main recommendation in the report is the approval of a Model Administrative Order for a managed mediation program for residential mortgage foreclosure actions for use by the chief judges. The report was addressed separately as an administrative matter. The task forces petition also recommended amendments to form 1.997 (Civil Coversheet). However, the civil coversheet was the subject of another case, case number SC08-1141, and the Task Force's proposals with regard to the civil

16TH CIR 00326

coversheet were addressed in that case. *See In re Amendments to Florida Rules of Civil Procedure—Management of Cases Involving Complex Litigation*, 34 Fla. L. Weekly S576 (Fla. Oct. 15, 2009).

[2]Prior to submitting this proposal to the Court, the committee published it for comment. One comment was received suggesting that, in addition to the other amendments proposed by the committee, provisions for specific findings as to the reasonable number of hours and the reasonable hourly rate for an award of attorneys' fees be added to paragraph one of the form. The committee initially took the position that the comment suggested a change unrelated to its proposed amendments and that the committee would consider it in its 2013 regular-cycle report. Subsequently, however, the committee filed an additional response in which it agreed with the comment and recommended that the suggested change be made in this case. We agree with the committee that this additional change is appropriate and, accordingly, we include it in the amendments adopted in this case.

[3]An explanatory committee note is also added.

[4]An original and nine paper copies of all comments must be filed with the Court on or before April 12, 2010, with a certificate of service verifying that a copy has been served on the Committee Chair, Mark A. Romance, 201 S. Biscayne Blvd, Suite 1000, Miami, FL 33131-4327, as well as separate request for oral argument if the person filing the comment wishes to participate in oral argument, which may be scheduled in this case. The Committee Chair has until May 3, 2010, to file a response to any comments filed with the Court. Electronic copies of all comments and responses also must be filed in accordance with the Court's administrative order in *In re Mandatory Submission of Electronic Copies of Documents*, Fla. Admin. Order No. AOSC04-84 (Sept. 13, 2004).

(CANADY, J., concurring in part and dissenting in part.) Because I am concerned that requiring prior judicial approval for the cancellation of foreclosure sales may produce untoward results, I dissent from the adoption of form 1.996(b). I would have instead adopted the proposal suggested by the Real Property, Probate, and Trust Law Section for the addition of a paragraph to the form final judgment of foreclosure stating that a foreclosure sale shall not begin until a representative of the plaintiff is present and that the plaintiff has the right to cancel the sale upon notice to the clerk. (POLSTON, J., concurs.)

APPENDIX

RULE 1.110. GENERAL RULES OF PLEADING

(a) [no change]

(b) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, must state a cause of action and shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader deems himself or herself entitled. Relief in the alternative or of several different types may be demanded. Every complaint shall be considered to demand general relief.

When filing an action for foreclosure of a mortgage on residential real property the complaint shall be verified. When verification of a document is required, the document filed shall include an oath, affirmation, or the following statement:

"Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief."

(c) - (h) [no change]

Committee Notes

[no change]

FORM 1.942. AFFIDAVIT OF DILIGENT SEARCH AND INQUIRY

I, *(full legal name)* _____ (individually or an Employee of _____), being sworn, certify that the following information is true:

1. I have made diligent search and inquiry to discover the current residence of _____, who is [over 18 years old] [under 18 years old] [age is unknown] (circle one). Refer to checklist below and identify all actions taken (any additional information included such as the date the action was taken and the person with whom you spoke is helpful) (attach additional sheet if necessary):

[check all that apply]

_____ Inquiry of Social Security Information

_____ Telephone listings in the last known locations of defendant's residence

_____ Statewide directory assistance search

_____ Internet people finder search {specify sites searched}

_____ Voter Registration in the area where defendant was last known to reside.

_____ Nationwide Masterfile Death Search

_____ Tax Collector's records in area where defendant was last known to reside.

_____ Tax Assessor's records in area where defendant was last known to reside

_____ Department of Motor vehicle records in the state of defendant's last known address

_____ Driver's License records search in the state of defendant's last known address.

_____ Department of Corrections records in the state of defendant's last known address.

_____ Federal Prison records search.

_____ Regulatory agencies for professional or occupational licensing.

_____ Inquiry to determine if defendant is in military service.

_____ Last known employment of defendant.

{List all additional efforts made to locate defendant}

_____

_____

_____

_____

Attempts to Serve Process and Results

_____

_____

_____

_____

_____ I inquired of the occupant of the premises whether the occupant knows the location of the borrower-defendant, with the following results:

_____

_____

_____

_____

2. _____ current residence

[check one only]

a. _____'s current residence is unknown to me

b. _____'s current residence is in some state or country other than Florida and _____'s last known address is:

_____

_____

c. The _____, having residence in Florida, has been absent from Florida for more than 60 days prior to the date of this affidavit, or conceals him (her) self so that process cannot be served personally upon him or her, and I believe there is no person in the state upon whom service of process would bind this absent or concealed _____.

I understand that I am swearing or affirming under oath to the truthfulness of the claims made in this affidavit and that the punishment for knowingly making a false statement includes fines

and/or imprisonment.

Dated: _____

Signature of Plaintiff
Printed Name: _____
Address: _____
City, State, Zip: _____
Phone: _____
Telefacsimile: _____

STATE OF _____
COUNTY OF _____
Sworn to or affirmed and signed before me on this _____ day of _____, 20__ by _____.

_____
NOTARY PUBLIC, STATE OF _____

_____
(Print, Type or Stamp Commissioned Name of Notary Public)

_____ Personally known
_____ Produced identification
_____ Type of identification produced: _____

NOTE: This form is used to obtain constructive service on the defendant.

FORM 1.996(a). FINAL JUDGMENT OF FORECLOSURE

FINAL JUDGMENT

This action was tried before the court. On the evidence presented IT IS ADJUDGED that:

1. Plaintiff, ...(name and address). . . . ., is due ~~.....as principal, $.....as interest to date of this judgment, $..... for title search expense, $..... for taxes, $..... for insurance premiums, $..... for attorneys' fees, with $..... for court costs now taxed, less $..... for undisbursed escrow funds and less $..... for unearned insurance premiums, under the note and mortgage sued on in this action, making a total sum of $....., that shall bear interest at the rate of .....% a year:~~

Principal	$.....
Interest to date of this judgment	.....
Title search expense	.....
Taxes	.....
Attorneys' fees	
Finding as to reasonable number of hours:	.....
Finding as to reasonable hourly rate:	.....
Attorneys' fees total	.....
Court costs, now taxed	.....
Other:.....	.....
Subtotal	$.....
LESS: Escrow balance	.....
LESS: Other.....	.....
TOTAL	$.....

that shall bear interest at the rate of .....% a year.

2. Plaintiff holds a lien for the total sum superior to anyall claims or estates of defendant(s), ~~.....(name and address, and social security number if known).....,~~ on the following described property in ..... County, Florida:

(describe property)

3. If the total sum with interest at the rate described in paragraph 1 and all costs accrued subsequent to this judgment are not paid, the clerk of this court shall sell the property at public sale on .....(date)....., ~~between 11:00 a.m. and 2:00 p.m.~~ to the highest bidder for cash, except as prescribed in paragraph ~~4~~5, at the ~~.....~~ door of the courthouse in located at .....(street address of courthouse)..... in ..... County in _____.....(name of city)....., Florida, in accordance with section 45.031, Florida Statutes, using the following method (CHECK ONE):

☐ At .....(location of sale at courthouse; *e.g.*, north door)..... beginning at .....(time of sale)..... on the prescribed date.

☐ By electronic sale beginning at .....(time of sale)..... on the prescribed date at .....(website).....

4. Plaintiff shall advance all subsequent costs of this action and shall be reimbursed for them by the clerk if plaintiff is not the purchaser of the property for sale, provided, however, that the purchaser of the property for sale shall be responsible for the documentary stamps payable on the certificate of title. If plaintiff is the purchaser, the clerk shall credit plaintiff's bid with the total sum with interest and costs accruing subsequent to this judgment, or such part of it, as is necessary to pay the bid in full.

5. On filing the certificate of title the clerk shall distribute the proceeds of the sale, so far as they are sufficient, by paying: first, all of plaintiff's costs; second, documentary stamps affixed to the certificate; third, plaintiff's attorneys' fees; fourth, the total sum due to plaintiff, less the items paid, plus interest at the rate prescribed in paragraph 1 from this date to the date of the sale; and by retaining any remaining amount pending the further order of this court.

6. On filing the certificate of title~~sale~~, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed of all estate or claim in the property ~~and the purchaser at the sale~~, except as to claims or rights under chapter 718 or chapter 720, Florida Statutes, if any. Upon the filing of the certificate of title, the person named on the certificate of title shall be let into possession of the property. If any defendant remains in possession of the property, the clerk shall without further order of the court issue forthwith a writ of possession upon request of the person named on the certificate of title.

7. Jurisdiction of this action is retained to enter further orders that are proper including, without limitation, ~~writs of possession and a~~ deficiency judgment.

IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THE FINAL JUDGMENT.

IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS.

[If the property being foreclosed on has qualified for the homestead tax exemption in the most recent approved tax roll, the final judgment shall additionally contain the following statement in conspicuous type:]

IF YOU ARE THE PROPERTY OWNER, YOU MAY CLAIM THESE FUNDS YOURSELF. YOU ARE NOT REQUIRED TO HAVE A LAWYER OR ANY OTHER REPRESENTATION AND YOU DO NOT HAVE TO ASSIGN YOUR RIGHTS TO ANYONE ELSE IN ORDER FOR YOU TO CLAIM ANY MONEY TO WHICH YOU ARE ENTITLED. PLEASE CHECK WITH THE CLERK OF THE COURT, (INSERT INFORMATION FOR APPLICABLE COURT) WITHIN 10 DAYS AFTER THE SALE TO SEE IF THERE IS ADDITIONAL MONEY FROM THE FORECLOSURE SALE THAT THE CLERK HAS IN THE REGISTRY OF THE COURT.

IF YOU DECIDE TO SELL YOUR HOME OR HIRE SOMEONE TO HELP YOU CLAIM THE ADDITIONAL MONEY,

16TH CIR 00328

YOU SHOULD READ VERY CAREFULLY ALL PAPERS YOU ARE REQUIRED TO SIGN, ASK SOMEONE ELSE, PREFERABLY AN ATTORNEY WHO IS NOT RELATED TO THE PERSON OFFERING TO HELP YOU, TO MAKE SURE THAT YOU UNDERSTAND WHAT YOU ARE SIGNING AND THAT YOU ARE NOT TRANSFERRING YOUR PROPERTY OR THE EQUITY IN YOUR PROPERTY WITHOUT THE PROPER INFORMATION. IF YOU CANNOT AFFORD TO PAY AN ATTORNEY, YOU MAY CONTACT (INSERT LOCAL OR NEAREST LEGAL AID OFFICE AND TELEPHONE NUMBER) TO SEE IF YOU QUALIFY FINANCIALLY FOR THEIR SERVICES. IF THEY CANNOT ASSIST YOU, THEY MAY BE ABLE TO REFER YOU TO A LOCAL BAR REFERRAL AGENCY OR SUGGEST OTHER OPTIONS. IF YOU CHOOSE TO CONTACT (NAME OF LOCAL OR NEAREST LEGAL AID OFFICE AND TELEPHONE NUMBER) FOR ASSISTANCE, YOU SHOULD DO SO AS SOON AS POSSIBLE AFTER RECEIPT OF THIS NOTICE.

ORDERED at....., Florida, on.....(date).....

Judge

NOTE: Paragraph 1 must be varied in accordance with the items unpaid, claimed, and proven. The form does not provide for an adjudication of junior lienors' claims nor for redemption by the United States of America if it is a defendant. The address of the person who claims a lien as a result of the judgment must be included in the judgment in order for the judgment to become a lien on real estate when a certified copy of the judgment is recorded. Alternatively, an affidavit with this information may be simultaneously recorded. For the specific requirements, see section 55.10(1), Florida Statutes; *Hott Interiors, Inc. v. Fostock*, 721 So. 2d 1236 (Fla. 4th DCA 1998). ~~The address and social security number (if known) of each person against whom the judgment is rendered must be included in the judgment, pursuant to section 55.01(2), Florida Statutes.~~

Committee Notes

1980 Amendment. The reference to writs of assistance in paragraph 7 is changed to writs of possession to comply with the consolidation of the 2 writs.

2010 Amendment. Mandatory statements of the mortgagee/property owner's rights are included as required by the 2006 amendment to section 45.031, Florida Statutes. Changes are also made based on 2008 amendments to section 45.031, Florida Statutes, permitting courts to order sale by electronic means.

Additional changes were made to bring the form into compliance with chapters 718 and 720 and section 45.0315, Florida Statutes, and to better align the form with existing practices of clerks and practitioners. The breakdown of the amounts due is now set out in column format to simplify calculations. The requirement that the form include the address and social security number of all defendants was eliminated to protect the privacy interests of those defendants and in recognition of the fact that this form of judgment does not create a personal final money judgment against the defendant borrower, but rather an in rem judgment against the property. The address and social security number of the defendant borrower should be included in any deficiency judgment later obtained against the defendant borrower.

FORM 1.996(b). MOTION TO CANCEL AND RESCHEDULE FORECLOSURE SALE

Plaintiff moves to cancel and reschedule the mortgage foreclosure sale because:

1. On this Court entered a Final Judgment of Foreclosure pursuant to which a foreclosure sale was scheduled for , 20 .

2. The sale needs to be canceled for the following reason(s):

a. Plaintiff and Defendant are continuing to be involved in loss mitigation;

b. Defendant is negotiating for the sale of the property that is the subject of this matter and Plaintiff wants to allow the Defendant an opportunity to sell the property and pay off the debt that is due and owing to Plaintiff.

c. Defendant has entered into a contract to sell the property that is the subject of this matter and Plaintiff wants to give the Defendant an opportunity to consummate the sale and pay off the debt that is due and owing to Plaintiff.

d. Defendant has filed a Chapter Petition under the Federal Bankruptcy Code;

e. Plaintiff has ordered but has not received a statement of value/appraisal for the property;

f. Plaintiff and Defendant have entered into a Forbearance Agreement;

g. Other

3. If this Court cancels the foreclosure sale, Plaintiff moves that it be rescheduled.

I hereby certify that a copy of the foregoing Motion has been furnished by U.S. mail postage prepaid, facsimile or hand delivery to this day of , 20 .

NOTE. This form is used to move the court to cancel and reschedule a foreclosure sale.

* * *

Elections—Counties—Florida Election Code does not preempt the field of elections law—Section of amendment to county charter that provides that no voting system can be used in elections that does not provide a voter verified paper ballot does not conflict with Election Code—Section of amendment that requires mandatory, independent, and random audits of voting system does not conflict with Election Code—Section of amendment setting forth procedure for certification of election results conflicts with Election Code and is unconstitutional—Unconstitutional section of amendment is severable from remainder of amendment

SARASOTA ALLIANCE FOR FAIR ELECTIONS, INC., etc., et al., Petitioners, vs. KURT S. BROWNING, etc., et al., Respondents. Supreme Court. Case No. SC07-2074. February 11, 2010. Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. Second District - Case No. 2D06-4339, Sarasota County. Counsel: Thomas D. Shults and Zachary L. Ross of Kirk Pinkerton, P.A., Sarasota, for Petitioners. Peter Antonacci and Allen Winsor of Gray Robinson, P.A., Tallahassee; Ronald A. Labasky and John T. LaVia, III of Young Van Assenderp, P.A., Tallahassee; and Stephen E. De Marsh, County Attorney, Frederick J. Elbrecht, Deputy County Attorney, and Scott T. Bossard, Assistant County Attorney, Board of County Commissioners, Sarasota, for Respondents

(QUINCE, C.J.) This case is before the Court for review of the decision of the Second District Court of Appeal in *Browning v. Sarasota Alliance for Fair Elections, Inc.*, 968 So. 2d 637 (Fla. 2d 2007). In its decision the district court ruled upon the following question, which the court certified to be of great public importance:

> IS THE LEGISLATIVE SCHEME OF THE FLORIDA ELECTION CODE SUFFICIENTLY PERVASIVE, AND ARE THE PUBLIC POLICY REASONS SUFFICIENTLY STRONG, TO FIND THAT THE FIELD OF ELECTIONS LAW HAS BEEN PREEMPTED, PRECLUDING LOCAL LAWS REGARDING THE COUNTING, RECOUNTING, AUDITING, CANVASSING, AND CERTIFICATION OF VOTES?

Id. at 654. We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const.

For the reasons set forth below, we conclude that the Florida Election Code does not preempt the field of elections law and answer the certified question in the negative. As explained below, we quash that portion of the Second District's decision that finds preemption, but approve the court's conclusion that portions of the proposed

Mortgage foreclosure—Intervention—Assignee of second mortgage—Trial court abused its discretion in granting motion to intervene filed by assignee of second mortgage after final judgment of foreclosure of first mortgage and sale of property to owner of first mortgage and note, and in directing the clerk of court to issue certificate of title to assignee, despite assignment's erroneous reference to public records book and page number of the first mortgage instead of the correct second mortgage book and page number—Assignee received only the rights it would have had under the assignment of mortgage it received from assignor, and assignor only possessed rights of a second mortgage holder—It was error to grant post judgment motion to intervene where granting of motion injuriously affected original parties

U.S. BANK NATIONAL ASSOCIATION, as trustee, on behalf of the holders of the Home Equity Asset Equity Pass-Through Certificates, Series 2005-2, Appellant, vs. DAVID TAYLOR, a/k/a David M. Taylor, et al., Appellees. 3rd District. Case No. 3D09-694. L.T. Case No. 2006CA711-K. Opinion filed February 10, 2010. An Appeal of a non-final order from the Circuit Court for Monroe County, Mark H. Jones, Judge. Counsel: Lapin & Leichtling and Jonathan R. Rosenn and Jeffrey S. Lapin, for appellant. John L. Penson (Bay Harbor Islands), for appellees.

(Before RAMIREZ, C.J., GERSTEN and SUAREZ, JJ.)

(SUAREZ, J.) U.S. Bank National Association ("U.S. Bank") appeals a non-final order granting a post-judgment motion to intervene. After final judgment of foreclosure and sale of property to U.S. Bank, the owner of the first mortgage and note, the trial court granted Northview Equities, LLC's ("Northview") motion to intervene and ordered the clerk of the court to issue title to Northview. We reverse the grant of Northview's motion to intervene and the direction to the clerk to issue the certificate of title to Northview, as Northview was assigned a second mortgage and not the first mortgage, which was owned by U.S. Bank.

FACTS

This case arises out of a residential foreclosure of a first mortgage brought by U.S. Bank, the owner of the note and first mortgage. The first mortgage referenced a note in the amount of $518,000.00 and an identification number ending in 6895. U.S. Bank's loan servicer executed a second mortgage, which stated that it was "subordinate to an existing first lien of record" and was referenced by an identification number ending in 6903. U.S. Bank obtained a final judgment of foreclosure against the borrower, David Taylor, based upon the note and first mortgage. The second mortgage was assigned to Asset Management Holdings, Inc. ("Asset"), and referenced the identification number ending in 6903. Asset then assigned the same mortgage to Northview.[1] Northview claimed title to the property based on the fact that, when U.S. Bank's loan servicer assigned the second mortgage to Asset, although the assignment itself referenced the correct identification number of the second mortgage, 6903, and the second mortgage stated that it was "subordinate to an existing first lien of record," the assignment was erroneously filled out by incorrectly substituting the Monroe County official records book and page number of the first mortgage instead of the correct second mortgage book and page number. Asset's execution of the assignment, referencing the incorrect book and page number of the first mortgage, to Northview is the basis of Northview's claim.

TRIAL COURT PROCEDURE

After the property was foreclosed upon, the owner of the first mortgage, U.S. Bank, bought the property at the foreclosure sale. Almost eight months after final judgment of foreclosure had been entered in favor of U.S. Bank and after the purchase by U.S. Bank at the foreclosure sale, but prior to the issuance of the certificate of title, Northview moved to intervene. Northview's theory was that the assignment it received from Asset was an assignment of the first mortgage because the document showed the Monroe County official records book and page number of the first mortgage giving it priority in title over U.S. Bank. The trial court allowed Northview to intervene and the trial court directed the clerk of the court to issue the certificate of title to Northview. U.S. Bank filed this interlocutory appeal. W find that the trial court abused its discretion in granting the motion t intervene and directing the clerk of the court to issue the certificate o title to Northview.

ANALYSIS

The trial court's order granting Northview's motion to intervene i reviewed for an abuse of discretion. *Barnhill v. Fla. Microsoft Anti Trust Lit.*, 905 So. 2d 195 (Fla. 3d DCA 2005). The portion of the tria court's order which directs the clerk to issue the certificate of title t Northview is reviewed *de novo* since it involves questions of law an the construction of written instruments. *Aronson v. Aronson*, 930 So 2d 766 (Fla. 3d DCA 2006).

The general law is that an assignee of a mortgage receives only those rights and benefits which are available to its assignor. *Dubbin v. Capital Nat'l Bank*, 264 So. 2d 1 (Fla. 1972). Under the facts before us, the assignee, Northview, received only the rights it would have had under the assignment of mortgage it received from Asset. Asset only possessed the rights of a second mortgage holder, as referenced by the amount of $148,000.00 "subordinate to an existing first lien of record" and identification number 6903. The facts that the second mortgage, held by Asset and assigned to Northview, had a different identification number than the first mortgage, and the second mortgage referenced $148,000, "subordinate to an existing first lien of record," serve to corroborate the conclusion that Northview received a second mortgage and not a first mortgage despite the erroneous book and page numbers. Had Northview executed a diligent search of the public records, barring the fact that the book and page numbers on the two mortgages were reversed, it would have become aware that there was a second mortgage on the property which was subordinate to the first. *See Graham v. Commonweath Life Ins. Co.*, 154 So. 335 (Fla. 1934); (holding that where a purchase money mortgage stated it was second mortgage, but incorrectly designated the first mortgagee, and the assignee had actual and constructive notice of a subordination agreement, the mortgagee of the building construction loan was entitled to priority over the assignee of the purchase money mortgage); *see also Crenshaw v. Holzberg*, 503 So. 2d 1275, 1277 (Fla. 2d DCA 1987) ("[A]n instrument of record is notice not only of its own existence and contents, but also of other facts that would have been learned from the record if it had been examined and that inquiry suggested by it would have disclosed."). Northview's argument that it was a bona fide purchaser fails because "[a]n assignee is not protected as against the equities of third persons if the assignment was . . . after the maturity of the debt secured." *Hulet v. Denison*, 1 So. 2d 467, 482 (Fla. 1941); *see Vance v. Fields*, 172 So. 2d 613 (Fla. 1st DCA 1965) (holding that purported assignee of mortgage without assignment of note creates no right in plaintiffs and recording gives no priority as against subsequent sale and delivery of note).

The trial court abused its discretion in granting Northview's motion to intervene. A post judgment motion to intervene is rarely, if ever, granted and only if the intervention will not injuriously affect the original litigants. In this case, the trial court abused its discretion since the granting of the post judgment motion to intervene did injuriously affect the original parties. *See Dickinson v. Segal*, 219 So. 2d 435 (Fla. 1969) (post-judgment intervention not permitted once litigation has resulted in final judgment); *see also Svadbik v. Svadbik*, 776 So. 2d 968 (Fla. 3d DCA 2000) (affirming denial of motion to intervene post judgment); *Idacon, Inc. v. Hawes*, 432 So. 2d 759 (Fla. 1st DCA 1983) (reversing order granting motion to intervene after final judgment of foreclosure had been entered and after judicial sale); *Lewis v. Turlington*, 499 So. 2d 905 (Fla. 1st DCA 1986) (trial court abused its discretion in allowing third parties to intervene after entry of final order).

We reverse the trial court's grant of Northview's motion to intervene and the direction to the clerk to issue title in Northview's name. We remand to the trial court to issue title in the name of U.S.

Bank.

Reversed and remanded with directions.

[1]The note was never delivered.

* * *

Criminal law—Juveniles—Probation revocation—No error in finding that juvenile willfully violated probation by failing to abide by curfew and appear for scheduled intake at Dade Marine Institute—Error to find juvenile violated probation by failing to live with mother and failing to regularly attend school where juvenile was not advised of those conditions—Where juvenile was given form order of probation, and some of the conditions were checked off while others were not, it was, at best, unclear that juvenile was required to comply with unchecked conditions—Because failure to report to Dade Marine Institute was substantial violation of probation, and this violation alone was sufficient to sustain revocation, remand for reconsideration by trial court is not necessary

E.J., a juvenile, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 3D09-1597. L. T. Case Nos. 07-4252-B, 07-7628, 07-7390-C, 07-7473-A, 07-7474-B. Opinion filed February 10, 2010. An Appeal from the Circuit Court for Miami-Dade County, Spencer Eig, Judge. Counsel: Carlos J. Martinez, Public Defender, and Howard K. Blumberg, Assistant Public Defender, for appellant. Bill McCollum, Attorney General, and Forrest L. Andrews, Jr., Assistant Attorney General, for appellee.

(Before SHEPHERD, SUAREZ, and ROTHENBERG, JJ.)

(ROTHENBERG, J.) The appellant, E.J., entered a plea of nolo contendere and an adjudication of delinquency was withheld on June 24, 2008, to burglary in Case No. J07-4252(B), grand theft in Case No. J07-7628, burglary of an unoccupied structure as a lesser included offense of burglary of a dwelling in Case No. J07-7611(C), grand theft of a firearm in Case No. J07-7473(A), criminal mischief in Case No. J07-7390(C), and burglary of an unoccupied structure as a lesser included offense of burglary of a dwelling in Case No. J07-7474(B). Based upon E.J.'s plea, the State nolle prossed numerous other counts including armed burglary (punishable by up to life in prison), and he was placed on probation.

On or about October 29, 2008, a probation affidavit was filed, alleging that E.J. violated his probation by: failing to reside in the home of his mother; violating his curfew; failing to attend school; and failing to appear for his scheduled intake at the Dade Marine Institute. The trial court conducted a probation violation hearing and found that the State proved by a preponderance of the evidence each of the violations alleged in the affidavit, and adjudicated E.J. delinquent. Although we conclude that the trial court erred in finding that E.J. violated his probation for failing to reside with his mother or to attend school, we affirm the remainder of the order under review and the finding that E.J. willfully violated his probation by failing to abide by his curfew and appear for his scheduled intake at the Dade Marine Institute.

A review of the orders placing E.J. on probation reflects that E.J. was not advised that as a condition of his probation he must live with his mother or regularly attend school. The probation order specifies that E.J. live and reside in the home of "parent(s)." E.J. testified that he lived and resided with his father when he did not live with or reside with his mother. Because his testimony was unrefuted and the probation order did not require that he live with and reside in only his mother's home, we conclude that the trial court erred when it included this ground as one of the conditions of probation E.J. violated.

Likewise, while the probation order specifically lists attending school every day as a condition of probation, this condition, unlike many of the other listed conditions of probation contained in the order, was not checked off, thereby inferring that the trial court did not intend to make school attendance a condition of E.J.'s probation. We recognize that general conditions of probation explicitly authorized or mandated by Florida Statutes need not be orally pronounced at sentencing. *See State v. Hart*, 668 So. 2d 589, 592 (Fla. 1996) (stating that " 'general conditions' of probation are those contained within the statutes. . . . [and] may be imposed and included in a written order of probation even if not orally pronounced at sentencing"); *D.P.B. v. State*, 877 So. 2d 770, 772 (Fla. 4th DCA 2004) (holding that so long as a condition of probation is explicitly authorized or mandated by Florida Statutes, it is not mandatory that the trial court orally advise the defendant of the condition). However, where, as here, a juvenile probationer is given a form order of probation and some of the conditions are checked off and others are not, we conclude it was unclear, at best, that the probationer was being required to comply with the unchecked conditions.

Although we conclude that the trial court erred by finding that E.J. violated his probation by failing to reside in his mother's home and by not regularly attending school, we affirm the portion of the trial court's order finding that E.J. willfully violated his probation by failing to comply with his curfew and by failing to attend the scheduled intake appointment for the Dade Marine Institute. E.J.'s probation officer testified that he personally visited the Dade Marine Institute and determined that E.J. never appeared for his intake as ordered and E.J. admitted under oath at the probation violation hearing that he did not appear for his intake or attend the Dade Marine Institute. E.J.'s probation officer additionally testified that according to E.J.'s mother, E.J. violated his curfew on four occasions.

Because E.J.'s remaining violations were not based solely on hearsay, *see Crawford v. State*, 982 So. 2d 1, 2 (Fla. 2d DCA 2008) (reversing the trial court's order finding the defendant in violation of his probation based solely on hearsay testimony), and these violations were proven by a preponderance of the evidence, we affirm the findings by the trial court as to those violations. *See E.P. v. State*, 901 So. 2d 193, 195 (Fla. 4th DCA 2005) (holding that the State need only establish a violation by a preponderance of the evidence); *Wilson v. State*, 781 So. 2d 1185, 1187 (Fla. 4th DCA 2001) (noting that whether a violation of probation is willful and substantial is a factual issue that cannot be overturned on appeal unless there is no evidence to support it); *Alvarez v. State*, 638 So. 2d 992, 993 (Fla. 3d DCA 1994) (affirming the revocation of the defendant's probation for failing to attend her first probation appointment and making no attempt thereafter to schedule a meeting with her probation officer).

Because failure to report to the Dade Marine Institute is a substantial violation of E.J.'s probation, and this violation alone is sufficient to sustain a revocation of his probation, remand for reconsideration by the trial court is not required. *See Matos v. State*, 956 So. 2d 1240, 1240 (Fla. 4th DCA 2007) (affirming revocation of community control after striking some of the violations but finding other violations were supported by the evidence); *Butler v. State*, 932 So. 2d 306, 307 (Fla. 2d DCA 2006) (recognizing that when an appellate court reverses on a finding regarding one of the conditions of community control, remand is not required if the remaining violation or violations are substantial); *Rawlins v. State*, 711 So. 2d 137, 137 (Fla. 5th DCA 1998) (finding unexcused absences from a treatment program, standing alone, may constitute a material violation); *Johnson v. State*, 667 So. 2d 475, 475 (Fla. 3d DCA 1996) (finding that the defendant's failure to attend G.E.D. classes, standing alone, was sufficient to revoke his probation).

In conclusion, because there are other substantial violations remaining, and they are supported by competent substantial evidence, we affirm the trial court's order revoking E.J.'s probation.

Affirmed.

* * *

In this case, unlike *Linn*, the state presented evidence that was inconsistent with appellee's explanation. Appellee claimed he informed the teller he was concerned about whether the check was real and asked the teller to verify it. The teller testified that appellee did not tell her he was concerned about the validity of the check and had not asked her to verify its validity. Here, the teller's testimony directly contradicted the appellee's testimony, creating an issue of fact.

Where there is contradictory, conflicting testimony, "the weight of the evidence and the witnesses' credibility are questions solely for the jury," and "the force of such conflicting testimony should not be determined on a motion for judgment of acquittal." *State v. Shearod*, 992 So. 2d 900, 903 (Fla. 2d DCA 2008) (quoting *Fitzpatrick v. State*, 900 So. 2d 495, 508 (Fla. 2005), and citing *Darling v. State*, 808 So. 2d 145, 155 (Fla. 2002)). Accordingly, we reverse the order granting the judgment of acquittal and remand with directions to reinstate the jury's verdict, enter judgment, and sentence the appellee.

Reversed and Remanded with directions. (DAMOORGIAN and GERBER, JJ., concur.)

---

[1]Section 831.02, Florida Statutes (2008), titled "Uttering forged instruments," states as follows:

> Whoever utters and publishes as true a false, forged or altered record, deed, instrument or other writing mentioned in s. 831.01 knowing the same to be false, altered, forged or counterfeited, with intent to injure or defraud any person, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

* * *

Mortgage foreclosure—Sale—Trial court abused discretion in granting continuance of sale on ground of benevolence and compassion for those who are losing their houses—In view of fact that postponed sale is due to take place shortly, petition for writ of certiorari is denied

REPUBLIC FEDERAL BANK, N.A., Petitioner, vs. JOSEPH M. DOYLE and BLANCA ALICIA DOYLE, Respondents. 3rd District. Case No. 3D09-2405. L.T. Case No. 08-7159. Opinion filed September 30, 2009. On Petition for Writ of Certiorari to the Circuit Court for Miami-Dade County, Valerie Manno Schurr, Judge. Counsel: Carlton Fields and Matthew J. Conigliaro (St. Petersburg) and Charles M. Rosenberg, for Petitioner. Barry L. Simons, for Respondents.

(Before GERSTEN and LAGOA, JJ., and SCHWARTZ, Senior Judge.)

(SCHWARTZ, Senior Judge.) We treat the petition for writ of mandamus as one for certiorari and deny the petition.

Following a November 4, 2008 final judgment of foreclosure, and after several delays—caused in part by the filing and the dismissal of a frivolous bankruptcy petition on the eve of a previous sale and a foul-up or two in the clerk's office—the trial court on July 29, 2009, entered an order fixing August 27, 2009, as the date of the sale. On motion of the defendants, however, apparently on the basis that in the case, like this one, of the foreclosure of a residence she routinely grants continuances of the sale rather than see "anybody lose their house," the trial judge granted a continuance until October 1, 2009.[1] The mortgagee now challenges this ruling. We deny its petition.

Although granting continuances and postponements are, generally speaking, within the discretion of the trial court, the "ground" of benevolence and compassion[2] (or the claim asserted below that the defendants might be able to arrange a sale of the property during the extended period until the sale) does not constitute a lawful, cognizable basis for granting relief to one side to the detriment of the other, and thus cannot support the order below: no judicial action of any kind can rest on such a foundation. This is particularly true here because the order contravenes the terms of the statute that a sale is to be conducted "not less than 20 days or more than 35 days after the date" of the order or judgment. § 45.031(1)(a), Fla. Stat. (2008). See also Kosoy Kendall Assocs., LLC v. Los Latinos Restaurant, Inc., 10 So. 3d 1168 (Fla. 3d DCA 2009); Comcoa, Inc. v. Coe, 587 So. 2d 474 (Fla. 3d DCA 1991).

The continuance thus constitutes an abuse of discretion in the most basic sense of that term. As the Court stated in Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980):

> The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness. In this regard, we note the cautionary words of Justice Cardozo concerning the discretionary power of judges:
>
> > The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.
> >
> > B. Cardozo, The Nature of the Judicial Process 141 (1921).

See Storm v. Allied Universal Corp., 842 So. 2d 245, 246 n.2 (Fla. 3d DCA 2003) (trial judge refused to preclude plaintiff, who misled and deceived the defendants, the jury and the trial court, from further litigation "to give the Plaintiff the break of his life"); Arango v. Arango, 450 So. 2d 583 (Fla. 3d DCA 1984) (trial judge reduced attorney's fee award to spouse of attorney on ground of "professional courtesy"). See also Flagler v. Flagler, 94 So. 2d 592, 594 (Fla. 1957) ("[C]ourts of equity have [no] right or power under the law of Florida to issue such order it considers to be in the best interest of 'social justice' at the particular moment without regard to established law."); Nordberg v. Green, 638 So. 2d 91 (Fla. 3d DCA 1994) (trial court may not decline to follow controlling law on ground it considers its application "inequitable" in particular case), review denied, 649 So. 2d 233 (Fla. 1994).

Although we thus thoroughly disapprove of the order, in view of the fact that the postponed sale is due to take place within a short time of this decision, no useful purpose will be served by formally quashing the order or ordering the sale to take place on an earlier date with all the procedural complications which would then result. For that reason alone, relief will be denied. We do emphasize that there are to be no further postponements of the sale.

Petition denied.

---

[1]The court's remarks on the issue included the following:

> I was trying to make everybody happy.
>
> ....
>
> We have so many foreclosures here and I give continuances on these sales. I just do.
>
> ....
>
> Unless it is so abundantly clear to me that it is just an abuse of the process, I give extensions on these because I don't want anybody to lose their house. If there is any chance that he can do this deal, get the money and try to save this home, you know, people are having a hard time now. They are having a difficult time. Everybody knows it. Businesses are failing. People are losing money in the stock market. You know, unemployment is high. It's just everybody knows that we are in a bad time right now and I hate to see anybody lose their home.

[2]See also the term referred to in Cooper v. Brickell Bayview Real Estate, Inc. 711 So. 2d 258, 258 n.1 (Fla. 3d DCA 1998).

* * *

Criminal law—Kidnapping—Defendant was properly convicted of kidnapping where defendant and codefendant jumped into a pickup truck left running by its driver and drove away with a two-year-old child asleep in the truck, seat-belted into the back seat—It is reasonable to infer from evidence that defendant became aware that the child was confined in the truck in the course of removing the radio from the truck and stealing other items from the truck—Confinement of child continued through theft of items within truck, and continued confinement of child was essential to defendant's attempt to avoid apprehension for theft of vehicle and its contents

ROGELIO DELGADO, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 3D08-1008. L.T. Case No. 06-16939-B. Opinion filed September 30,

16TH CIR 00332

Criminal law—Post conviction relief—Timeliness of motion—Where last day of two-year period for filing timely motion fell on a legal holiday, motion filed on the next day was timely

RONALD SZEWCZYK, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 2D09-5684. Opinion filed April 14, 2010. Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Charlotte County; Alane C. Laboda, Judge.

(CRENSHAW, Judge.) Ronald Szewczyk challenges the postconviction court's order dismissing as untimely his postconviction motion filed pursuant to Florida Rule of Criminal Procedure 3.850(b). We reverse.

Rule 3.850(b) provides that in a noncapital case, a motion for postconviction relief is timely if filed within the two-year period following the date on which the judgment and sentence become final. If the last day of the period ends on a legal holiday, "the period shall run until the end of the next day that is neither a Saturday, Sunday, nor legal holiday." Fla. R. Crim. P. 3.040; *see also* Fla. R. App. P. 9.420(f).

This court per curiam affirmed Mr. Szewczyk's direct appeal, and the mandate issued on September 7, 2007. *See Szewczyk v. State*, 963 So. 2d 239 (Fla. 2d DCA 2007) (table decision). Mr. Szewczyk had until September 7, 2009, to file his motion for postconviction relief. However, since the two-year period ended on Labor Day, a legal holiday, he had until the next day to file his motion. Thus Mr. Szewczyk's motion for postconviction relief, filed on September 8, 2009, was timely.

Accordingly, we reverse the postconviction court's order and remand for the court to consider the timely filed motion. (DAVIS and WALLACE, JJ., Concur.)

* * *

Mortgage foreclosure—Trial court erred in granting condominium association's motion to compel mortgagee to pay monthly assessments due to association after seven months had passed with no record activity in mortgage foreclosure suit based on finding that it was fair and equitable for mortgage holder to pay these assessments if there was extended delay in foreclosure proceeding for no good reason

DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE, Under the Pooling and Servicing Agreement Relating to IMPAC SECURED ASSETS CORP. MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-5, Appellant, v. CORAL KEY CONDOMINIUM ASSOCIATION (at Carolina), INC., and DARIO LUNA, Appellees. 4th District. Case No. 4D09-3392. April 14, 2010. Appeal of a non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Ronald J. Rothschild, Judge; L.T. Case No. 08-21500 CACE 08. Counsel: Jack R. Reiter and Jordan S. Kosches of Adorno & Yoss LLP, Miami, for appellant. Steven A. Fein and Shelley J. Murray of Fein & Meloni, Esqs., Plantation, for appellee Coral Key Condominium Association (at Carolina), Inc.

(STEVENSON J.) On May 12, 2008, Deutsche Bank National Trust Company filed a mortgage foreclosure complaint, naming the unit owner, Dario Luna, as well as the Coral Key Condominium Association (at Carolina), Inc., as defendants. After seven months of no record activity, the Association filed a motion to compel Deutsche to proceed with the foreclosure sale or pay monthly assessments due to the Association. The trial court granted the motion, explaining that it was fair and equitable for the mortgage holder to pay monthly assessments due to the Association if there is an extended period of delay in the foreclosure proceeding for no good reason. We reverse.

After the trial court entered the order appealed, the Third District issued *U.S. Bank National Ass'n v. Tadmore*, 23 So. 3d 822 (Fla. 3d DCA 2009), which addressed this precise issue. In *Tadmore*, the court rejected the notion that equity and fairness support an order requiring a bank to pay condominium assessments while foreclosure proceedings are pending since section 718.116(1)(b), Florida Statutes (2009), makes it clear that the first mortgagee is required to pay assessments only after acquiring title, and equity follows the law. *Id.* at 823-24. We agree with *Tadmore* and reverse.

Reversed and remanded. (GROSS, C.J., and POLEN, J., concur.)

* * *

Mortgage foreclosure—Jurisdiction—Non-residents—Allegation that non-resident defendant owned property in state was sufficient to give rise to personal jurisdiction under long-arm statute—Trial court erred in finding that it lacked personal jurisdiction necessary to enter deficiency judgment—Default—Plaintiff failed to meet its burden of establishing error with respect to trial court's order vacating default and affording property owner the opportunity to file an answer

KRISTY S. HOLT, Appellant, v. WELLS FARGO BANK, N.A., Appellee. 4th District. Case No. 4D09-3015. April 14, 2010. Appeal and cross-appeal of a non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Peter M. Weinstein, Judge; L.T. Case No. 08-19406 CA 12. Counsel: Philippe Symonovicz of the Law Offices of Philippe Symonovicz, and Jerome R. Schechter, Fort Lauderdale, for appellant. Dean A. Morande and Michael K. Winston of Carlton Fields, P.A., West Palm Beach, for appellee.

(STEVENSON, J.) In this mortgage foreclosure case, the bank filed a complaint seeking to foreclose on a mortgage on real property located in Broward County, Florida. Holt, the out-of-state owner of the real property, was personally served with process at her California home and, when she failed to file an answer, a default was entered. Several months later, the non-resident property owner filed a motion to quash service of process and vacate the default, asserting the complaint did not allege facts that would support the exercise of personal jurisdiction under Florida's long-arm statute. The trial court accepted the property owner's argument and found that it lacked the personal jurisdiction necessary to enter a deficiency judgment, but refused to quash service of process as it had *in rem* jurisdiction over the Florida real property. The court vacated the default and afforded the property owner the opportunity to file an answer. Both parties have challenged the trial court's July 13, 2009 order. We affirm the order appealed in all respects, save the trial court's finding that it lacked personal jurisdiction over the non-resident property owner and write primarily to address that issue.

Prior to 1993, section 48.193(1)(c), Florida Statutes, provided that "[o]wning, using, or possessing any real property within this state" was sufficient to give rise to personal jurisdiction provided the cause of action arose from such ownership, use, or possession. Ownership of real property in Florida was thus held sufficient to establish personal jurisdiction where the cause of action arose from such ownership. *See Nichols v. Paulucci*, 652 So. 2d 389, 392 n.5 (Fla. 5th DCA 1995); *cf. Damoth v. Reinitz*, 485 So. 2d 881, 883 (Fla. 2d DCA 1986).

In 1993, the legislature amended subsection (1)(c), adding the words "holding a mortgage or other lien on," such that the statute now provides "[o]wning, using, possessing, or holding a mortgage or other lien on any real property within this state" gives rise to personal jurisdiction. Despite the appellant's argument to the contrary, we do not believe that the amendment eliminated the ownership of real property as a basis for the establishment of personal jurisdiction and the exercise of long-arm jurisdiction. In context, the amended statute is more reasonably read as *extending* personal long-arm jurisdiction to those "holding a mortgage or other lien on" real property in Florida, rather than *eliminating* the long-standing jurisdictional basis for those "owning . . . real property within this state." The complaint in this case alleged Holt's ownership of Florida real property and thus the trial court erred in ruling it lacked the personal jurisdiction necessary to support the entry of a deficiency judgment.

As for that portion of the trial court's order which vacates the default, we find that the bank failed to meet its burden of establishing error. The instant case is remanded to the trial court for further proceedings consistent with this opinion.

Affirmed in part; Reversed in part; and Remanded. (GROSS, C.J., and POLEN, J., concur.)

* * *

16TH CIR 00333

TATYANA NUDEL, Petitioner, v. FLAGSTAR BANK, FSB, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR FLAGSTAR BANK, FSB, PALM BEACH COUNTY, and ADORNO & YOSS, LLP, Respondents. RICHARD J. DAVIS and NANCY DAVIS, Petitioners, v. HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE, FOR SEQUOIA 2007-3, Respondent.

No. 4D10-641, No. 4D10-1842

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

2010 Fla. App. LEXIS 11742

August 11, 2010, Decided

NOTICE:

NOT FINAL UNTIL DISPOSITION OF TIMELY FILED MOTION FOR REHEARING.

PRIOR HISTORY: [*1]

Consolidated petitions for writ of prohibition to the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Meenu T. Sasser, Judge; L.T. Case Nos. 2009CA023221XXXXMB and 2009CA040226XXXXMB.

COUNSEL: Thomas E. Ice of Ice Legal, P.A., West Palm Beach, for petitioners Tatyana Nudel, Richard J. Davis and Nancy Davis.

No response required for respondents.

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

OPINION

PER CURIAM.

In these two cases, which we have consolidated for purposes of this opinion, the law firm of Ice Legal, P.A. (Ice), seeks, under the guise of disqualifying the judge, to exclude itself from proceeding before Judge Sasser, who presides over the foreclosure division of the Palm Beach circuit court. [1] These petitions for writ of prohibition represent the seventh and eighth petitions that this law firm has filed in this court seeking the same relief. [2] All the prior petitions were carefully reviewed and denied on the merits.

1 The foreclosure division, which attempts to streamline scheduling procedures, was created to handle the extraordinary backlog of foreclosure cases. *See Administrative Order 3.302, Fifteenth Judicial Circuit.* At the time the petition was filed, an estimated [*2] 55,000 foreclosure cases were pending in that court. This number has likely increased since that time.

2 *Feith v. Indy Mac Fed. Bank*, 4D09-5070; *Sandomingo v. Washington Mut. Bank*, 4D09-5000; *Vidal v. U.S. Nat'l Bank Ass'n*, 4D10-397; *Glarum v. Lasalle Bank*, 4D10-603; *Brown v. Wachovia Bank*, 4D10-130; *Brown v. Wachovia*, 4D10-642.

As in the prior petitions and motions to disqualify filed by the firm, Ice attempts to pyramid a host of unrelated matters, which were not raised within the ten-day time limit of *Florida Rule of Judicial Administration 2.330(e)*, to achieve its goal. The repetitive claims have been reviewed *de novo* on numerous occasions and rejected on the merits. None of these issues, alone or together, provide Ice's clients with any objectively reasonable basis to fear that the judge is biased.

In addition to re-raising these issues, the Ice firm raised new arguments alleging that *ex parte* communication between opposing counsel and the judge requires disqualification. The communications involved a recurring scheduling dispute involving Ice. The Ice firm has insisted on specially-set hearings on its motions even though the judge, through her judicial assistant (JA), had expressed [*3] that the types of motions at issue should be set for ten-minute hearings on the uniform motion calendar. Ice has complained that it needs at least fifteen minutes to be heard and demanded specially-set hearings.

In one of these cases, aware of Ice's persistent objections to their motion being set on the uniform motion calendar, the plaintiff bank scheduled a hearing on Ice's motion to dismiss during a time reserved for summary judgment motions. The judge phoned the bank's counsel advising that the hearing needed to be scheduled on the uniform motion calendar and that twenty minutes was not necessary to argue the motion. The bank's attorney immediately informed Ice and tried to coordinate a convenient time for the hearing. The next day, the judge entered a written order requiring the bank to schedule the hearing on the motion calendar within ten days.

In the second case, an administrative employee for the bank's counsel attempted to coordinate scheduling of Ice's motions on the uniform motion calendar. Ice continued to object to the scheduling, maintaining its position that it needed fifteen minutes instead of ten. [3] Another administrative employee for the bank's counsel contacted the [*4] judge's JA to inform her that the Ice firm was again objecting to having their motions heard at the uniform motion calendar. Another judge, sitting in Judge Sasser's absence, signed orders scheduling the hearing on the uniform motion calendar. The above incident led Ice to request all emails between the law firm's staff and the JA. Ice contends the emails show that the law firm's administrative staff has been engaged in *ex parte* communications with the judicial assistant.

> 3 A specially-set hearing would not be available until much later in time, whereas the motions could be heard sooner if set on the uniform motion calendar. Ice made no attempt to schedule its motions for hearing nor has it provided any explanation why its motions-which do not involve evidentiary matters-required any additional time for oral argument. As noted by the judge, at a hearing where the policy was explained to Ice, the judge had read the motions-which raised similar issues Ice has repeated in many of its cases-and additional time for oral argument was unnecessary.

> We are aware of no rule or law that requires a trial court to hear oral argument on a pretrial, non-evidentiary motion. *See Gaspar, Inc. v. Naples Fed. Sav. & Loan Ass'n, 546 So. 2d 764, 766 (Fla. 5th DCA 1989)* [*5] ("Judicial consideration and determination of a non-evidentiary motion on the basis of memoranda of law rather than oral argument by counsel at a noticed hearing does not constitute an ex parte hearing or a denial of due process"); *First City Dev. of Fla., Inc. v. Allmark of Hollywood Condo. Ass'n, 545 So. 2d 502, 503 (Fla. 4th DCA 1989)* ("There is no rule of procedure or law that requires the trial court to have oral argument as to [objections to discovery]"). *See also Fla. R. App. P. 9.320* ("Oral argument *may* be permitted in any proceeding") (emphasis supplied); *In re Proposed Florida Appellate Rules, 351 So. 2d 981, 1011 (Fla. 1977)* ("[T]here is no right to oral argument" in appellate proceedings).

Based on these allegedly improper *ex parte* communications, Ice seeks to disqualify the judge from all of its cases. In all of its prior petitions, Ice has sought what amounts to firm-wide disqualification which would effectively exclude Ice from proceeding in the foreclosure division. Judge Sasser is presently the only judge presiding in the foreclosure division.

We review *de novo* the legal sufficiency of the motions to disqualify that were filed below. *See Edwards v. State, 976 So. 2d 1177, 1178 (Fla. 4th DCA 2008).*

Ex [*6] *parte* communications regarding purely administrative, non-substantive matters, such as scheduling, do not require disqualification. *See Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992)* ("[A] judge should not engage in *any* conversation about a pending case with only one of the parties participating in that conversation. Obviously, . . . this would not include *strictly* administrative matters not dealing in any way with the merits of the case."). *See Rodriguez v. State, 919 So. 2d 1252, 1274-75 (Fla. 2006)* (*ex parte* discussion of an administrative matter, the nature of a scheduled hearing, did not require disqualification); *Randolph v. State, 853 So. 2d 1051, 1064 (Fla. 2003)* (*ex parte* conversation about ministerial matter-wording of a sentence in an order-was insufficient to disqualify); *Arbelaez v. State, 775 So. 2d 909, 916 (Fla. 2000)* (holding that an *ex parte* communication between the judge and the state attorney in a death penalty case did not require disqualification where the communication related to purely administrative matters, including the amount of time the state would be provided to respond to defendant's postconviction motion and the scheduling of hearings).

The *ex parte* [*7] communications in the present cases all involved purely administrative, non-substantive matters regarding the scheduling of motions, not the merits of the case. The judge, who had read and was familiar with Ice's motions, did not exhibit any objectively reasonable basis for Ice's clients to fear bias when she indicated that the motions did not require additional time.

As to the communications between the administrative personnel of the bank's law firm and the JA, neither the *ex parte* communications, nor the alleged animosity that has developed between the JA and one of Ice's employees, provides an objectively reasonable basis for Ice's clients to fear that the judge will not be fair and impartial. *See Leone v. F.J.M. Constr., 911 So. 2d 1285, 1285-86 (Fla. 1st DCA 2005)* (holding that a judicial assistant's disparaging comments to a party's attorney, made after a scheduling dispute, did not provide any reasonable basis to fear that the judge would not be fair). As noted in *Leone*, scheduling of hearings is typically a matter delegated by judges to judicial assistants. This is particularly necessary in the foreclosure division which has an extraordinary backlog of cases. Judge Sasser cannot [*8] be expected to hold hearings *regarding the length of upcoming hearings* in order to settle insignificant disputes about whether an additional five minutes is necessary for oral argument on a motion.

Contrary to Ice's accusations, Judge Sasser did not violate *Canon 3(B)(7) of the Florida Code of Judicial Conduct*, which expressly exempts communications relating to scheduling and other administrative matters from its prohibition on *ex parte* communications. The judge's *ex parte* communication with the bank's counsel regarding the bank's improperly-scheduled motion was immediately brought to Ice's attention. Ice has had abundant opportunity to respond but never specified any reason why fifteen minutes was required to hear its motions.

Ice's repetitive attempts at disqualification in these cases appear designed, not to ensure that the proceedings against their clients are presided over by a neutral and fair tribunal, but to achieve a strategic advantage and/or frustrate the efficient function of the foreclosure division. As we suggested in *Nassetta v. Kaplan, 557 So. 2d 919, 921 (Fla. 4th DCA 1990)*, this tactic is an improper use of the disqualification procedure.

The petitions are denied on [*9] the merits.

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

EVIE KONTOS, Appellant, v. AMERICAN HOME MORTGAGE SERVICING, INC., Appellee.

CASE NO. 1D09-2803

COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

2010 Fla. App. LEXIS 11698; 35 Fla. L. Weekly D 1798

August 10, 2010, Opinion Filed

NOTICE:

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

PRIOR HISTORY: [*1]

An appeal from the Circuit Court for Walton County. Kelvin C. Wells, Judge.

COUNSEL: Matthew W. Burns, Destin, for Appellant.

Katherine E. Giddings and Nancy M. Wallace of Akerman Senterfitt, Tallahassee, and William P. Heller, Akerman Senterfitt, Fort Lauderdale, for Appellee.

JUDGES: HAWKES, C. J., KAHN and WEBSTER, JJ., CONCUR.

OPINION

PER CURIAM.

In this mortgage foreclosure action, appellee, American Home Mortgage Servicing, Inc., obtained a final summary judgment. This judgment relies in part upon appellee's allegation that it is the assignee of the original holders of the mortgage and note executed by appellant. As all parties acknowledge, however, the uncontested facts of record do not establish that appellee is presently entitled to foreclose because the record contains no evidence of any assignment or comparable transaction. Accordingly, we VACATE the final summary judgment and REMAND this case for further proceedings.

HAWKES, C. J., KAHN and WEBSTER, JJ., CONCUR.

LEXSEE 35 SO. 3D 189

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

No. 4D09-1340

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

35 So. 3d 189; 2010 Fla. App. LEXIS 8183; 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; Ronald J. Rothschild, Judge; L.T. Case No. 08-45895 (08).

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

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

No appearance for other appellees.

JUDGES: GERBER, J. POLEN and LEVINE, JJ., concur.

OPINION BY: GERBER

OPINION

[*189] GERBER, J.

We reverse the circuit court's final summary judgment of foreclosure against Stelian Lazuran (the "defendant"). Citimortgage's complaint alleged that all conditions precedent to the mortgage note's acceleration had been fulfilled, and Citimortgage's affidavit in support of its motion for summary judgment stated "[t]hat each and every allegation in the Complaint is true." Such a conclusory allegation is insufficient to refute the defendant's affirmative defense [*190] that Citimortgage failed to provide him with notice of the acceleration pursuant to the procedures specified in paragraph 22 of the mortgage. Therefore, reversal is required. *See Frost v. Regions Bank, 15 So. 3d 905, 906-07 (Fla. 4th DCA 2009)* ("Because the bank did not meet its burden to refute the Frosts' lack of notice and opportunity to [**2] cure defense, the bank is not entitled to final final summary judgment of foreclosure.").

Reversed.

POLEN and LEVINE, JJ., concur.

LexisNexis®

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

took no action to satisfy the debt for over four months after the judgment was entered--even past the sale date:

> The failure of a party to take the required steps necessary to protect its own interests, cannot, standing alone, be grounds to vacate judicially authorized acts to the detriment of other innocent parties. The law requires certain diligence of those subject to it, and this diligence cannot be lightly excused. The mere assertion by a party to a lawsuit that he does not comprehend the legal obligations attendant to [the pending legal action] does not create a sufficient showing of mistake, inadvertence, surprise or excusable neglect to warrant the vacating of a final judgment.

John Crescent, Inc. v. Schwartz, 382 So. 2d 383, 385-86 (Fla. 4th DCA 1980).

We [*4] therefore reverse the order granting Chery's emergency motion to set aside foreclosure sale and remand with directions to reinstate the final judgment of foreclosure and certificate of sale and thereafter issue a certificate of title in favor of the bona fide purchaser.

We recognize the harsh result produced by this opinion but the law simply does not authorize the setting aside of the final judgment and certificate of sale under the facts of this case.

Reversed and remanded with instructions.

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

LexisNexis®

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.

LexisNexis®

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.

LexisNexis®

LEXSEE 28 SO. 3D 976

Cited
As of: Aug 26, 2010

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.

LexisNexis®

LEXSEE 36 SO. 3D 875

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.

LexisNexis®

LEXSEE 36 SO. 3D 932

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.

LEXSEE 28 SO 3D 936

Caution
As of: Aug 26, 2010

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.

Mortgage foreclosure—Intervention—Assignee of second mortgage—Trial court abused its discretion in granting motion to intervene filed by assignee of second mortgage after final judgment of foreclosure of first mortgage and sale of property to owner of first mortgage and note, and in directing the clerk of court to issue certificate of title to assignee, despite assignment's erroneous reference to public records book and page number of the first mortgage instead of the correct second mortgage book and page number—Assignee received only the rights it would have had under the assignment of mortgage it received from assignor, and assignor only possessed rights of a second mortgage holder—It was error to grant post judgment motion to intervene where granting of motion injuriously affected original parties

U.S. BANK NATIONAL ASSOCIATION, as trustee, on behalf of the holders of the Home Equity Asset Equity Pass-Through Certificates, Series 2005-2, Appellant, vs. DAVID TAYLOR, a/k/a David M. Taylor, et al., Appellees. 3rd District. Case No. 3D09-694. L. T. Case No. 2006CA711-K. Opinion filed February 10, 2010. An Appeal of a non-final order from the Circuit Court for Monroe County, Mark H. Jones, Judge. Counsel: Lapin & Leichtling and Jonathan R. Rosenn and Jeffrey S. Lapin, for appellant. John L. Penson (Bay Harbor Islands), for appellees.

(Before RAMIREZ, C.J., GERSTEN and SUAREZ, JJ.)

(SUAREZ, J.) U.S. Bank National Association ("U.S. Bank") appeals a non-final order granting a post-judgment motion to intervene. After final judgment of foreclosure and sale of property to U.S. Bank, the owner of the first mortgage and note, the trial court granted Northview Equities, LLC's ("Northview") motion to intervene and ordered the clerk of the court to issue title to Northview. We reverse the grant of Northview's motion to intervene and the direction to the clerk to issue the certificate of title to Northview, as Northview was assigned a second mortgage and not the first mortgage, which was owned by U.S. Bank.

FACTS

This case arises out of a residential foreclosure of a first mortgage brought by U.S. Bank, the owner of the note and first mortgage. The first mortgage referenced a note in the amount of $518,000.00 and an identification number ending in 6895. U.S. Bank's loan servicer executed a second mortgage, which stated that it was "subordinate to an existing first lien of record" and was referenced by an identification number ending in 6903. U.S. Bank obtained a final judgment of foreclosure against the borrower, David Taylor, based upon the note and first mortgage. The second mortgage was assigned to Asset Management Holdings, Inc. ("Asset"), and referenced the identification number ending in 6903. Asset then assigned the same mortgage to Northview.[1] Northview claimed title to the property based on the fact that, when U.S. Bank's loan servicer assigned the second mortgage to Asset, although the assignment itself referenced the correct identification number of the second mortgage, 6903, and the second mortgage stated that it was "subordinate to an existing first lien of record," the assignment was erroneously filled out by incorrectly substituting the Monroe County official records book and page number of the first mortgage instead of the correct second mortgage book and page number. Asset's execution of the assignment, referencing the incorrect book and page number of the first mortgage, to Northview is the basis of Northview's claim.

TRIAL COURT PROCEDURE

After the property was foreclosed upon, the owner of the first mortgage, U.S. Bank, bought the property at the foreclosure sale. Almost eight months after final judgment of foreclosure had been entered in favor of U.S. Bank and after the purchase by U.S. Bank at the foreclosure sale, but prior to the issuance of the certificate of title, Northview moved to intervene. Northview's theory was that the assignment it received from Asset was an assignment of the first mortgage because the document showed the Monroe County official records book and page number of the first mortgage giving it priority in title over U.S. Bank. The trial court allowed Northview to intervene and the trial court directed the clerk of the court to issue the certificate of title to Northview. U.S. Bank filed this interlocutory appeal. We find that the trial court abused its discretion in granting the motion to intervene and directing the clerk of the court to issue the certificate of title to Northview.

ANALYSIS

The trial court's order granting Northview's motion to intervene is reviewed for an abuse of discretion. *Barnhill v. Fla. Microsoft Anti-Trust Lit.*, 905 So. 2d 195 (Fla. 3d DCA 2005). The portion of the trial court's order which directs the clerk to issue the certificate of title to Northview is reviewed *de novo* since it involves questions of law and the construction of written instruments. *Aronson v. Aronson*, 930 So. 2d 766 (Fla. 3d DCA 2006).

The general law is that an assignee of a mortgage receives only those rights and benefits which are available to its assignor. *Dubbin v. Capital Nat'l Bank*, 264 So. 2d 1 (Fla. 1972). Under the facts before us, the assignee, Northview, received only the rights it would have had under the assignment of mortgage it received from Asset. Asset only possessed the rights of a second mortgage holder, as referenced by the amount of $148,000.00 "subordinate to an existing first lien of record" and identification number 6903. The facts that the second mortgage, held by Asset and assigned to Northview, had a different identification number than the first mortgage, and the second mortgage referenced $148,000, "subordinate to an existing first lien of record," serve to corroborate the conclusion that Northview received a second mortgage and not a first mortgage despite the erroneous book and page numbers. Had Northview executed a diligent search of the public records, barring the fact that the book and page numbers on the two mortgages were reversed, it would have become aware that there was a second mortgage on the property which was subordinate to the first. *See Graham v. Commonwealth Life Ins. Co.*, 154 So. 335 (Fla. 1934) (holding that where a purchase money mortgage stated it was second mortgage, but incorrectly designated the first mortgagee, and the assignee had actual and constructive notice of a subordination agreement, the mortgagee of the building construction loan was entitled to priority over the assignee of the purchase money mortgage); *see also Crenshaw v. Holzberg*, 503 So. 2d 1275, 1277 (Fla. 2d DCA 1987) ("[A]n instrument of record is notice not only of its own existence and contents, but also of other facts that would have been learned from the record if it had been examined and that inquiry suggested by it would have disclosed."). Northview's argument that it was a bona fide purchaser fails because "[a]n assignee is not protected as against the equities of third persons if the assignment was . . . after the maturity of the debt secured." *Hulet v. Denison*, 1 So. 2d 467, 482 (Fla. 1941); *see Vance v. Fields*, 172 So. 2d 613 (Fla. 1st DCA 1965) (holding that purported assignee of mortgage without assignment of note creates no right in plaintiffs and recording gives no priority as against subsequent sale and delivery of note).

The trial court abused its discretion in granting Northview's motion to intervene. A post judgment motion to intervene is rarely, if ever, granted and only if the intervention will not injuriously affect the original litigants. In this case, the trial court abused its discretion since the granting of the post judgment motion to intervene did injuriously affect the original parties. *See Dickinson v. Segal*, 219 So. 2d 435 (Fla. 1969) (post-judgment intervention not permitted once litigation has resulted in final judgment); *see also Svadbik v. Svadbik*, 776 So. 2d 968 (Fla. 3d DCA 2000) (affirming denial of motion to intervene post judgment); *Idacon, Inc. v. Hawes*, 432 So. 2d 759 (Fla. 1st DCA 1983) (reversing order granting motion to intervene after final judgment of foreclosure had been entered and after judicial sale); *Lewis v. Turlington*, 499 So. 2d 905 (Fla. 1st DCA 1986) (trial court abused its discretion in allowing third parties to intervene after entry of final order).

We reverse the trial court's grant of Northview's motion to intervene and the direction to the clerk to issue title in Northview's name. We remand to the trial court to issue title in the name of U.S.

Bank.

Reversed and remanded with directions.

[1]The note was never delivered.

* * *

Criminal law—Juveniles—Probation revocation—No error in finding that juvenile willfully violated probation by failing to abide by curfew and appear for scheduled intake at Dade Marine Institute—Error to find juvenile violated probation by failing to live with mother and failing to regularly attend school where juvenile was not advised of those conditions—Where juvenile was given form order of probation, and some of the conditions were checked off while others were not, it was, at best, unclear that juvenile was required to comply with unchecked conditions—Because failure to report to Dade Marine Institute was substantial violation of probation, and this violation alone was sufficient to sustain revocation, remand for reconsideration by trial court is not necessary

E.J., a juvenile, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 3D09-1597. L. T. Case Nos. 07-4252-B, 07-7628, 07-7390-C, 07-7473-A, 07-7474-B. Opinion filed February 10, 2010. An Appeal from the Circuit Court for Miami-Dade County, Spencer Eig, Judge. Counsel: Carlos J. Martinez, Public Defender, and Howard K. Blumberg, Assistant Public Defender, for appellant. Bill McCollum, Attorney General, and Forrest L. Andrews, Jr., Assistant Attorney General, for appellee.

(Before SHEPHERD, SUAREZ, and ROTHENBERG, JJ.)

(ROTHENBERG, J.) The appellant, E.J., entered a plea of nolo contendere and an adjudication of delinquency was withheld on June 24, 2008, to burglary in Case No. J07-4252(B), grand theft in Case No. J07-7628, burglary of an unoccupied structure as a lesser included offense of burglary of a dwelling in Case No. J07-7611(C), grand theft of a firearm in Case No. J07-7473(A), criminal mischief in Case No. J07-7390(C), and burglary of an unoccupied structure as a lesser included offense of burglary of a dwelling in Case No. J07-7474(B). Based upon E.J.'s plea, the State nolle prossed numerous other counts including armed burglary (punishable by up to life in prison), and he was placed on probation.

On or about October 29, 2008, a probation affidavit was filed, alleging that E.J. violated his probation by: failing to reside in the home of his mother; violating his curfew; failing to attend school; and failing to appear for his scheduled intake at the Dade Marine Institute. The trial court conducted a probation violation hearing and found that the State proved by a preponderance of the evidence each of the violations alleged in the affidavit, and adjudicated E.J. delinquent. Although we conclude that the trial court erred in finding that E.J. violated his probation for failing to reside with his mother or to attend school, we affirm the remainder of the order under review and the finding that E.J. willfully violated his probation by failing to abide by his curfew and appear for his scheduled intake at the Dade Marine Institute.

A review of the orders placing E.J. on probation reflects that E.J. was not advised that as a condition of his probation he must live with his mother or regularly attend school. The probation order specifies that E.J. live and reside in the home of "parent(s)." E.J. testified that he lived and resided with his father when he did not live with or reside with his mother. Because his testimony was unrefuted and the probation order did not require that he live with and reside in only his mother's home, we conclude that the trial court erred when it included this ground as one of the conditions of probation E.J. violated.

Likewise, while the probation order specifically lists attending school every day as a condition of probation, this condition, unlike many of the other listed conditions of probation contained in the order, was not checked off, thereby inferring that the trial court did not intend to make school attendance a condition of E.J.'s probation. We recognize that general conditions of probation explicitly authorized or mandated by Florida Statutes need not be orally pronounced at sentencing. *See State v. Hart*, 668 So. 2d 589, 592 (Fla. 1996) (stating that " 'general conditions' of probation are those contained within the statutes. . . . [and] may be imposed and included in a written order of probation even if not orally pronounced at sentencing"); *D.P.B. v. State*, 877 So. 2d 770, 772 (Fla. 4th DCA 2004) (holding that so long as a condition of probation is explicitly authorized or mandated by Florida Statutes, it is not mandatory that the trial court orally advise the defendant of the condition). However, where, as here, a juvenile probationer is given a form order of probation and some of the conditions are checked off and others are not, we conclude it was unclear, at best, that the probationer was being required to comply with the unchecked conditions.

Although we conclude that the trial court erred by finding that E.J. violated his probation by failing to reside in his mother's home and by not regularly attending school, we affirm the portion of the trial court's order finding that E.J. willfully violated his probation by failing to comply with his curfew and by failing to attend the scheduled intake appointment for the Dade Marine Institute. E.J.'s probation officer testified that he personally visited the Dade Marine Institute and determined that E.J. never appeared for his intake as ordered and E.J. admitted under oath at the probation violation hearing that he did not appear for his intake or attend the Dade Marine Institute. E.J.'s probation officer additionally testified that according to E.J.'s mother, E.J. violated his curfew on four occasions.

Because E.J.'s remaining violations were not based solely on hearsay, *see Crawford v. State*, 982 So. 2d 1, 2 (Fla. 2d DCA 2008) (reversing the trial court's order finding the defendant in violation of his probation based solely on hearsay testimony), and these violations were proven by a preponderance of the evidence, we affirm the findings by the trial court as to those violations. *See E.P. v. State*, 901 So. 2d 193, 195 (Fla. 4th DCA 2005) (holding that the State need only establish a violation by a preponderance of the evidence); *Wilson v. State*, 781 So. 2d 1185, 1187 (Fla. 4th DCA 2001) (noting that whether a violation of probation is willful and substantial is a factual issue that cannot be overturned on appeal unless there is no evidence to support it); *Alvarez v. State*, 638 So. 2d 992, 993 (Fla. 3d DCA 1994) (affirming the revocation of the defendant's probation for failing to attend her first probation appointment and making no attempt thereafter to schedule a meeting with her probation officer).

Because failure to report to the Dade Marine Institute is a substantial violation of E.J.'s probation, and this violation alone is sufficient to sustain a revocation of his probation, remand for reconsideration by the trial court is not required. *See Matos v. State*, 956 So. 2d 1240, 1240 (Fla. 4th DCA 2007) (affirming revocation of community control after striking some of the violations but finding other violations were supported by the evidence); *Butler v. State*, 932 So. 2d 306, 307 (Fla. 2d DCA 2006) (recognizing that when an appellate court reverses on a finding regarding one of the conditions of community control, remand is not required if the remaining violation or violations are substantial); *Rawlins v. State*, 711 So. 2d 137, 137 (Fla. 5th DCA 1998) (finding unexcused absences from a treatment program, standing alone, may constitute a material violation); *Johnson v. State*, 667 So. 2d 475, 475 (Fla. 3d DCA 1996) (finding that the defendant's failure to attend G.E.D. classes, standing alone, was sufficient to revoke his probation).

In conclusion, because there are other substantial violations remaining, and they are supported by competent substantial evidence, we affirm the trial court's order revoking E.J.'s probation.

Affirmed.

* * *

will pay $360,000 of the settlement to NABCO to fund the stream of periodic payments. The document contains language of a nonqualified assignment, but it also contains language indicating that NICA will not be liable in the event that NABCO fails to make the payments. Ms. Shipley apparently was still concerned about her authority to execute this agreement and testified that she had been advised that she would still need to issue a 1099 form showing the payment as income in the year that NICA provided the payment.

NICA is an unusual legal entity. It is an "association" that is either authorized or created by statute. *See* § 766.302(1). Its directors are appointed by the Chief Financial Officer of the State of Florida. It supposedly is not a state agency, but it is authorized to use the state seal. *See* § 766.315(1). Whether its Executive Director could sign binding documents obligating NICA to make periodic payments over many years, as contemplated in the November document, is unclear in this record. Nothing in this record establishes, as a matter of undisputed fact or law, that Ms. Shipley was acting in bad faith when she balked at these settlement proposals.

In hindsight, at this point, it would have been useful for the lawyers, Ms. Shipley, and the necessary experts to sit down together in one room and determine whether there was a way for NICA lawfully to assist the Michaels with a structured settlement that deferred income tax obligations. That did not happen.

Instead, on January 12, 2006, the Michaels filed this lawsuit to enforce a settlement. They maintained that NICA was compelled to enter into a structured settlement that deferred tax payment. The complaint alleged both breach of contract and specific performance. For whatever reason, the lawsuit thereafter focused on the claim for breach of contract.

Both sides eventually moved for summary judgment, each side arguing that they were entitled to judgment on the issue of liability on the claim for breach of contract. The parties relied on the contents of the settlement correspondence and the deposition of Ms. Shipley.

We review orders granting or denying motions for summary judgment de novo. *See Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Summary judgment is appropriate only "if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." *Id.* "The moving party carries the heavy burden of showing conclusively that the nonmoving party cannot prevail." *Shaw v. Tampa Elec. Co.*, 949 So. 2d 1066, 1069 (Fla. 2d DCA 2007). "If the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper." *Holland v. Verheul*, 583 So. 2d 788, 789 (Fla. 2d DCA 1991).

Here, simply stated, NICA never expressly agreed that it would execute any specific structured settlement. The Michaels needed to establish that, before they filed this lawsuit, Ms. Shipley or NICA was obligated to enter into a specific structured settlement agreement because NICA had agreed to consider suggestions to minimize tax consequences and the Michaels' proposed structured settlement was so straightforward that NICA's agreement to consider such suggestions compelled them to actually agree to the specific structured settlement. When the summary judgment was granted in this case, the record contained no undisputed evidence establishing as a matter of uncontested law that Ms. Shipley negotiated in error or bad faith when she balked at the various settlement proposals and that her agreement to consider such suggestions compelled her to execute any specific document. Accordingly, the trial court erred in granting this summary judgment.

Because the trial court erred in granting this summary judgment, we must reverse the final judgment, including the award of attorneys' fees and costs. It is obvious that the parties nearly settled this case without judicial involvement. When the settlement collapsed, the dispute mushroomed and took on a new life of its own. In reversing this final judgment, we encourage the parties, on remand, to return to the settlement table and, perhaps with the assistance of an experienced mediator, attempt to resolve this dispute.

Reversed and remanded for proceedings not inconsistent with this opinion. (CASANUEVA, C.J., and KHOUZAM, J., Concur.)

* * *

Mortgage foreclosure—Summary judgment—Error to enter summary judgment of foreclosure where promissory note and assignment, which constituted portion of evidence plaintiff relied on in support of motion for summary judgment, were not attached to complaint and were not served at least twenty days before date of summary judgment hearing—Further, there is factual issue as to whether promissory note has been validly assigned to plaintiff so that plaintiff has standing to foreclose mortgage

DAVID VERIZZO, Appellant, v. THE BANK OF NEW YORK, AS SUCCESSOR TRUSTEE UNDER NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2006-3, Appellee. 2nd District. Case No. 2D08-4647. Opinion filed March 3, 2010. 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.

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

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

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

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

On August 29, 2008, the trial court granted the motion for summary judgment and entered a final judgment of foreclosure. We review the summary judgment by a de novo standard. *Estate of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Car 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 judgment as a matter of law.' " *Id.* (quoting Fla. R. Civ. P. 1.510(c)

16TH CIR 00361

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

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

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

Reversed and remanded. (WHATLEY and MORRIS, JJ., Concur.)

* * *

Criminal law—Post conviction relief—Ineffective assistance of counsel—Trial court erred in summarily denying claim of defendant, who pled no contest to charge of failure to register as sex offender, that counsel was ineffective for failing to advise him that he could not be designated as a sex offender for offense of false imprisonment if the offense had no sexual component, and that he would not have entered plea but for counsel's misadvice—Trial court improperly found that defendant could only challenge his sexual offender designation in court where he was convicted of false imprisonment and that the false imprisonment conviction qualified him as a sexual offender regardless of whether there was a sexual component to the offense

CHRISTOPHER W. MUNROE, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 2D09-4222. Opinion filed March 3, 2010. Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Pasco County; Pat Siracusa, Judge. Counsel: Christopher W. Munroe, pro se.

(MORRIS, Judge.) Christopher W. Munroe appeals the summary denial of his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850, which raised one claim of ineffective assistance of counsel. We reverse and remand for an evidentiary hearing to determine whether Munroe's counsel failed to advise him of a viable defense and, if so, whether Munroe would have gone to trial if he had been informed of the defense.

On August 28, 2008, Munroe pleaded no contest to failure to register as a sexual offender in the Sixth Judicial Circuit, Pasco County. *See* § 943.0435(9), Fla. Stat. (2007). He was designated a sexual offender because he had been convicted of false imprisonment in the Seventeenth Judicial Circuit, Broward County. *See* § 787.02, Fla. Stat. (2000); § 943.0435(1)(a)(1)(a)(I), Fla. Stat. (2007). He was sentenced to three years in prison for failure to register.

To show ineffective assistance of counsel, a defendant must satisfy both prongs of the test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984): (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the result of the proceeding. The first prong requires a showing that counsel made errors so serious that his performance fell below an objective standard of reasonableness. *Id.* at 688. In the context of a plea, the second prong requires a showing that there is "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In determining the credibility of the defendant's claim that he would have insisted on going to trial, the court should consider

> "the totality of the circumstances surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at a trial."

Lawrence v. State, 969 So. 2d 294, 307 (Fla. 2007) (quoting *Grosvenor v. State*, 874 So. 2d 1176, 1181-82 (Fla. 2004)).

Munroe claims that his counsel was ineffective for incorrectly advising him that he had no defense to his sexual offender designation and that the designation automatically flowed from his prior false imprisonment conviction. He claims that the false imprisonment offense had no sexual component and that he was not designated a sexual offender in Broward County. He maintains that but for counsel's misadvice that these factors were irrelevant to his sex offender status, he would not have entered his plea. The postconviction court incorrectly denied Munroe's claim, finding that Munroe could only challenge his sexual offender designation in Broward County and that his false imprisonment conviction qualified him as a sexual offender regardless of whether there was a sexual component to the crime.

To convict a defendant of failure to register as a sexual offender, the State must prove beyond a reasonable doubt that the defendant is a sexual offender unless the defendant stipulates that he or she is a sexual offender. *In re Standard Jury Instructions in Criminal Cases—Report No. 2007-4*, 983 So. 2d 531 app. at 533 (Fla. 2008). Florida's sexual offender registration statute provides several ways to prove sexual offender status, one of which is proof of a prior conviction under a cross-referenced statutory section:

> *943.0435 Sexual offenders required to register with the department; penalty.—*
>
> (1) As used in this section, the term:
>
> (a)1. "Sexual offender" means a person who meets the criteria in sub-subparagraph a., sub-subparagraph b., sub-subparagraph c., or sub-subparagraph d., as follows:
>
> a.(I) Has been convicted of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes in this state or similar offenses in another jurisdiction: s. 787.01, s. 787.02, or s. 787.025(2)(c), where the victim is a minor and the defendant is not the victim's parent or guardian; s. 794.011, excluding s. 794.011(10); s. 794.05; s. 796.03; s. 796.035; s. 800.04; s. 825.1025; s. 827.071; s. 847.0133; s. 847.0135, excluding s. 847.0135(4); s. 847.0137; s. 847.0138; s. 847.0145; or s. 985.701(1); or any similar offense committed in this state which has been redesignated from a former statute number to one of those listed in this sub-sub-subparagraph . . . .

§ 943.0435(1)(a)(1)(a)(I). However, where the sexual offender

16TH CIR 00362

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

Brown was arrested and placed in the patrol car. The officer then looked into the car and noticed a lady's wallet in plain view on the driver's seat. He seized the wallet, looked at it and determined it belonged to an elderly woman. He then searched the entire vehicle and discovered three more wallets. 24 So. 3d at 674.

In considering whether the wallets should be suppressed in light of *Gant*, this Court analyzed *Chimel*, 395 U.S. 752, *New York v. Belton*, 453 U.S. 454 (1981), and *Thornton v. United States*, 541 U.S. 615 (2004), which laid the framework for *Gant*. We ultimately concluded: "[T]he 'reasonable belief that evidence might be found' prong of *Gant* can be satisfied solely from the inference that might be drawn from the nature of the offense of arrest itself, and the assumption that evidence *might* be found at the place of arrest." *Brown*, 24 So. 3d at 678 (emphasis added). Thus, because the offense of arrest in *Brown* was theft, "an offense for which police could 'expect to find evidence,' " we held that the search was "justified as an incident to the arrest for the purpose of 'gathering evidence' of the crime of theft." 24 So. 3d at 677.

Similarly here, the offenses for which Grant was being arrested were crimes for which a search of the vehicle could have yielded physical evidence. Grant was arrested for offenses related to mortgage fraud, and it was reasonable for the arresting agent to believe that evidence relevant to the crimes might be found in the vehicle. We conclude that the agent was justified in searching Grant's vehicle given the arrest warrant and his observation of documents in a not-fully zipped briefcase in plain view on the backseat of the vehicle. The court did not err in denying Grant's motion to suppress this evidence.

We now consider the motion for judgment of acquittal. A motion for judgment of acquittal is reviewed de novo to determine whether the evidence is legally sufficient to support the jury's verdict. *Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002). In ruling on a motion for judgment of acquittal, it "is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other [reasonable] inferences. That view of the evidence must be taken in the light most favorable to the state." *State v. Law*, 559 So. 2d 187, 189 (Fla. 1989). On review, the appellate court will generally not reverse a conviction that is supported by substantial, competent evidence. *Williams v. State*, 884 So. 2d 1097, 1099 (Fla. 5th DCA 2004) (citing *Donaldson v. State*, 722 So. 2d 177, 182 (Fla. 1998); *Terry v. State*, 668 So. 2d 954, 964 (Fla. 1996)). If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, then there is sufficient evidence to sustain a conviction. *Id.* (citing *Banks v. State*, 732 So. 2d 1065 (Fla. 1999)).

In count 5 of the information, Grant and Morris were charged with and convicted of mortgage fraud pursuant to section 817.54, Florida Statutes (2004).[3] The information alleged that Patricia Hemingway was the victim of the fraud. To prove this charge, the State was required to show that Grant and Morris: (1) obtained a mortgage, mortgage note, promissory note, or other instrument evidencing a debt or obtained the signature of a person to a mortgage, mortgage note, promissory note, or other instrument evidencing a debt; (2) by color or aid of fraudulent or false representation or pretenses; (3) with intent to defraud. The victim's reliance on the false or misrepresented information is an essential element of the crime of mortgage fraud. *Adams v. State*, 650 So. 2d 1039, 1041 (Fla. 3d DCA 1995). Grant and Morris both assert that the trial court erred in denying their motions for judgment of acquittal because the State failed to present any evidence that Hemingway relied on any misrepresentations relating to the mortgage or note they made. We agree.

All the misrepresentations made concerning the mortgage loan were made to the lender or its agents, not Hemingway, the seller. There was no evidence that Hemingway saw the mortgage documents or relied on the false or fraudulent misrepresentations made concerning the mortgage in selling the property to Morris.[4] *See Darwish v. State*, 937 So. 2d 789 (Fla. 2d DCA 2006) (explaining that where evidence fails to show that victim was induced to part with money or property in reliance on misstatement of fact by defendant, conviction for obtaining money or property by false pretenses may not be sustained; conversely, conviction for such offense may be upheld where element of reliance is proven or conceded); *Pizzo v. State*, 910 So. 2d 287, 293 (Fla. 2d DCA 2005) (holding evidence was insufficient to prove mortgage fraud as there was no evidence that defendant made any fraudulent or false representations to any named victim or that named victims relied on any false or fraudulent representations made by defendant). Accordingly, we conclude that the trial court erred in denying Grant's and Morris's motions for judgment of acquittal on mortgage fraud (count 5). As a result, we reverse Grant's and Morris's conviction and sentence for mortgage fraud as alleged in count 5 of the joint amended information. In all other respects, we affirm.

AFFIRMED in part; REVERSED in part and REMANDED. (TORPY and JACOBUS, JJ., concur.)

---

[1]Grant and Morris were tried together and each has filed an appeal. Although we have consolidated these cases for disposition in this opinion, they remain separate and distinct cases for all other purposes.

[2]The validity of that stop is not challenged on appeal.

[3]Section 817.54, Florida Statutes, provides:

> Any person who, with intent to defraud, obtains any mortgage, mortgage note, promissory note or other instrument evidencing a debt from any person or obtains the signature of any person to any mortgage, mortgage note, promissory note or other instrument evidencing a debt by color or aid of fraudulent or false representation or pretenses, or obtains the signature of any person to a mortgage, mortgage note, promissory note, or other instrument evidencing a debt, the false making whereof would be punishable as forgery, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

[4]For this reason, the State's reliance on several fraud cases is misplaced, and, in fact, read in favor of Grant and Morris. In each of these case, the evidence showed that the named victim was defrauded of monies due to the defendant's deception. *See Finlay v. State*, 12 So. 2d 112 (Fla. 1943) (affirming conviction for obtaining money by false pretenses where defendant's misrepresentations of fact induced *donor* to make charitable contribution); *Green v. State*, 190 So. 2d 614 (Fla. 3d DCA 1966) (affirming conviction for grand larceny by obtaining money by false pretenses where evidence showed that *victim would not have given money* to defendant absent defendant's false representations). *See generally* 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.7(c) (2d ed. 2003) (discussing element of reliance in connection with crime of obtaining money or property by false pretenses).

* * *

Mortgage foreclosure—Setting aside of foreclosure sale—Trial court erred in summarily denying foreclosing mortgagee's motion to set aside foreclosure sale where motion alleged that sale price was grossly inadequate and that mortgagee mistakenly failed to send a representative to the sale—Unilateral mistake which results in grossly inadequate sale price is sufficient to invoke trial court's discretion to consider setting sale aside—Question of whether mortgagee's failure to have a representative present was the result of mistake is factual question that requires a hearing

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, ETC., Appellant, v. BOGDAN BJELJAC, ET AL., Appellees. 5th District. Case No. 5D09-2809. Opinion filed September 3, 2010. Appeal from the Circuit Court for Volusia County, John V. Doyle, Judge. Counsel: Jack R. Reiter and Jordan S. Kosches, of Adorno & Yoss LLP, Miami, for Appellant. Harlan L. Paul, of Paul & Elkind, P.A., Deland, for Appellees, Hill & Beckman, Inc. and Tamco Corp. of Volusia County. No appearance for Appellee, Bogdan Bjeljac.

(ORFINGER, J.) U.S. Bank appeals the trial court's order denying its motion to cancel and reschedule a foreclosure sale, objection to the sale, and motion to vacate the foreclosure sale and return funds to the third-party purchasers. We affirm in part and reverse in part.

16TH CIR 00363

or other means without the express permission of the publishers. 1-800-351-0917

Although the procedural history of this seemingly uncomplicated mortgage foreclosure proceeding is unnecessarily complex, suffice it to say that after U.S. Bank obtained a final judgment of foreclosure, the Clerk of the Circuit Court sold the property to Hill & Beckman Inc. and Tamco Corporation of Volusia County[1] at a properly noticed public sale. U.S. Bank failed to send a representative to the sale. The day after the sale, U.S. Bank filed an objection and a motion to return third-party funds, vacate the certificate of sale and set aside the sale. Without a hearing, the trial court denied the motion. U.S. Bank then filed a motion for rehearing and supplemental objections to the sale, arguing that the sale should be set aside since it mistakenly failed to send a representative to the sale resulting in an inadequate bid price. Again, without holding a hearing, the trial judge denied the motion."[2]

U.S. Bank first argues that the trial court erred when it denied its motion to cancel and reset the foreclosure sale. We disagree. U.S. Bank's motion to cancel and reset the foreclosure sale alleged only that it "requests that the foreclosure sale . . . be cancelled and reset." The trial court denied the motion, finding that it set forth no basis on which the court could intelligently exercise its discretion. Florida Rule of Civil Procedure 1.100(b) requires that motions "state with particularity the grounds therefor . . ." U.S. Bank's motion failed to satisfy this basic requirement. We find no error in the trial court's denial of its motion to cancel and reset the foreclosure sale.

U.S. Bank next contends that the trial court erred in failing to set aside the foreclosure sale and vacate the certificate of title because the bid price was inadequate and it mistakenly failed to send a representative to the sale. The general rule is that mere inadequacy of price, standing alone, is not a basis for setting aside a judicial sale. However, when the inadequacy of price is gross and results from any mistake, accident, surprise, fraud, misconduct or irregularity upon the part of either the purchaser or other person connected with the sale, with resulting injustice to the complaining party, equity will act to prevent the wrong result. *Arlt v. Buchanan*, 190 So. 2d 575, 577 (Fla. 1966); *Wells Fargo Credit Corp. v. Martin*, 605 So. 2d 531, 533 (Fla. 2d DCA 1992). The third-party purchasers concede that the price they paid for the foreclosed property was grossly inadequate. Consequently, we need only determine if the inadequacy resulted from some mistake, fraud or other irregularity in the sale. *Arlt*, 190 So. 2d at 577; *see Maule Indus., Inc. v. Seminole Rock & Sand Co.*, 91 So. 2d 307, 311 (Fla. 1956).

In Florida, "even a unilateral mistake which results in a grossly inadequate price is legally sufficient to invoke the trial court's discretion to consider setting the sale aside." *United Cos. Lending Corp. v. Abercrombie*, 713 So. 2d 1017, 1019 (Fla. 2d DCA 1998); *see Long Beach Mortgage Corp. v. Bebble*, 985 So. 2d 611, 614 (Fla. 4th DCA 2008); *Wells Fargo Fin. Sys. Fla., Inc. v. GRP Fin. Servs. Corp.*, 890 So. 2d 383, 384 (Fla. 2d DCA 2004). The sufficiency of the "mistake" is shown, if "the owner became deprived of an opportunity to bid at the sale when, because of inadvertence or a mistake, an attorney who was to represent him there for that purpose was not present." *Van Delinder v. Albion Realty & Mortgage, Inc.*, 287 So. 2d 352, 353 (Fla. 3d DCA 1973).

Section 45.031(8), Florida Statutes (2009), provides that objections based on the amount of the bid may be filed within ten days after the clerk files a certificate of sale, and "[i]f timely objections to the bid are served, the *objections shall be heard by the court.*" (Emphasis added). "For the court to 'hear' objections, it must provide both notice and an opportunity for any interested party to address those objections." *Shlishey the Best, Inc. v. CitiFinancial Equity Servs., Inc.*, 14 So. 3d 1271, 1276 (Fla. 2d DCA 2009); *see Nelson v. Santora*, 570 So. 2d 1374, 1376 (Fla. 1st DCA 1990) (interpreting former version of section 45.031(8) to require court to hold actual hearing on any objections).

We recognize that "[t]he specific parameters of the notice and opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding." *Massey v. Charlotte County*, 842 So. 2d 142, 146 (Fla. 2d DCA 2003). Consequently, we do not hold that a court may only "hear" objections to a foreclosure sale at an in-court proceeding with counsel physically present. Still, we are confident that the term "heard" in section 45.031(8) does not contemplate that objections to a foreclosure sale are to be decided ex parte and without notice to all interested parties. *See Shlishey*, 14 So. 3d at 1276. We believe the question of whether U.S. Bank's failure to have a representative present at the sale was the result of a mistake is inherently a factual question that requires a hearing before the court. Because the trial court summarily denied the motion to set aside the sale without a hearing, the record is devoid of anything that would support or refute U.S. Bank's allegations of mistake. Due process requires more.

For these reasons, we reverse the order denying U.S. Bank's motion to set aside the foreclosure sale and return funds to the third-party purchasers and remand for further proceedings consistent with this opinion.

AFFIRMED in part; REVERSED in part; REMANDED for further proceedings. (GRIFFIN, J., and BURGER, R., Associate Judge, concur.)

---

[1]Hill & Beckman, Inc. and Tamco Corporation of Volusia County, the third-party purchasers, have intervened as appellees in this appeal.

[2]Because of jurisdictional concerns, we previously remanded this matter to the trial court for rendition of proper orders. *See U.S. Bank Nat'l Ass'n v. Bjeljac*, 17 So. 3d 862 (Fla. 5th DCA 2009).

* * *

Torts—Automobile accident—Negligent hiring of independent contractor—Action by plaintiff who was injured when his car collided with a tractor-trailer rig hauling scrap metal for defendant reentered highway from the shoulder, alleging that defendant was liable for the negligent hiring and retention of the trucking company to transport scrap metal—Although Florida recognizes a cause of action for the negligent selection of an independent contractor, trial court properly entered summary judgment for defendant because plaintiff could not, as a matter of law under the undisputed facts, show that defendant's alleged negligence in selecting trucking company as its independent contractor proximately caused the accident

MATTHEW DAVIES, C&W TRUCKING, A Florida Corporation, and TITUS CLARK, Appellants, v. COMMERCIAL METALS COMPANY ETC., ET AL., Appellees. 5th District. Case Nos. 5D08-3579 & 5D08-3738. Opinion filed September 3, 2010. Appeal from the Circuit Court for Orange County, Reginald K. Whitehead, Judge. Counsel: Griffith J. Winthrop, III, Jennifer K. Birmingham and David R. Eveler of Alvarez, Sambol, Winthrop & Madison, P.A., Orlando, for Appellants, C&W Trucking and Titus Clark. Bard D. Rockenbach of Burlington & Rockenbach, P.A., and F. Gregory Barnhart of Searcy, Denney, Scarola, Barnhart & Shipley, P.A., West Palm Beach, for Appellant, Matthew Davies. Judith W. Simmons and Kenneth A. Beytin of Burton, Beytin & McLaughlin, P.A., Tampa, for Appellants, C&W Trucking & Titus Clark. Arthur J. England, Jr., Brigid F. Cech Samole, and Kerri L. McNulty of Greenberg, Traurig, P.A., Miami, and Scott P. Yount, Robert T. Vorhoff of Garrison, Yount, Lormand, Forte & Mulcahy, LLC, Tampa, for Appellees.

(JACOBUS, J.) This is an appeal by Matthew Davies, C&W Trucking, and Titus Clark of a final summary judgment entered in favor of Commercial Metals Company. We find the summary judgment was properly entered and affirm, as there were no disputed issues of material fact. We write primarily to address a point of confusion that arose regarding the precise nature of the trial court's decision.

First, an overview of the case and the parties is in order. Matthew Davies was the plaintiff below. Commercial Metals Company, C&W Trucking, and Titus Clark were the defendants. Davies filed suit after he was seriously injured in an accident that occurred on the morning of October 12, 2005, when his car collided with the rear of a tractor-

"such difficulties do not . . . outweigh the burdens faced by a minor child who must do without monetary support from the incarcerated parent. Our primary concern is that the child receives the support to which he or she is entitled. *Of secondary concern are the parent's difficulties—largely self-inflicted—resulting from incarceration due to criminal conduct unrelated to the support obligations.*" [e.s.]

846 So.2d at 493; *see also Holt v. Geter*, 809 So.2d 68 (Fla. 1st DCA 2002) (affirming order directing defendant to pay child support despite argument that payment should be suspended until release from prison because unable to earn an income; applying *Mascola*).

A child's best interest is certainly not served by refusing to set an initial amount of support based on imputed income for a parent about to be imprisoned. We therefore hold that income should be imputed to the father so that the arrearages can accumulate until he is able to earn an income. When release occurs, the court should establish a payment plan to reduce arrearages according to his earning ability, setting a payment plan. On remand the trial court shall recalculate child support to reflect the father's obligation for support by imputing income.

Reversed. (HAZOURI and DAMOORGIAN, JJ., concur.)

[1]*See* § 61.30(2)(b), Fla. Stat. (2009).

* * *

Mortgage foreclosure—Error to grant summary judgment in favor of plaintiff where plaintiff's status as lawful "owner and holder" of note was not conclusively established by record evidence—Unsigned, unauthenticated "endorsement in blank" did not establish that plaintiff validly owned and held note and mortgage

JERRY A. RIGGS, SR., Appellant, v. AURORA LOAN SERVICES, LLC, Appellee. 4th District. Case No. 4D08-4635. April 21, 2010. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Thomas M. Lynch, IV, Judge; L.T. Case No. CACE 07-17670 (14). 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.

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

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

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

Reversed and remanded. (GROSS, C.J., and POLEN, J., concur.)

* * *

Criminal law—Juveniles—Resisting officer without violence—Lawful execution of legal duty—Evidence—Contents of BOLO dispatch received by arresting officer were non-hearsay and were admissible to establish element of crime of resisting officer without violence—BOLO was not offered to prove truth of its contents, but to establish that arresting officer was engaged in lawful execution of legal duty when he commanded juvenile to stop and juvenile fled

S.D.T., a child, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 4D09-1955. April 21, 2010. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Merrilee Ehrlich, Judge; L.T. Case No. 08-11785DL00A. Counsel: Carey Haughwout, Public Defender, and Patrick B. Burke, Assistant Public Defender, West Palm Beach, for appellant. Bill McCollum, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee.

(GROSS, C.J.) We hold that the contents of a BOLO dispatch were non-hearsay admissible to establish an element of the crime of resisting an officer without violence. *See* § 843.02, Fla. Stat. (2008).

To find appellant guilty, the trial judge relied on a BOLO dispatch received by the arresting officer, which described two theft suspects at a Wal-Mart. Seeing two persons leaving the Wal-Mart who matched the description in the BOLO, the officer approached and said that he wanted to talk to them. One of the suspects was S.D.T., who fled in spite of the officer's command to stop. The officer ran down S.D.T. catching up with him around the corner of the store.

S.D.T. contends that because the content of the dispatch was hearsay, the trial court was precluded from relying on it to find him guilty. However, the dispatch was not hearsay, because the state did not offer it for the truth of its contents.

One of the elements of resisting an officer without violence is that, at the time of the resisting, the officer was engaged in the lawful execution of a legal duty. *See C.E.L. v. State*, 24 So. 3d 1181, 1185-86 (Fla. 2009). If an officer has reasonable suspicion to make an investigatory stop, then an officer is engaged in the lawful execution of a legal duty. *Id.* at 1186. "To be guilty of unlawfully resisting an officer, an individual who flees must know of the officer's intent to detain him, and the officer must be justified in making the stop at the point when the command to stop is issued." *Id.* (citations omitted).

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. (2008). For the purpose of a hearsay analysis, the declarant in this case was the dispatcher who broadcast the BOLO giving the description of the theft suspects at the Wal-Mart.[1] The state offered the BOLO not to prove the truth of its contents—that the suspects had committed a theft—but to establish that the arresting officer was engaged in the lawful execution of a legal duty at the time of the stop. Regardless of the truth of the statements in the BOLO, the officer was justified in relying on it to make an investigatory stop.

This non-hearsay use of the BOLO to establish an element of the crime of resisting without violence distinguishes this case from those cases which have held that the contents of a BOLO are inadmissible hearsay. *See Conley v. State*, 620 So. 2d 180 (Fla. 1993); *Owens v. State*, 948 So. 2d 1009 (Fla. 4th DCA 2007); *Taylor v. State*, 845 So. 2d 301 (Fla. 2d DCA 2003); *Tosta v. State*, 786 So. 2d 21 (Fla. 4th DCA 2001); *Horne v. State*, 659 So. 2d 1311 (Fla. 4th DCA 1995);

increased his aggregate sentence length from sixty years to seventy years. The trial court denied the claim on the theory that it had been previously adjudicated. The defendant has appealed.

By way of background, in 1997, the defendant had sixteen pending criminal cases in the trial court. Pursuant to a plea agreement, the defendant was sentenced to concurrent sixty year sentences in a number of the cases, and shorter concurrent sentences in the remaining cases.

Thereafter the defendant filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850, and in 2000, the trial court granted partial relief. In three of the trial court cases, there had never been a notice of habitualization. As a result, the trial court resentenced the defendant to ten year sentences under the sentencing guidelines in those cases. The judge's oral pronouncement made clear that the defendant's aggregate sentence would remain sixty years.

Thereafter the Department of Corrections recalculated the defendant's tentative release date. The Department concluded that as a result of the resentencing, the defendant's aggregate sentence is now seventy years. The Department's explanation to the defendant was that in two of the resentenced cases, the ten year sentences were now running consecutive, rather than concurrent.

The State's response filed in this court acknowledges that this is a claim which the defendant has not previously raised and that the trial court erred in concluding that this particular claim had been previously adjudicated. The claim here is that the written sentencing order deviates from the court's oral pronouncement. Such a claim is cognizable under rule 3.800(a). *Williams v. State*, 957 So. 2d 600, 601 (Fla. 2007). We therefore reverse the order now before us on this issue and remand for consideration of the merits of the claim.*

We affirm with regard to claims two and three.

Affirmed in part, reversed in part, and remanded for further proceedings consistent herewith.

*Because the sentencing structure in this case is complicated, counsel shall be appointed for the proceedings on remand.

* * *

Mortgage foreclosure—It was a gross abuse of discretion to grant mortgagors' motion to set aside foreclosure judgment and vacate foreclosure sale on the ground that the trial judge did not think it was fair—Foreclosure judgment could not properly be reversed on ground that copy of final default judgment was served to mortgagors at the wrong address

PHOENIX HOLDING, LLC, Appellant, vs. ARMANDO N. MARTINEZ, LUMINADA MARTINEZ AND THE BANK OF NEW YORK, on behalf of Cwmortgage Loan Trust, Appellees. 3rd District. Case No. 3D09-3365. L.T. Case No. 08-58360. Opinion filed February 17, 2010. An Appeal from the Circuit Court for Miami-Dade County, Peter Adrien, Judge. Counsel: Arnaldo Velez, for Appellant. Shapiro and Fishman and Heidi J. Weinzetl; Dania S. Fernandez and Monica Amador, for Appellees.

(Before RAMIREZ, C.J., and CORTIÑAS J., and SCHWARTZ, Senior Judge.)

(CORTIÑAS, J.) Phoenix Holding, LLC, the successful bidder at a foreclosure sale, appeals an order denying its motion for a writ of possession and granting the mortgagors' motion to vacate the sale and the judgment upon which it was based. The mortgagors had provided no true defense to the foreclosure but had merely pled their victimhood in various ways.[1] The trial court, agreeing with the notion that they had received no court notices because of a clerical error sending the notices to the wrong address, set aside the summary judgment of foreclosure "[i]n terms of fairness and due process." We find this to be a gross abuse of discretion and therefore reverse.

"Whether the complaining party has made the showing necessary to set aside a [foreclosure] sale is a discretionary decision by the trial court, which may be reversed only when the court has grossly abused its discretion." *United Cos. Lending Corp. v. Abercrombie*, 713 So. 2d 1017, 1018 (Fla. 2d DCA 1998). "When analyzing a trial court's exercise of its discretion, the appellate court is to determine whether 'reasonable persons could differ as to the propriety of the action taken by the trial court.' " *Ingorvaia v. Horton*, 816 So. 2d 1256, 1259 (Fla. 2d DCA 2002) (quoting *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)). "If reasonable persons could differ, then the court's action was not an abuse of discretion." *Id.*

"It is established that a judicial sale may be set aside on the grounds of gross inadequacy of consideration, surprise, accident, mistake, or irregularity in the conduct of the sale." *U-M Pub., Inc. v. Home News Pub. Co.*, 279 So. 2d 379, 381 (Fla. 3d DCA 1973) (citing *Moran-Alleen Co. v. Brown*, 123 So. 561 (Fla. 1929)). "However, even though a judicial sale will not be set aside due to 'slight defects,' or for 'merely technical, formal, and unimportant irregularities,' we must view the proceedings in their totality." *Id.* (internal citations omitted). In their motion to set aside foreclosure sale, the mortgagors cite Rule 1.540(b), Florida Rules of Civil Procedure, for the proposition that a court may relieve a party from a final judgment, but they neglect to assert the presence any of the required elements: mistake, excusable neglect, newly discovered evidence, or fraud.

For the first time on appeal, the mortgagors argue that because Rule 1.080(h)(2), Florida Rules of Civil Procedure, gives a mortgagor against whom a default judgment has been entered the right to be served with a copy of the judgment, and because the final judgment in this case was served to them at the wrong address, it was correctly reversed. However, Rule 1.080(h)(3) notes that subdivision (h) "is directory and a failure to comply with it does not affect the order or judgment or its finality or any proceedings arising in the action." *See also Bennett v. Ward*, 667 So. 2d 378, 381 (Fla. 1st DCA 1995) (quoting *Subsaro v. Van Heusden*, 191 So. 2d 569, 570 (Fla. 3d DCA 1966)) ("The 'failure of the judgment debtor to receive . . . notice' does not automatically require that a judicial sale be set aside.").

The two cases the mortgagors cite in which a foreclosure judgment is reversed are distinguishable because, in both cases, neither the debtors nor their attorneys received notice. *See Ingorvaia*, 816 So. 2d at 1257; *Bennett*, 667 So. 2d at 380-81. Here, the mortgagors were undisputedly served at their correct address, and it is apparent from their filing of both an answer[2] and a motion to deny summary judgment that they were aware of what was occurring in the action. In addition, the mortgagors' counsel clearly knew about the final judgment and notice of sale, as reflected in a letter to mortgagors dated seven weeks before the sale.

With no valid reason, the trial judge set aside the judgment and sale solely because he did not "think it [was] fair." Unfortunately, neither the ground of fairness nor "the 'ground' of beneyolence and compassion . . . constitute[s] a lawful, cognizable basis for granting relief to one side to the detriment of the other, and thus cannot support the order below: no judicial action of any kind can rest on such a foundation." *Republic Fed. Bank, N.A. v. Doyle*, 19 So. 3d 1053, 1054 (Fla. 3d DCA 2009). Although the trial judge might believe otherwise, "[w]e cannot agree that courts of equity have any right or power under the law of Florida to issue such order it considers to be in the best interest of 'social justice' at the particular moment without regard to established law." *Flagler v. Flagler*, 94 So. 2d 592, 594 (Fla. 1957). Accordingly, we reverse and remand with instructions to reinstate the final judgment and sale of the foreclosed property.

Reversed and remanded.

[1]Among other excuses, the mortgagors asserted that they had lost their second jobs, they were not given salary raises, their mortgage payment increased, they were not credit-worthy, they were defrauded by loan modification companies, and they had separated.

[2]The mortgagors included the wrong return address in their answer.

* * *

16TH CIR 00366

Holly Elomina

From: Winston Burrell [judgetaylor16@msn.com]
Sent: Thursday, October 07, 2010 2:12 PM
To: Holly Elomina
Subject: RE:

[redacted] Hearing
Order - status conference
[redacted] not Judge's Taylor Case
[redacted] Dismissal 4 failure to Prosecute

Holly,

Yes, I have started a list. The cases I am giving Regi on this first list are cases from my last trip down. These are mostly cases where the attorneys had matters scheduled and then cancelled them before the hearing. I haven't reviewed them on Odyssey yet, so perhaps their motions have already been rescheduled. If so, I do not need a status hearing.

Regie may want to develope her own system, but I have found the most expedient way of doing this is to look up the file on Odyssey, print a copy of the most recent document containing a service list of the parties involved, then prepare the notice and envelopes. I always make an extra copy of the notice and give it to Josephine to put on my calendar.

[redacted]

The cases are:

9/15 09-CA-2021-K check oct 15th Hearing
6/2 08-CA-1440-K order
9/22 08-CA-1070-K check oct 22nd 30 days (Defendant) to answer
9/17 09-CA-1335-K order
10/4 07-CA-1499-K order - status Conference (motion to withdraw)
[redacted]
9/16 08-CA-1068-K Set 4 Sale 10/22
9/9 08-CA-1271-K order - status conf.
not found 08-CA-0611-K
9/15 10-CA-66-K order - status conf
10/1 10-CA-278-K Hearing - 10/14
9/24 09-CA-1856-K order
9/15 09-CA-1120-K order - (Hearing - CA 9/15)
9/14 08-CA-728-K order
9/24 08-CA-2068-K Hearing 10/18
9/16 09-CA-319-K order
9/24 08-CA-1581-K order (Emergency)
10/4 07-CA-1180-K Hearing 10/13

8/17 09-CA-604-P Filed Status 7/30 - no hearing on 8/17 - Order - Status conf
9/15 08-CA-997-P order - conf.
5/21 09-CA-1142-P Hearing 11/8
9/13 09-CA-500-P mediation: Granted (30 days = 10/13) 10/18 mediation did not happen
9/20 09-CA-739-P order - conf.
10/7 09-CA-409-P [redacted]
9/9 09-CA-847-P Q's to Judge Taylor
[redacted] For 12/17/10
3/10 10-CA-164-P [redacted]
08-CA-853-P Hearing 10/18@8:30
9/21 09-CA-273-P order
~~09-CA-739-P~~ order
9/20 08-CA-981-P (?) Judge's Summons Hearing
9/7 09-CA-1061-P order

10/7/2010

|24 09-CA-456-M Writ of Possession - served 9/28
116 10-CA-292-M expired 10/06 - order conf.
/17 09-CA-459-M Hearing - Att's responsible 2 sent Order → call ms milk received order on it
129 10-CA-189-M Order - conf. Judge's look for
/17 08-CA-290-M - case is moving Do we need Set status conf.?
9/17 09-CA-494-M - oct 18 Due Date - Set Status
9/17 07-CA-404-M - OCT 18 - for mediation Set Status Set Status
10/4 09-CA-383-M - Notice of Filing 10/4 - Previous Hearing Cancelled (Send order conf Y/N
08-CA-289-M Hearing 10/20@9:30
08-CA-84-M
08-CA-86-M
0/4 09-CA-183-M Hearing 10/22@9:30
08-CA-45-M Hearing 10/27@11:00
)/24 10-CA-38-M Set Status
9/24 10-CA-39-M
9/24 10-CA-40-M
1/24 10-CA-41-M
9/24 10-CA-42-M
9/24 10-CA-45-M
9/24 10-CA-46-M
9/24 10-CA-47-M
9/24 10-CA-48-M

Attorney's are in a process of negociation and they will be filling voluntary dismissal. 09/24

Should we file an order setting status conference?

Set Status

Subject:
Date: Wed, 6 Oct 2010 12:01:48 -0400
From: holly.elomina@keyscourts.net
To: judgetaylor16@msn.com

Were you going to send me a list of the cases for Regi to work on? Also, we never talked about the Litton Loan v. Hardy case that Judge Audlin wanted to go back to you.

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

Key West Court

Order Setting Status Conference

November 15th, 2010 at 11:30

09-CA-2021-K	Set Status - Judge Taylor to sign
08-CA-1440-K	Set Status
08-CA-1070-K	Set Status - Judge Taylor to sign
09-CA-1335-K	Set Status
07-CA-1499-K	Set Status
08-CA-1271-K	Set Status
10-CA-0066-K	Set Status
09-CA-1856-K	Set Status
09-CA-1120-K	Set Status
08-CA-0728-K	Set Status
09-CA-0319-K	Set Status
08-CA-1581-K	Set Status

Marathon Court

Order Setting Status Conference

November 17th, 2010 at 10:30am

10-CA-292-M	Set Status
10-CA-189-M	Set Status
09-CA-494-M	Set Status
07-CA-404-M	Set Status
09-CA-383-M	Set Status
10-CA-038-M	Set Status
10-CA-039-M	Judge's Taylor to sign
10-CA-040-M	
10-CA-041-M	
10-CA-042-M	
10-CA-045-M	
10-CA-046-M	
10-CA-047-M	
10-CA-048-M	

Plantation Key Court

Order Setting Status Conference

November 17th, 2010 at 2:00pm

09-CA-0604-P	Set Status
08-CA-0997-P	Set Status
09-CA-0500-P	Set Status
09-CA-0739-P	Set Status
09-CA-0847-P	Set Status
08-CA-0703-P	Dismissal For Failure to Prosecute 12/17/10
10-CA-0164-P	Dismissal For Failure to Prosecute 12/17/10
09-CA-0273-P	Set Status
09-CA-1061-P	Set Status

DISMISSAL

8 06-CA-1086-K Order of Dismissal Filed 10/18 – Agenda: 12/15 → No Record Activity
15 07-CA-367-K " " " " "
[redacted] 07-CA-912-K → case closed 8/09
36 07-CA-968-K → Order of Dismissal & Lack of Service 10/18
51 07-CA-1376-K → Dismissal filed 10/18 & 10/18 Counsel Substitution & 10/26 letter CT CORP
110 08-CA-448-K → Order of Dismissal filed 10/18 - Agend 12/15
133 08-CA-604-K → " " " "
[redacted] 08-CA-644-K → case closed 9/9
162 08-CA-728-K → Set Status :. Hearing 11/15 @ 11:30
09/09 [redacted] 08-CA-774-K
197 08-CA-892-K
[redacted] 08-CA-1450-K → case closed 9/10
08/09 [redacted] 08-CA-1465-K
[redacted] → Set Status instead Order of Dismissal 9/10
02/10 [redacted] 08-CA-2032-K
[redacted] notice filed 9/10
08/09 [redacted] 08-CA-2088-K

Files from Clerk

11/08 [redacted] 07-CA-464-K
[redacted] 07-CA-3459-K case closed 10/10 :. Notice of Voluntary Dismissal (Plaintiff)
12/08 [redacted] 06-CA-885-K

[redacted] Dismissal
Order of Dismissal filed on 10/18 :. Agenda 12/15
10/21 :. Agenda 12/30
[redacted] case closed
[redacted] ≠ Dismissal

Location #	CASE NUMBER	Notes
KEY WEST		
2	03-CA-1092-K	11/18
21	07-CA-572-K	
52	07-CA-1384-K	
58	07-CA-1501-K	Hearing Set 11/15 @ 10am
64	07-CA-1629-K	
65	07-CA-1632-K	
67	07-CA-1658-K	
70	07-CA-1711-K	11/18
71	07-CA-1737-K	11/18
73	08-CA-26-K	
82	08-CA-174-K	
91	08-CA-319-K	
94	08-CA-320-K	set hearing 12/09 @ 9:30am [redacted]
96	08-CA-344-K	
119	08-CA-521-K	case closed @ 1:30pm → Plantiff Dismissal
126	08-CA-563-K	case closed → Foreclosure Sale
141	08-CA-640-K	
144	08-CA-655-K	Hearing Set 11/18
150	08-CA-686-K	
165	08-CA-742-K	11/18
166	08-CA-746-K	11/19 @ 1:30pm
NO #	07-CA-1311-K	11/19
PLANTATION KEY		
63	07-CA-818-P ✓	12/6
66	07-CA-821-P ✓	
93	08-CA-151-P	verify if was set status by 11/9 @ 9:30
154	08-CA-336-P ✓	
156	08-CA-343-P ✓	
167	08-CA-358-P ✓	12/6
172	08-CA-374-P ✓	12/10
173	08-CA-384-P ✓	
178	08-CA-390-P ✓	
203	08-CA-455-P ✓	@ 9:30
NO #	08-CA-120-P ✓	12/10
MARATHON KEY		
1	98-CA-315-M	12/7 Hearing 11/16
72	08-CA-3-M ✓	
88	08-CA-60-M ✓	
90	08-CA-62-M ✓	
101	08-CA-89-M ✓	@ 9:30am
153	08-CA-157-M ✓	
183	08-CA-190-M ✓	
184	08-CA-194-M ✓	

DISMISSAL

8	06-CA-1086-K
15	07-CA-367-K
34	07-CA-912-K
36	07-CA-968-K
51	07-CA-1376-K
110	08-CA-448-K
133	08-CA-604-K
147	08-CA-644-K
162	08-CA-728-K
174	08-CA-774-K
197	08-CA-892-K

Consolidated case 1-CA-744-K (Hearing Judge Jones)

[redacted] note to Josephine
[redacted] closed case
[redacted] question (?)

Location #	CASE NUMBER	Notes
KEY WEST		
207 ✓	08-CA-923-K ✓	11/19
239 ✓	08-CA-1103-K ✓	@ 1:30pm
242 ✓	08-CA-1116-K ✓	
245 ✓	08-CA-1127-K ✓	
252 ✓	08-CA-1169-K ✓	
255 ✓	08-CA-1197-K ✓	11/19
258 ✓	08-CA-1208-K ✓	12/1
268 ✓	08-CA-1247-K ✓	[redacted] Set status 11/19 @ 1:30pm
272 ✓	08-CA-1259-K ✓	
281 ✓	08-CA-1327-K ✓	
299 ✓	08-CA-1446-K ✓	
301 ✓	08-CA-1453-K ✓	@ 9:30 am
302 ✓	08-CA-1459-K ✓	
303 ✓	08-CA-1464-K ✓	
312 ✓	08-CA-1514-K ✓	
313 ✓	08-CA-1519-K ✓	
321 ✓	08-CA-1566-K	Foreclosure Sale 12/13 → Case closed
326 ✓	08-CA-1582-K ✓	
329 ✓	08-CA-1611-K ✓	12/1
330 ✓	08-CA-1616-K ✓	12/1
332 ✓	08-CA-1624-K	10/22 Voluntary Dismissal → Case closed
333 ✓	08-CA-1625-K ✓	@ 2:00 pm
335 ✓	08-CA-1630-K ✓	
342 ✓	08-CA-1658-K ✓	
343 ✓	08-CA-1666-K ✓	
350 ✓	08-CA-1700-K ✓	
368 ✓	08-CA-1814-K ✓	12/1
369 ✓	08-CA-1815-K ✓	[redacted] Set 12/1 @ 9:30 am
381 ✓	08-CA-1858-K ✓	[redacted] 12/1 @ 2pm ✓
386 ✓	08-CA-1870-K ✓	[redacted] 11/18 @ 10 am
388 ✓	08-CA-1885-K ✓	[redacted] 11/18 @ 1:30pm
(*) 393 ✓	08-CA-1901-K	11/18 @ 1:30 pm
417 ✓	08-CA-2015-K ✓	[redacted] 11/18 @ 1:30pm
423 ✓	08-CA-2034-K	[redacted] NO Suggestion of Bankruptcy filed - Set Status 10/13
442 ✓	08-CA-2128-K ✓	[redacted] 12/1 @ 2pm
PLANTATION KEY		
208 ✓	08-CA-462-P ✓	12/3
220 ✓	08-CA-497-P ✓	@ 2:00pm
225 ✓	08-CA-521-P ✓	
264 ✓	08-CA-621-P ✓	
286 ✓	08-CA-696-P	f/c Sale Cancelled 10/18 [redacted]
296 ✓	08-CA-736-P ✓	
338 ✓	08-CA-844-P ✓	10/3

need agenda 8 cases

1 was thes

DISMISSAL

300	08-CA-1450-K
304	08-CA-1465-K
344	08-CA-1670-K
424	08-CA-2037-K
426	08-CA-2044-K
437	08-CA-2088-K

MARATHON KEY		
223 ✓	08-CA-235-M ✓	12/7
278 ✓	08-CA-292-M ✓	@ 10am
284 ✓	08-CA-302-M ✓	
367 ✓	08-CA-415-M ✓	
412 ✓	08-CA-452-M ✓	
418 ✓	08-CA-456-M ✓	12/7

Josephine Cieri

From: josephine.cieri@keyscourts.net
Sent: Tuesday, November 02, 2010 11:44 AM
To: 'Winston Burrell'
Subject: RE: December 9th Calendar

Yes, it is and I will make a note to leave it open.

Josephine Cieri
Judicial Assistant
Sandra Taylor, Senior Circuit Judge
Freeman Justice Center
302 Fleming Street
Key West, FL 33040
305-295-3943
Josephine.Cieri@KeysCourts.net

From: Winston Burrell [mailto:judgetaylor16@msn.com]
Sent: Tuesday, November 02, 2010 11:37 AM
To: Josephine Cieri
Subject: December 9th Calendar

Jos--

I just gave Regie 9:30 a.m. - 10:30 am for status conferences on December 9th. I know you have set one Special Set for 10:30 - 12:30 and I have set one from 3:00 - 5:00 . I am about to set one more hearing from 1:30 - 3:00 and I want to make certain that we don't double-book the hearing times. Is 1:30 to 3:00 still available? If so, I will use it and that should close out the day.

Let me know.

S

Josephine Cieri

From: josephine.cieri@keyscourts.net
Sent: Friday, November 05, 2010 4:22 PM
To: 'Winston Burrell'
Subject: KW Dockets Attached
Attachments: KW Foreclosure Docket (11-15-10).doc; KW Foreclosure Docket (11-18-10).doc; KW Foreclosure Docket (11-19-10).doc

There are three and if you have any problems opening them, please let me know. Because I have a newer version of Word, I've been replacing the dockets with Word 03-07 so all the Clerks can open them.

Thank you.

Josephine Cieri
Judicial Assistant
Sandra Taylor, Senior Circuit Judge
Freeman Justice Center
302 Fleming Street
Key West, FL 33040
305-295-3943
Josephine.Cieri@KeysCourts.net

From: Winston Burrell [mailto:judgetaylor16@msn.com]
Sent: Friday, November 05, 2010 4:08 PM
To: Josephine Cieri
Subject: RE: Signing Order w/o a Hearing & Future KW Nov. Dates

Would you send me a copy of those dockets as they now stand. It will help me make a decision about whether we can take any more. It is unusual for the Clerk to cry "uncle", and I really try to accomodate them the best I can.

S

From: josephine.cieri@keyscourts.net
To: judgetaylor16@msn.com
Subject: RE: Signing Order w/o a Hearing & Future KW Nov. Dates
Date: Fri, 5 Nov 2010 15:07:20 -0400

I've conveyed this message and await their response.

I also just received a phone call from Jacque asking for all our KW dockets for the week of Nov. 15, saying "I hope you're not planning on scheduling any more hearings for those dates." I said it was up to you, and so would like to know if I (also Regi) should not book anything else for KW for 11/15, 11/18 and 11/19.

Thank you

Josephine Cieri
Judicial Assistant
Sandra Taylor, Senior Circuit Judge
Freeman Justice Center
302 Fleming Street
Key West, FL 33040
305-295-3943

Josephine.Cieri@KeysCourts.net

From: Winston Burrell [mailto:judgetaylor16@msn.com]
Sent: Friday, November 05, 2010 12:06 PM
To: Josephine Cieri
Subject: RE: Signing Order w/o a Hearing?

This does not require a hearing. They should submit a proposed order and envelopes to our office, along with a courtesy copy of their motion.

S

Subject: Signing Order w/o a Hearing?
Date: Fri, 5 Nov 2010 10:49:49 -0400
From: josephine.cieri@keyscourts.net
To: judgetaylor16@msn.com

I've been asked if you are willing to sign an order "without appearance since there is there is no one on the other side to appear, and it is to re-set a foreclosure date"

The case No. 08-CA-820-P, Wells Fargo Bank v. Rodriguez.

Please advise.

Josephine Cieri
Judicial Assistant
Sandra Taylor, Senior Circuit Judge
Freeman Justice Center
302 Fleming Street
Key West, FL 33040
305-295-3943
Josephine.Cieri@KeysCourts.net

Josephine Cieri

From: Josephine Cieri
Sent: Monday, November 08, 2010 8:53 AM
To: 'Winston Burrell'
Subject: Sp. Magistrate Calendar

A couple of questions: Do I make a separate calendar or just keep it on yours with a note (Sp. Mg.)? Also, is the Court open on 1/1? Your first date is that, and I though it unusual since most offices are closed on New Year's Day.

Please confirm.

(I see you were very busy in KW this weekend. I hope you gave yourself time to breath!)

Thanks,
jos

Josephine Cieri
Judicial Assistant
Sandra Taylor, Senior Circuit Judge
Freeman Justice Center
302 Fleming Street
Key West, FL 33040
305-295-3943
Josephine.Cieri@KeysCourts.net

Josephine Cieri

From: Josephine Cieri
Sent: Monday, November 08, 2010 2:56 PM
To: 'Winston Burrell'
Cc: Renee Parker
Subject: CourtCall Issue

There are two attorneys waiting to get through but have been told that the cases (2:00) were already heard and they cannot get on the line. I have been speaking with Grace from CourtCall at x163, and she has told me she will tell these two attorneys to continue to wait, that we will try to straighten this out.

I don't have a phone number to call into the courtroom, but have forwarded this message to Renee, in hopes she will get it.

Thank you.

Josephine Cieri
Senior Secretary
Sandra Taylor, Senior Circuit Judge
Freeman Justice Center
302 Fleming Street
Key West, FL 33040
305-295-3943
Josephine.Cieri@KeysCourts.net

Monday, November 15–Key West

SENIOR CIRCUIT JUDGE SANDRA TAYLOR

TIME	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
9:00 ✓	09-CA-1390-K	BOA v William R. Skeele, et al	Order Setting Status Conference	Judge Taylor
✓	07-CA-957-K	Saxon Mortage v Raysi Morffi-Otero	Order Setting Status Conference	Judge Taylor
✓	05-CA-911-K	Bd of Ct Commissioners of Monroe v Matthew R. Bonnett	Order Setting Status Conference	Judge Taylor
✓	07-CA-1138-K	Deutsche Bk/Bankers Trust of CA v Sunil A. Jagasia, et al	Order Setting Status Conference	Judge Taylor
✓	07-CA-772-K	Bk of NY/CWALT v Richard C. Medlin & Nicole Medlin, et al	Order Setting Status Conference	Judge Taylor
✓	07-CA-764-K	Wendy M. Rozzero v Sunil A. Jagasia, et al	Order Setting Status Conference	Judge Taylor
✓	07-CA-447-K	Deutsche Bk v Kelly J. Friend	Order Setting Status Conference	Judge Taylor
✓	07-CA-1347-K	Bk of NY/CWMBS v Christopher J. Smith, et al	Order Setting Status Conference	Judge Taylor
✓	07-CA-1501-K	Greenpoint Mortgage v Natasha M. Cole	Order Setting Status Conference	Judge Taylor
✓	07-CA-985-K	Bank of NY/CWALT v Joseph V. Greno, et al	Order Setting Status Conference	Judge Taylor
[new, 11/1]	09-CA-1237-K Tel, 5 min	Bank of America NA successor by merger to Countrywide Bank FSB vs. Irick, Kirksten C	Motion to Dismiss Counterclaim	Roderick F. Coleman 561-620-9292
9:30 ✓	07-CA-960-K Tel, 5 min	Key West Bank, FSB v. Adam M. Harper	Motion for Contempt and for Sanctions	Arthur E. Lewis 305-389-3005
✓	07-CA-960-K Tel, 5 min	Key West Bank, FSB v. Adam M. Harper, et. al.	Motion for Writ of Garnishment	Arthur E. Lewis 305-389-3005
✓	09 CA 60 K Tel, 10 min	Chase Home Finance , LLC v. Adadino Valiente	Defendants' Motion to Compel Mediation	Austin Nowakowski 866-609-5947 Karen A. Marozsan 800-441-2438
[new]	09-CA-1237-K Tel, 5 min	Bank of America NA successor by merger to Countrywide Bank FSB vs. Irick, Kirksten C	Motion to Dismiss Counterclaim	Roderick F. Coleman 561-620-9292
✓	2010-CA-552-K Tel, 5 min	CNLBank v. Conch Developers, LLC, et al	Motion for Summary Final Judgment	Michael Caborn 407- 423-4246
✓	07-CA-1466-K	Bk of NY v Jessval Acevedo	Order Setting Status Conference	Judge Taylor
10:00 ✓	10-CA-1219-K In person, 15 min	Keys Federal Credit Union v. Richard B. Shenk, et al.	Defendant's Motion for Referral to mediation	Eric McCarthy 305-296-8337
10:30 ✓	08-CA-2033-K Tel/15 mins.	Provident Bank of Maryland v. Mark Robino and Jennifer Robino	Defendant's Motion for Withdrawal of Counsel	Jiulio Margalli 305-295-9382 Michael Esposito
✓	08-CA-861-K Tel/15 mins.	U.S. Bank National Association v. Albert Gruneisen, III	Motion for Order Compelling Discovery	Jiulio Margalli 305-295-9382 Rick Garcia Christine Green 800-807-1179
✓	07-CA-233-K Tel, 15 min	South Point v Michael D. Cristler	Motion to Amend Style, direct clerk to issue summons, MET for Service of Process, Motion to Amend 2nd Revised amended complaint to add third party	954-564-0071 x 104

Update: 11/10/2010 4:46 PM

Monday, November 15--Key West

SENIOR CIRCUIT JUDGE SANDRA TAYLOR

TIME	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
			action, Motion to Consolidate and Motion to Continue Trial	
11:30 ✓	07-CA-1499-K	Bk of NY/CWALT v Samantha O'Farrell, et al	Order Setting Status Conference	Judge Taylor
✓	08-CA-1271-K	US Bk Nat. Assoc./JPMorgan v Gary P. Burchfield, et al	Order Setting Status Conference	Judge Taylor
✓	10-CA-66-K	Litton Loan Svcs v Larry C. Baeder, Tamara L. Bader, et al	Order Setting Status Conference	Judge Taylor
✓	09-CA-1856-K	Centennial Bk/Marine Bk v Andrew Wright	Order Setting Status Conference	Judge Taylor
✓	08-CA-728-K	Wells Fargo/IMPAC v Richard E. Wunsch, et al	Order Setting Status Conference	Judge Taylor
✓	09-CA-319-K	JPMorgan Chase v Adare Fritz, et al	Order Setting Status Conference	Judge Taylor
✓	08-CA-1581-K	Countrywide Home v Peter W. Obermeyer, et al	Order Setting Status Conference	Judge Taylor
✓	09-CA-2021-K	Bk of NY Mellon/JPMorgan Chase/SAM II Trust v Swati Goyal; Walter Price, et al	Order Setting Status Conference	Judge Taylor
✓	08-CA-1070-K	JPMorgan Chase v Julian Kainan, et al	Order Setting Status Conference	Judge Taylor
1:30 ✓	09-CA-1701 K Tel, 5 min	One West Bank FSB vs. Joseph Schroeder	Motion to Withdraw	Ulysses Felder 305.864.0136
✓	09-CA-1440 -K Tel, 5 min	Bank Of America NA vs. Joseph Schroeder, Nat. City Bk, et al	Motion to Withdraw	
✓	09-CA-455-K	Aurora Loan Services v Edward G. Deleon, Keys Fed. Credit, et al	Motion to Withdraw	
✓	09-CA-59-K Tel, 5 min	Suntrust Mortgage v Donald A. Alessi, et. al	Defendant's Request for Case Management Conference	Adam Cervera 305-262-4433
3:30 ✓	10-CA-1064-K Tel, 5 min	PennyMac Loan Services vs Cleghorn, Joseph D	Motion to Dismiss Pending	Lawrence U Taube 561-651-4160
✓	08-CA-1672-K In person, 15 min	Deutsche Bank v Paul Waldron	Motion to Dismiss Plaintiff's Second Amended Complaint	Albert L. Kelley 305-296-0160
✓	08-CA-1672-K In person, 15 min	Deutsche Bank v Paul Waldron	Motion for Mediation	Albert L. Kelley 305-296-0160
✓	08-CA-1672-K In person, 15 min	Deutsche Bank v Paul Waldron	Motion to Compel Response to Request for Production	Albert L. Kelley 305-296-0160
✓	08-CA-1095-K Tel, 5 min	Deutsche Bank v. Renade Grant	Motion for Case Management Conference	Vanessa Gamboa 305-262-4433
4:00 ✓	10-CA-534-K Tel, 10 min	Citibank/LMT vs. Frederick L. Covan, Covan, Diane Tolbert, et al	Emergency Motion for Protective Order & Motion to allow for Telephonic Depositions	Lindsay Dunn (813) 915-8660
✓	10 CA-703 K Tel, 5 min	Chase Home Finance vs. Danette Marie Baso, Silvers, Todd Christopher, Keys Fed. Credit, et al	Motion for Reformation	Jennifer Kopf 561-998-6700

Update: 11/10/2010 4:46 PM

Monday, November 15–Key West

SENIOR CIRCUIT JUDGE SANDRA TAYLOR

N/O = No NOH in Odyssey

TIME	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
N/O	10-CA-40-K 5 min	BAC Home Loans Servicing, L.P vs Young, James J	Defendant Motion to Dismiss	Michael Gelety 800-441-2438 x1649
N/O	08-CA-1467-K	National City Bank v Amada Blanco	Motion for Summary Judgment	Ricardo Corona
N/O	10-CA-19-K	US Bank Nat. Assoc. v Randy B. Pinkson, et al	Motion to Quash	Judge Taylor
N/O	10-CA-593-K Tel, 5 min	Bank of Coral Gables vs. Greunke, Chester, Greunke, Kristen, Ohlemacher, Richard, Ohlemacher, Marilyn, et al.	Motion to Proceed Without Need to Comply With Administrative Order 3.005 Because Subject Property is Vacant Land and Not a Residence	David B. Haber 305-379-2400 Chester Greunke Kristen Greunke Richard Ohlemacher Marilyn Ohlemacher
N/O	09-CA-1335-K	Deutsche Bk /IndyMac v Terrence A. Monson, et al	Order Setting Status Conference	Judge Taylor
N/O	08-CA-776-K Tel, 15 min	Washington Mutual vs. Jerry Coleman	Motion to Set Aside Default	
N/O	09-CA-1220-K	TIB Bk v Francis J. Gonzon, Nichol Gonzon, et al	Order Setting Status Conference	Judge Taylor

CANCELLATIONS

DATE	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
10/28	09-CA-42-K Tel, 5 min	Saxon Mortgage Services vs. Michael G. Haggerty	Reschedule a Foreclosure Sale	Luciana Ugarte 561-998-6700 x6850
11/2	08-CA-1633-K Tel,	M&I Marshall & Ilsley Bk v Caroline St. Partners	Plaintiff's Motion to Schedule Foreclosure Sale	Lori V. Vaughan 813-227-7432
11/3	08-CA-1581-K Tel, 5 min	Countrywide Home v Peter W. Obermeyer, et al	Motion to Dismiss	800-441-2438 Def: pro se
11/4	09-CA-126-P Tel, 5 min	Bayview Loan Servicing, LLC vs. Ana Alicia Gonzalez	Motion for Summary Judgment	

Thursday, November 18–Key West

SENIOR CIRCUIT JUDGE SANDRA TAYLOR

TIME	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
9:00 ✓	09-CA-309-K	USB Real Estate v. Walter W. Howell	Order Setting Status Conference	Judge Taylor
✓	09-CA-59-K	Suntrust v Donald A. Alessi	Plaintiff's Motion to Dismiss Counterclaim	Judge Taylor
9:30 ✓	08-CA-996-K	US Bank Nat. Asso. v Michelle Cates Deal, et al	Order Setting Status Conference	Judge Taylor
✓	09-CA-487-K	Indymac Fed. Bk v Kenneth W. Longacre, et al	Order Setting Status Conference	Judge Taylor
✓	US Bank Nat. Asso. v Michelle Cates Deal, et al	Order Setting Status Conference	Judge Taylor	Judge Taylor
✓	05-CA-153-K	Joseph J. White v Ronald W. Salisbury & Clinton A. Ramey v Ronald W. Salisbury & Joseph J. White	Order Setting Status Conference	Judge Taylor
✓	09-CA-1868-K Tel & In person, 5 min	National City Bank v Irwin, Sharon B., Grinnel Group Homeowners Assoc., et al	Motion to Compel	John Marston 305-294-0120 Daniel Consuegra 813-915-8660
✓	09-CA-1868-K In person, 5 min	National City Bank v Irwin, Sharon B., Grinnel Group Homeowners Assoc., et al	Motion to Dismiss for Plaintiff's Failure to Seek Leave to Amend	John Marston 305-294-0120 Daniel Consuegra 813-915-8660
✓	09-CA-94-K	Countrywide vs. Jameson, Diane	Motion for Summary Judgment	Jonathan D. Lack
✓	09-CA-667 K	Wells Fargo/Soundview Home vs. John Davis, Kyung Park, St. of FL Dept. of Revenue, KW Golf Club Homeowners Assoc., et al	Motion for Summary Judgment of Foreclosure	Weinzetl, Heidi J
✓	09-CA-866-K Tel, 5 min	Nationstar Mortgage vs. Spagnolo, Anh	Motion for Summary Judgment	Kelley Cramer 813-915-8660 x 213 Jerry Coleman
✓	09-CA-310-K Tel, 10 min	Countrywide Home Loans Servicing v Anh Aka Anh H. Spagnolo Spagnolo	Plaintiff's Motion for Relief from Order Denying Ex-Parte Motion to Reset Sale Date and to Reset Foreclosure Sale Date	Ida Moghimi-Kian 954-453-0365 x1811
✓	09-CA-1639-K Tel, 5 min	E Trade Bk vs. Kukoda, Jim, et al	Motion for Summary Judgment	Kelley Cramer 813-915-8660 x 213
✓	09-CA-94-K Tel, 5 min	Bank of NY v Jameson, Diane	Motion for SumNAtmary Judgment	Kelley Cramer 813-915-8660 x 213
✓	09-CA-086-K Tel, 5 min	Deutsche Bank vs Anthony Zirilli	Motion for Summary Judgment	Diana Leon 888-422-2022, x3665
✓	09 CA 1943 K Tel, 15 min	Capital One v Donal Morris, Jr. & Sr., Morris, Jeffrey, Morris, Gregory, Express Electric & Co., Monroe Svcs, et al	Motion To Dismiss	Lance Morley 813-915-8660 X 455 Martin Hoffman 305-653-5555
✓	10-CA-1116-K Tel, 15 min	Citibank v Hally Case	Motion to Dismiss	Kimberlee J. Otis 954-735-4455
✓	10-CA-816-K Tel, 15 min	BB&T v Short	Motion To Dismiss	Michelle Shupe-Abbas 305-770-4100
✓	10-CA-579-K	BB&T v Irwin, Sharon B., Grinnell	Defendant's Motion To Dismiss	John Marston

Update: 11/10/2010 4:46 PM

Thursday, November 18--Key West

SENIOR CIRCUIT JUDGE SANDRA TAYLOR

TIME	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
	15 min	Grp. Homeowners Assoc., PNC Bk, et al		305-294-0120 Ben-Ezra & Katz 877-563-9958
✓	08-CA-1547-K Tel, 15 min	Bk of NY Mellon v. Fair, Scheryl	Motion to Reset Sale	Ron Rice, Jr. 866-655-5516, #8
10:00	08-CA-1870-K	Branch Banking & Trust v Michael T. Ferrell	Order Setting Status Conference	Judge Taylor
11:30 ✓	09-CA-1893-K In person, 15 min	U.S. Bank National Association v. Christian C. Belland and Vanessa Belland	Motion to Dismiss Plaintiff's Amended Mortgage Foreclosure Complaint	Jiulio Margalli 305-295-9382 Ashley Simon 813-229-0900
✓	09-CA-1335-K Tel, 5 min	Deutsche Bk/IndyMac v. Monson, Terrence A., Monson, Brenda A., aka Brenda A. Rathmann, et al	Motion for Summary Judgment	Ron Rice, Jr. 866-655-5516, #8
1:30 ✓	08-CA-576-K Tel, 5 min	Chase Home Finance, LLC vs. Fiona Houghton, et al	Notice for Case Management Conference	Vanessa Gamboa 305-262-4433 x11019
✓	10-CA-233-K Tel, 10 min	BOA v Steven D. Ladage, et al	Motion to Dismiss	James Mcquade 305-292-3926 Cheryl Burm 305-770-4100
	08-CA-1885-K	Wachovia/World Savings Bk v Don C. Miller	Order Setting Status Conference	Judge Taylor
	08-CA-1901-K	Deutsche Bk v Robert W. Ourada	Order Setting Status Conference	Judge Taylor
	08-CA-2015-K	Countrywide Home v Jenny a/k/a Jenny Y. Chau Chau	Order Setting Status Conference	Judge Taylor
✓	08-CA-463-K Tel, 8 min	National City v. Burrell	Defendant's Motion to Compel Plaintiff's Responses to Defedant's First Set of Interrogatories	Kevin Hoyes 305-731-3349
✓	08-CA-463-K Tel, 7 min	National City v. Burrell	Plaintiff's Motion to Strike Defendant's Interrogatories	Kevin Hoyes 305-731-3349
✓	08-CA-655-K Tel & in person, 10 min	Bank of New York v. Dean Townsend	Plaintiff's Motion to Strike Defendants First Interrogatorries and Defendant's Request for Additional Interrogatories	Kevin Hoyes 305 731 3349
✓	09-CA-1449-K Tel & In person, 10 min	Bank of NY Mellon v Dudley, Leslie E. Bryant, Suzanne, Key West Golf Club Homeowners, Mortgage Electronic Registration Systems, et al	Association's Motion for Summary Judgment	John R. Allison, III 305.395.1610 Kelly Williams 954.233.8000
✓	08-CA-1240-K In person, 5 min	Indymac (Deutsche) Bank v. Robert A. Butler	Motion for Extension	Laura Templer (866) 655-5516
✓	08-CA-1240-K In person, 20 min	Indymac (Deutsche) Bank v. Robert A. Butler	Motion for an Order of Judgement	Albert L. Kelley 305-296-0160
✓	08-CA-1240-K In person, 30 min	Indymac (Deutsche) Bank v. Robert A. Butler	Motion for Mediation	Albert L. Kelley 305-296-0160

Update: 11/10/2010 4:46 PM

Thursday, November 18–Key West

SENIOR CIRCUIT JUDGE SANDRA TAYLOR

TIME	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
✓	10-CA-493-K Tel, 15 min	Chase Home Finance, LLC v. Maria Galletti Autrey, Autrey, Thomas, Miklos, John, Galletti, Joseph, Baker, Jay, Lesman, John, et al	Motion is Defendants Motion to Dismiss	Maria I. Escoto-Castiello (305) 860-0991
✓	10-CA-675-K Tel, 5 min	Gisselbeck Family Ltd v. Miller, John C., Sr., Miller, Melody C., et al	Motion for Summary Judgment	Jeffrey Leasure 239.275.7797
✓	10-CA-675-K Tel, 5 min	Gisselbeck Family Ltd v. Miller, John C., Sr., Miller, Melody C., et al	Motion for Mediation	Mimi Wolok 239/403-9992
3:00 ✓	08-CA-2081-K In person, 5 min	Countrywide Home Loans v Morris, Donal Sr	Motion for Better Responses to Discovery	Martin Hoffman 305-653-5555
4:00 ✓	09-CA-177-K Tel/15 min	Wells Fargo v Unknown Heirs, Key West Golf Club, Guy Church, a/k/a Guy Wakefield Church, et al	Motion for Summary Judgment	EJ Generotti 954-474-8000

N/O = Notice of Hearing not received

Status	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
N/O	09-CA-877-K In person, 10 min	Margaret Margaret L. Makris v. Myron F. Makris, Railway Condo Assoc., et al	Motion for Summary Judgment	Patrick M. Flanigan 305-296-7227
N/O	09-CA-818-K Tel, 5 min	OneWest Bank v. Foltz, Kristine	Motion for Summary Judgment	Ron Rice, Jr. 866-655-5516, #8
N/O	03-CA-1092-K Tel, 5 min	Mario City Restaurant Corp.et al v. Southernmost House, Ltd	Motion to Set for Trial	
N/O	08 CA 776-K Tel, 15 min	Washington Mutual Bank vs. Coleman, Jerry	Motion to Set Aside Default	Michelle Garcia Gilbert 813.443.5087
N/O	09-CA-274-K Tel, 5 min	Deutsche Bk v White III, Robert	Motion for Summary Judgment	Felix Canino 800-441-2438 x1855 Patricia Eables 305-294-0400
N/O	08-CA-732 K Tel, 5 min	Fidelity/Washington Mutual (WAMU) vs Petak, Scott	Motion for Summary Judgment	Elizabeth Le 800-441-2438 x1248
N/O	09-CA–1344-K In person, 10 min	Iberia Bank vs Burchfield	Motion for Summary Judgment	Richard Malafy 305-743-2492
N/O	09-CA-1724-K	Iberiabank v Cayman Lane, Trimble, Steven B., Trimble, James C., Howard J., Trimble, Edna, et al	Plaintiff's Motion for Summary Judgment	Richard Malafy 305-743-2492
N/O	09 CA 2144 K	JPMorgan Chase v Pentz, Francesca, Biscardi, Carla, KW Bk, et al	Motion to Dismiss Pending	
N/O	08 CA 0863-K Tel, 5 min	JPMorgan Chase v Burns, Kathleen M.	Motion for Summary Judgment	Luciana Ugarte 561-998-6700 x 6850
N/O	10-CA-745-K Tel, 5 min	Wachovia Bank, N.A. vs. Peat, Douglas Allen, et al	Motion to Dismiss	Hawkins, Vegina T. 888-233-8338 x 2123 Miller, Roger H. 941-639-1158

Update: 11/10/2010 4:46 PM

Thursday, November 18–Key West

SENIOR CIRCUIT JUDGE SANDRA TAYLOR

N/O	09 CA 721 K Tel, 5 min	The Bank of New York Mellon v Black, Matthew J., Annabell Black, et al	Motion for Summary Judgment	Luciana Ugarte 561-998-6700 x 6850
N/O	10-CA-540-K 5 min	Citifinancial Equity Svcs v Summers, Dwayne, Summers, Louise, Unknown Spouse, et al	Motion for Summary Judgment	Kelley Cramer 813-915-8660 x 213
N/O	08-CA-876-K	US Bank vs. Anderson, W.	Motion for Summary Judgment	

Cancellations

Date	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
10/7	08-CA-850-K In person, 5 min	U.S. National Bank vs. Reshma Gidwani	Motion to Compel Better Responses to Discovery	305-653-5555
10/7	09-CA-1299-K In person, 5 min	D'Isa, Frank & Catherine v. E*Trade	Motion to Compel Better Responses to Discovery	305-653-5555
10/8	09-CA-2147-K Tel, 15 min	TIB Bank vs. Scott W. Morris	Defendant's Motion to Dismiss	Natasha Coyle 561-713-1400 x 103
10/8	09-CA-829-K	Wells Fargo Bank v Valerie Lauritzen, et al	Order Setting Status Conference	877-338-4101
10/11	09-CA-1062-K Tel, 5 min	Bank of New York Mellon vs. Brian Suprynowicz	Motion for Summary Final Judgment of Foreclosure and Taxation of Attorney's Fees and Costs	Daniel J Nagler 888-233-8338 x2340
10/20	09-CA-715-K	Deutsche Bank National vs. Parada, Carolyn	Motion for Summary Judgment	
10/27	09-CA-1270-K Tel, 5 min	National City Mortgage v Burke, Robert E, et al	Defendant's Motion to Dismiss	Marie A. Fox 1-888-233-8338

Josephine Cieri

From: josephine.cieri@keyscourts.net
Sent: Tuesday, October 05, 2010 12:00 PM
To: 'Winston Burrell'
Subject: RE: Calendars, 9/10 & 9/17
Attachments: KW Foreclosure Docket (9-10-10 Special Set).docx; MK Foreclosure Docket (9-17-10 930-1130).doc; PK Foreclosure Docket (9-17-10).docx

Here are the dockets for 9/10 & 9/17, which were in Marathon & Plantation.

I've been trying to get updated addresses for defendants in some of the upcoming Status Conference hearings which were returned to us. Fortunately, I now have a printer to share with Marissa (HOORAY!) so I can do envelopes. However, some of these folks seem to have fallen off the planet. How much time should I put into trying to reach them? Presumably they have a lawyer who has been noticed, but I'd hate it if that weren't the case.

Maritza just notified me that November 15 (Monday) will be a jury day for the other judges, and so you will be "floating" unless schedules change.

Of course, we just go with the flow.

Hope all's well in Tampa.

Josephine Cieri
Judicial Assistant
Sandra Taylor, Senior Circuit Judge
Freeman Justice Center
302 Fleming Street
Key West, FL 33040
305-295-3943
Josephine.Cieri@KeysCourts.net

From: Winston Burrell [mailto:judgetaylor16@msn.com]
Sent: Tuesday, October 05, 2010 11:48 AM
To: Josephine Cieri
Subject: RE: Calendars, 12/1 & 12/9

Jos-

Thanks for the info. Don't schedule a whole lot more on 12/1 - I am going to set several status conferences and get a magistrate to cover 9:30 - 11:30 and 1:30 - 3:30. I will let you know more when I get it all together. Also, go ahead and keep 12/9 open - I may have a mediation on that date and if I don't I will use it for a mediation, I will set some of these two hour trials/hearings that keep bugging us.

Also, I am getting our "numbers" ready for Holly to submit to Tallahassee and I can't locate a couple of my old calendars. Hopefully you haven't deleted them from your computer. I am trying to find my 9/10/10 calendar and my 9/17/10 calendar (I have a copy of my morning in Marathon, but not my afternoon in PK) Any help you can give me is appreciated. Holly is trying to get the count in today, so would you check ASAP and email them to me if you have kept them??

Thanks a bunch.

Sandy

From: josephine.cieri@keyscourts.net
To: judgetaylor16@msn.com
Subject: Calendars, 12/1 & 12/9
Date: Mon, 4 Oct 2010 15:56:44 -0400

December 9 was listed for special sets in the morning only, and so far there have been no takers.

Josephine Cieri
Judicial Assistant
Sandra Taylor, Senior Circuit Judge
Freeman Justice Center
302 Fleming Street
Key West, FL 33040
305-295-3943
Josephine.Cieri@KeysCourts.net

From: Winston Burrell [mailto:judgetaylor16@msn.com]
Sent: Monday, October 04, 2010 2:49 PM
To: Josephine Cieri
Subject:

Hi Josephine--

Would you email a copy of my calendar for December 1st and December 9th? Thanks.

S

Friday, September 10, 2010 – Key West (SPECIAL SET) SENIOR CIRCUIT JUDGE SANDRA TAYLOR

TIME	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
CX	2009-CA-1515-K & 2009-CA-1517-K In Person 45 min	Centennial Bank v Karen Taporowski, Key West Golf Homeowners Association	Plaintiff's Motion for Sanctions & Injunctive Relief for Taporowski's Malicious Interference at Clerk of Court's Foreclosure Sale, Plaintiff's Motion for Sanctions for Failure to Appear at Court Ordered Mediation, Defendant's First Request for Production, Defendant's Motion for Summary Final Judgment as to Count Two	Stacy Vazquez 305-377-8802
9:30	09-CA-1850-K	LaSalle Bank, NA v Bruce James, Peggy James, et al	Order Setting Status Conference *Ordered by Court*	Moved to 9/22
CX	08-CA-1109-K	Guaranty Bank v Steven Scott Reese, et al	Order Setting Status Conference	
1:30	2008-CA-2035-K In Person 90 min	Wachovia Bank vs Harry Torres	Objection to Sale, Motion to Set Aside Sale, Motion to Vacate Final Judgment for Fraud on the Court, Motion to Vacate Default Judgment for Fraud on the Court, Motion to Dismiss for Fraud on the Court, Motion for Attorney's Fees & Sanctions	Anthony Rumore 954-942-2414
	08-1549-K In person, 30 min	Vanguard M and T v. Robert Butler	Defendant's Motion to Vacate Plaintiff's Motion to Substitute Plaintiff and to Require Robert Butler to return rent proceeds	David Bakalar 954-965-9101 Albert Kelly 305-296-0160
	2009-CA-127-K In person, 30 min	U.S. Bank National Association vs Coleman	Motion To Strike Summons	Jerry Coleman 305-292-3095
	2009-CA-127-K In person, 30 min	U.S. Bank National Association vs Coleman	Motion To Compel Discovery From Defendant Countrywide Financial Corporation	Jerry Coleman 305-292-3095
	2009-CA-127-K In person, 30 min	U.S. Bank National Association vs Coleman	Motion to Compel Discovery From Defendant Countrywide Home Loans, Inc.	Jerry Coleman 305-292-3095
	2009-CA-127-K In person, 30 min	U.S. Bank National Association vs Coleman	Defendant Coleman's Motion to Compel Discovery from Defendant Mers	Jerry Coleman 305-292-3095
	2009-CA-127-K In person, 10 min	U.S. Bank National Association vs Coleman	Defendant Coleman's Motion To Permit Additional Requests For Admissions And Interrogatories	Jerry Coleman 305-292-3095
	2009-CA-127-K In person, 10 min	U.S. Bank National Association vs Coleman	Defendant Coleman's Motion To Conduct Party And Non-Party Depositions	Jerry Coleman 305-292-3095
	2008-CA-776-K In person, 45 min	Washington Mutual vs. Jerry Coleman	1. Defendant Jerry Coleman's amended mtn. for leave to file answer, affirmative defenses, counterclaim, cross-claim, 3rd party claims 2. Countrywide's motion to strike summons 3. Coleman's ex-parte motion to compel discovery from MERS 4. Coleman's ex-parte motion to compel discovery from Countrywide Home Loans, Inc., Countrywide Financial Corp.	Jerry Coleman 305-292-3095

Update: 11/10/2010 4:33 PM

Friday, September 17, 2010 – MARATHON (9:30-11:30) SENIOR JUDGE SANDRA TAYLOR

TIME	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
9:30	2009-CA-292-M Telephone, 5 min	Centennial Bank f/k/a Key West Bank, FSB v. Patricia A. Robenolt, et. al.	Plaintiff's Motion to Compel Financials	Arthur E. Lewis, Esq. 954-958-2265
CX	08-CA-290-M	Deutsche Bank, trustee for New Century Alternative v Kevin Johnsen, et al	Notice of Filing	Katherine Renninger 813-251-4766
	08-CA-290-M	Deutsche Bank, trustee for New Century Alternative v Kevin Johnsen, Neil Cataldo, et al	Notice of Appearance	Mercy B. Pina-Brito 305-274-1565
	2009-CA-225-M Telephone, 5 min	Centennial Bank f/k/a Key West Bank, FSB v. Stephen R. Cusimano, et. al.	Plaintiff's Motion to Compel Defendant's to Complete Form 1.977 Fact Information Sheet	Arthur E. Lewis, Esq. 954-958-2265 Catherine Frances Vogel 305-296-0203
	08-CA-290-M Telephone, 5 min	Deutsche Bank vs. Johnsen	Motion for Summary Judgment	Katherine Renninger 813-251-4766
	09-CA-494-M	Bank of NY v Janeen Cantanzaro, et al	Order Setting Status Conference and Defendant's Counsel's Motion to Withdraw	
	07-CA-404-M	CitiMortgage v Lisa Key	Order Setting Status Conference	
	08-CA-043-M Telephone?	LaSalle Bank v Sarah Hunter Brawer	Motion for Summary Judgment	Sarah Brawer
	2008-CA-225-M Telephone, 5 min	HSBC Bank vs Veronica Mackebon	Motion for Summary Judgment	Kristina Carlisi 561-998-6700 x6793
	2008-CA-441-M Telephone, 5 min	Bank of New York vs Jeff Wyman	Motion for Summary Judgment	Kristina Carlisi 561-998-6700 x6793
	2009-CA-344-M Telephone, 5 min	CitiMortgage vs James Scanlon	Motion for Summary Judgment	Kristina Carlisi 561-998-6700 x6793
	2009-CA-383-M Telephone, 5 min	JPMorgan Chase Bank vs Pavel Bacallao	Motion for Summary Judgment	Kristina Carlisi 561-998-6700 x6793
	2009-CA-557-M Telephone, 5 min	Bank of Miami vs. Key Investment Group, LLC et al	Plaintiff's Motion for Default against Defendants Peter Suarez, Michael Kaufman, Jerry Mayor, Gayle F. Zimmerman, Michael J. Zimmerman, Joseph Impellizzeri, Melba Acosta, Robert Acosta, Lisa Koppe, Gary Koppe and Linda F. Kantrowitz	Alan E. Krinzman, Esq. 305-2624433 Carlos A. Triay, Esq. 305-5978944 Jerry D. Sanders, Esq. 305-2947050
	2009-CA-384-M Telephone, 5 min	Eastern Savings Bank vs Duane Hansen	Motion for Summary Judgment	Angelina Noble 813-443-5087
	2008-CA-000289-M Telephone, 15 min	JPMorgan Chase Bank vs Luis Alonso	Motion to Dismiss	Guetchine Hylaire 561-998-6700 x6792
	2008-CA-000084-M Telephone, 15 min	JPMorgan Chase Bank vs Luis Alonso	Motion to Dismiss	Guetchine Hylaire 561-998-6700 x6792
	2009-CA-505-M	Citibank, N.A. v Edmund Christopher	Order Setting Status Conference	Ryan Shipp

Update: 11/10/2010 5:02 PM

TIME	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
		James, et. Al	*Ordered by Court*	Edmund Christopher James
	2009-CA-00161-M	Wells Fargo Bank, N.A. v Douglas T. Hattendorf, et. al.	Order Setting Status Conference *Ordered by Court*	Kahane & Associates Douglas T. Hattendorf, pro se
	2008-CA-0194-M	JP Morgan Chase Bank, N.A. v Edward J. Hendrickson and Calll Hendrickson	Order Setting Status Conference *Ordered by Court*	Shapiro & Fishman?
	2009CA86M Telephone, 10-15 minutes	Citibank v. Luiz Alonzo	Motion to Compel Discovery & Plaintiff's Objections to our Third Request for Production	
10:30	09-CA-183-M	Deutsche Bank v Sonja Sweeney	Final Summary Judgment of Foreclosure	Stephen Davis 305-262-4433
	2008-CA-315-M Telephone, 10 min	Wachovia v. Edwards, Karen	Motion for Summary Judgment	Arnold M. Straus, Jr. or Michael Eisler 954-349-9400
	2010-CA-56-M Telephone, 5 min	Emigrant Mortgage Co. vs. James W. Rider, et. al	Motion For Final Summary Judgment Of Foreclosure And Motion To Tax Costs And Attorney's Fees	Steven M. Davis, Esq. 305 262 4433
	2008-CA-45M Telephone, 5 min	Washington Mutual vs Kujo Chinbuah	Motion to Compel Completion of Foreclosure Sale	Adam Cervera 305-262-4433 Sean Marshall 954-453-0365
CX	09-CA-000310A001-M Telephone, 5 min	JPMorgan Chase Bank, N.A. vs Rigoberto Lemus, et al.	Motion for Summary Judgment	Gregg M. Goldfarb, Esq. 305-374-7000 ext. 408 or 403 E. Dennis Brod, Esq. 305-374-7000 ext. 414 or 415
	2009-CA-265-M Telephone,	Regions Bank v. Newsome	Motion for Final Summary Judgment of Foreclosure	Steven Imparato 1-866-765-1900
	2009-CA-456-M Telephone, 10 min	BAC Home Loans vs. Debra Mcelderry		
	2010-CA-292-M Telephone,15 min	Centennial Bank v. Cranney, et al. – 2010-CA-292-M	Motion for Summary Judgment	Greg Oropeza 305-296-8851
	09-CA-459-M 30 minutes	Iberia vs. Fraser S. Gilchrist and Wendy Gilchrist	Plaintiff's Motion for Default	Robert K. Miller 305-743-9428
	2010 CA 189 M 30 minutes	Iberia vs. Warren R. Bernard	Plaintiff's Motion for Default	Robert K. Miller 305-743-9428
	2009-CA-265 M Telephone, 5 min	Regions Bank v. Newsome	Plaintiff's Motion for Final Summary Judgment of Foreclosure	

Update:
11/10/2010
5:02 PM

Friday, September 17– Plantation Key (2 - 4) **SENIOR CIRCUIT JUDGE SANDRA TAYLOR**

TIME	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
2:00	2010-CA-105 P Telephone, 5 min.	Deutsche Bank v. Armas, Orlando	Motion for Summary Judgment	Ron Jr., Rice 866-855-5516
	10-CA-0382 P Telephone, 5 min	JPMorgan Chase Bank vs Gladys Aguila	Motion for Summary Judgment	Rebecca Winner 561-998-6700 x6672
	10-CC-80-P In Person, 5 min	Townhouses of Kawama Condo Assoc v. Putzig	Motion for Summary Final Judgment of Lien Foreclosure	Robert E. Paige, Esq Jaime M. Coco, Esq 305-670-0020
	10-CC-82-P In Person, 5 min	Townhouses of Kawama Condo Assoc v. Romero	Motion for Summary Final Judgment of Lien Foreclosure	Robert E. Paige, Esq Jaime M. Coco, Esq 305-670-0020
	10-00190A001-P Telephone, 5 min	Metro Bank Of Dade County v Pad In Largo, A. Navarro, and Blue Water Property Owners Association, Inc.	Motion for Summary Final Judgment	Brian P. Yates, & Bertram A. Sapurstein 305-670-9500 Rafael DJ. Pozo, ESQ. 305-285-9221
	10-CA-504-P 10 min	Eager Family vs. Urrutia	Motion for Default Final Judgment	Gus H. Crowell, Esq. 305 852-3206
	2007-CA-758-P In person, 15 min	The Bank of New York v. Charles Dircks	On Plaintiff's Motion for Summary Final Judgment, Defendant's Motion to Dismiss and Defendant's Motion to Consolidate	Cynthia Talton 407-381-5200 Michelle Maxwell 294-4585 Robert Stober 305-852-8440
	2009-CA-001058-P Telephone, 20 min	Bank of America, N.A. vs Elizabeth Ginart; Unknown Spouse of Elizabeth Ginart, Alexander Aguiar, et. al	Defendants Elizabeth Ginart and Alexander Aguiar's Motion to Deny Plaintiff's Motion for Summary Judgment Without Prejudice	Jorge Rodriguez-Chomat 305-374-0056
3:00	2007-0000712-P Telephone, 15 min	Suntrust Mortgage, Inc. v. Waker	Plaintiff's Motion for Contempt and Motion for Summary Judgment as to Supplemental Complaint for Deficiency	Julie Anthousis 813-342-2200 ext. 3432 Mario S. Waker, pro se 1517 NE 175th Street North Miami Florida 33162
	2009-CA-001058-P	Bank of America v. Ginart, Elizabeth, Aguiar, Alexander, et al	Defendants Elizabeth Ginart and Alexander Aguiar's Motion for and Order Referral to Mediation	Jorge Rodriguez-Chomat 305-374-0056
	2009-CA-001058-P	Bank of America v. Ginart, Elizabeth, Aguiar, Alexander, et al	Defendants Elizabeth Ginart and Alexander Aguiar's Motin for Leave of Court to Amend Her Pleadings and in Opposition to the Plaintiff's Motion for Summary Judgment of	Jorge Rodriguez-Chomat 305-374-0056
	2009-CA-001058-P	Bank of America v. Ginart, Elizabeth, Aguiar, Alexander, et al	Defendants Alexander Aguiar's Motion for A Court Order Setting Aside the Default Entered by the Clerk and to Deem his Answers and Affirmative Defenses as filed an din Opposition to the Plaintiff's Motion for a Summary Judgment of Foreclosure	Jorge Rodriguez-Chomat 305-374-0056
	10-CA-40-P In person, 30 min	Fifth Third Bank v. Gordon Weber Construction, Inc.	Plaintiff's Motion for Summary Judgment and Supporting Memorandum of Law	Michael Strauch 305- 539.7323
	10-CA-371-P In Person, 5 min	Townhouses of Kawama Condo Assoc v. Nunez	Motion for Summary Final Judgment of Lien Foreclosure	Robert E. Paige, Esq Jaime M. Coco, Esq 305-670-0020
	10-CA-527-P	Fifth Third Bank v Islamorada	Plaintiff's Motion for Order to Show	Alan M Grunspan

Update: 11/10/2010 5:02 PM

TIME	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
		Property Investments, Jon's Air Conditioning, et al	Cause	305-530-0050
	10-CA-545-P ?	Mercedes Drive LLC v Stacie L. Krupa-Myers, Christopher Forrest Myers, Islamorado South Condo Assoc.	Order to Show Cause *Ordered by Court*	?
CX	10-CA-558-P ?	Diana J. Lewis, Unknown Spouse of DJL, Flagstar Bank FBS and Unknown Tenant [Opposition was not notified]	Order to Show Cause Why Final Judgment of Foreclosure should not be entered *Ordered by Court*	?
	2008-CA-195-P ?	Chase Home Finance LLC v Rolando Lucas	Order Setting Status Conference *Ordered by Court*	Ronald Pereira Rolando Lucas
	2009-CA-438-P	Deutsche Bank v Frank A. Reiner, et al	Order Setting Status Conference *Ordered by Court*	Roger Gladstone, Esq. Frank A. Reiner
	2009-CA-604-P	BAC Home Loans Servicing v Irene Louis Flegel, et al	Order Setting Status Conference *Ordered by Court*	Irene Louis Flegel Law office David Stern
	08-997 CA P In person, 5 min	La Salle Bank vs Enrique Gonzalez	Motion to Withdraw	Lourdes Núñez, Esq. 305-854-0888
	09-CA-1142P Telephone, 5 min	HSBC Bank USA, v. David D. Gibson, et. al	Defendant's Request For Case Management Conference	
	10 CA 000039 P Telephone, 15 min	American Home Mortgage vs Galvan, Andres	Telephonic Motion to Dismiss	Julio C Marrero 305-446-0163
	2009 CA 000242-P Telephone, 15 min	Chase Home Finance vs Gonzalez, Colleen M	Minute Telephonic Motion to Dismiss set for 9/17/10 at 2:30 pm.	John J Spittler 305-860-9992
	2009-CA-001031-P Telephone, 5 min	Wells Fargo vs. Ford	Motion for Writ of Possession	Tamara Walters 888 422-2022

Josephine Cieri

From: josephine.cieri@keyscourts.net
Sent: Monday, October 04, 2010 3:57 PM
To: 'Winston Burrell'
Subject: Calendars, 12/1 & 12/9
Attachments: KW Foreclosure Docket (12-1-10).docx

December 9 was listed for special sets in the morning only, and so far there have been no takers.

Josephine Cieri
Judicial Assistant
Sandra Taylor, Senior Circuit Judge
Freeman Justice Center
302 Fleming Street
Key West, FL 33040
305-295-3943
Josephine.Cieri@KeysCourts.net

From: Winston Burrell [mailto:judgetaylor16@msn.com]
Sent: Monday, October 04, 2010 2:49 PM
To: Josephine Cieri
Subject:

Hi Josephine--

Would you email a copy of my calendar for December 1st and December 9th? Thanks.

S

Wednesday, December 1–Key West

SENIOR CIRCUIT JUDGE SANDRA TAYLOR

TIME	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
9:30	09-CA-1956-K Tel & In person, 5 min	BAC Home Loan Servicing v. Cuervo; Homesteaded Residential Foreclosure	Motion to Compel Mediation and Stay Proceedings (filed March 24, 201)	J. Jon Ashby (305) 293-0084
	09 CA 2009 K	Litton Loan Servicing, LP v Haskell, James S.	Motion to Dismiss Pending	
	08-CA-1611-K Tel, 15 min	Loan Link Financial Services v. John Harry Zimmerman and Debra Diane Zimmerman	Motion for Summary Judgment	Robert Lithman 305-858-0220
	09-CA-920-K In person,	Deutsche Bank v Jeffrey Feuer, et al	Defendant's Motion for Summary Judgment	Jeffrey Feuer 305-587-9277 Desiree Russano 561-998-6700
	09-CA-91929-K 5 min	Fargo Bank v. Minna Detweiler, et al	Motion for Summary Final Judgment	
1:30	2008 CA 1971 K	Lasalle v. Koenig		
	2009 CA 178 K Telephone, 30 min	U.S. Bank v. Bird	Motion for Attorney's Fees Pursuant to Contract and F.S. 57.105	Marci L. Rose 305-293-1881 Laura Noyes, Esq.
1:30				

Josephine Cieri

From: Josephine Cieri
Sent: Thursday, October 07, 2010 9:39 AM
To: 'Winston Burrell'
Subject: 10/18 Cancellations
Attachments: KW Foreclosure Docket (10-18-10).dotx

This morning I received an email opening 18 slots from one attorney. I just thought you'd like to know in case you have special sets that could be heard in the afternoon.

The docket is attached.

Josephine Cieri
Judicial Assistant
Sandra Taylor, Senior Circuit Judge
Freeman Justice Center
302 Fleming Street
Key West, FL 33040
305-295-3943
Josephine.Cieri@KeysCourts.net

Monday, October 18, 2010 – Key West

SENIOR CIRCUIT JUDGE SANDRA TAYLOR

TIME	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
9:30	2010 CA K 334 Tel, 5 min	Countrywide Bank, F.S.B. v. Adele Brechner et al	Motion to Dismiss the Amended	Robyn R. Katz 888- 233-8338 x1249 Jeff Barnes 561- 864-1067
	10 CA-334-K Tel, 5 min	Countrywide Bank, F.S.B. v. Adele Brechner et al	Motion For Final Order Of Reforeclosure	Robyn R. Katz 888- 233-8338 x1249 Jeff Barnes 561- 864-1067
	09-CA-244-K Tel, 5 min	Bank of America v. Wolszczak, Andrew	Motion for Summary Judgment	Ron Jr., Rice 866-855-5516
	10-CA-757-K Tel, 5 min	Litton Loan v. Calero, Amado	Motion for Summary Judgment	Ron Jr., Rice 866-855-5516
	10-CA-505-K Tel, 5 min	American Home v. Carmouze, Arnaldo	Motion for Summary Judgment	Ron Jr., Rice 866-855-5516
	09-CA-9487-K Tel, 5 min	OneWest Bank v. Longacre Jr., Kenneth W	Motion for Summary Judgment	Ron Jr., Rice 866-855-5516
	09-CA-9783-K Tel,	US Bank vs. Meyers, Derrick P	Motion for Summary Judgment	Steven M. Davis 305-262-4433 Marie A. Fox 888-233-8338 x 2009
	09-CA-260-K Tel, 15 min	OneWest Bank v. Alvarez, Magali	Motion to Dismiss	Ron Jr., Rice 866-855-5516 David Van Loon 305-296-8851
	09-CA-561-K	Indymac v Felger	Motion for Summary Judgment	John Allison
	09-CA-1527-K	BAC Home Loan v Sullivan	Motion for Summary Judgment	John Allison
	09-CA-1389-K	BAC Home Loan Servicing vs. Woodward		
	09-CA-1315-K In person, 20 min	Rose Marie Barrett v. Michael and Frances Lepine	Motion to Amend the Complaint	David Van Loon 305-296-8851
	09-CA-702-K Tel & in person, 5 min	US Bank v. Wardlow	Motion for Summary Judgment	Gabrielle Straus 800-807-1179 David Van Loon 305-296-8851
	2009-CA-22-K Tel, 5 min	Wells Fargo Bank vs. Guillen	Motion for Summary Judgment	Mitch Rothman 813-342-2200 x 3144 John Ruiz 305-649-0020
	09-CA-741-K Tel, 5 min	JPMorgan Chase Bank v. William David Mcgrogan	Defendants Motion for Sanctions	Steven M. Davis 305-262-4433 Cheryl L. Burm 305-770-4100
	CA-08578-K Tel, 20 min	Fifth Third Bank Cincinnati - Mandalay Bay	Motion to Reset Sale Date	Brian T. Giles 513-587-4443 Stanford R. Solomon 813- 225-1818 Timothy J. Koenig 305-296-8851
	08-CA-521-K Tel, 5 min	Colonial Bank vs. Professional Investments and Consulting Inc., a Florida Corporation	Motion for Summary Judgment in Foreclosure	G. Michael Mahoney 800-254-5265
	09 CA 2017 K	Chase Home Finance, LLC v	Motion for Summary Judgment	Luciana Ugarte

Update: 11/10/2010 4:34 PM

Monday, October 18, 2010 – Key West

SENIOR CIRCUIT JUDGE SANDRA TAYLOR

TIME	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
	Tel, 5 min	Meyers, Richard J.		561-998-6700 x 6850
	10 CA 0703 K Tel, 5 min	Chase Home Finance, LLC v Silvers, Danette M.	Motion for Summary Judgment	Luciana Ugarte 561-998-6700 x 6850
	08 CA 1215 K Tel, 5 min	The Bank Of New York Mellon v Gage, Richard and Toni Michelle	Motion for Summary Judgment	Luciana Ugarte 561-998-6700 x 6850
	08 CA 453 K Tel, 5 min	JPMorgan Chase Bank v JPMorgan Chase Bank	Motion for Summary Judgment	Luciana Ugarte 561-998-6700 x 6850
	08 CA 1245 K Tel, 5 min	LaSalle Bank v Cuneo, Edward J.	Motion for Summary Judgment	Luciana Ugarte 561-998-6700 x 6850
	2009-CA 88K Tel, 10 min	1800 Atlantic CAI ADV. HSBC Bank USA v Miroslaw Trzaskowski	Motion to Compel Completion of Foreclosure Sale	Steven M. Davis 305-262-4433
	09 CA 1384 K Tel, 5 min	2008 CA 001245 K [?] v Cepero, Jesus L.	Motion for Summary Judgment	Luciana Ugarte 561-998-6700 x 6850
	09 CA 1450 K Tel, 5 min	OneWest Bank, FSB v Russo, Edward R.	Motion for Summary Judgment	Luciana Ugarte 561-998-6700 x 6850
	10-CA-949-K Tel, 5 min	JPMorgan Chase Bank, National Association v Davidson, David	Motion for Summary Judgment	Luciana Ugarte 561-998-6700 x 6850
	09 CA 304 K Tel, 5 min	Chase Home Finance vs. Berris, William M	Motion for Summary Judgment	Mariya Weekes Jeff Barnes
	09CA598-K Tel, 5 min	Lydian Mortgage vs. Carla Cherry	Motion for Summary Judgment	Cassandra Jeffries Albert Kelly
	09-CA-336-K Tel, 5 min	U.S. Bank National vs. Felix Gazul	Motion to Strike Affirmative Defenses	Brian F. Bedell,Esq (305) 770-4100 x 774
1:30	09 CA-1680-K Tel, 5 min	CitiMortgage, Inc. v O'Mahoney, Michael P.	Motion for Summary Judgment	Luciana Ugarte 561-998-6700 x 6850
	10-CA-729-K Tel, 5 min	Wells Fargo Bank v Moen, Michael S.	Motion for Summary Judgment	Luciana Ugarte 561-998-6700 x 6850
	09 CA 381-K Tel, 15 min	Select Portfolio Servicing vs Kemp, Robert F	Motion to Dismiss	Brian S. Behar 305-931-3771
	09-CA 88-K Tel, 10 min	1800 Atlantic CAI ADV. HSBC Bank USA v Miroslaw Trzaskowski	Motion to Compel Completion of Foreclosure Sale	Steven M. Davis 305-262-4433
	10-CA-725-K Tel, 5 min	The Bank Of New York Mellon vs. Reilly, Keith	Motion for Summary Judgment	Christine Green 800-807-1179
4	09-CA-537-K Tel & in person,15 min	Deutsche Bank v. Henshaw	Defendant's Motion to Dismiss and Defendant's Motion to Compel	Cynthia Talton 407-381-5200 Robert Stober 305-852-8440
	09-CA-1007-K In person, 20 min	Branch Banking and Trust Company v. Riptide, Inc., et al	Plaintiff's Motion for Partial Summary Judgment of Foreclosure and Damages	Lori L. Heyer-Bednar, Esq 954-462-4150 Mark D. Kushner
	09-CA-1667-K Tel, 15 min	Onewest Bank v. Diaz, Ernesto Case	Defendants Motion to Dismiss	Marie Montefusco (866) 655-5516
	09-CA-1007-K In person, 20 min	Branch Banking and Trust Company v. Riptide, Inc., et al	Plaintiff's Motion for Partial Summary Judgment of Foreclosure and Damages	Lori L. Heyer-Bednar 954-462-4150 Mark D. Kushner

CANCELLATIONS

Update: 11/10/2010 4:34 PM

Monday, October 18, 2010 – Key West

SENIOR CIRCUIT JUDGE SANDRA TAYLOR

TIME	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
CX	08CA710 K Tel, 5min	Wells Fargo Bank vs. Benkoczy	Motion for Summary Judgment	Ryan D. Johnson 888.233.8338 x2076
CX	09-CA-129-K 5 min	U.S. Bank National Association vs. Cheryl Smith	Motion For Judicial Default	
CX	10-CA-541-K Tel, 5 min	The Bank Of New York Mellon, vs. Moehring, Mark E	Motion for Summary Judgment	Christine Green 800-807-1179
CX	08-CA-1393 K Tel, 5 min	U.S. Bank National Association vs. Syring, Michael aka Michael K	Motion for Summary Judgment	Christine Green 800-807-1179
CX	09-CA-1162-K Tel, 5 min	BAC Home Loans Servicing, LP vs. Siegrist, Michael & M & A Diversified Holdings, Inc.	Motion for Summary Judgment	Christine Green 800-807-1179
CX	09-CA-1332 K Tel, 5 min	Deutsche Bank National Trust Company vs. Eberle, Karen S & Harry E, Jr	Motion for Summary Judgment	Christine Green 800-807-1179
CX	09-CA-1457 K Tel, 5 min	U.S. Bank National Association, vs. Safeguard Homes, Inc.	Motion for Summary Judgment	Christine Green 800-807-1179
CX	09-CA-1452 K Tel, 5 min	The Bank Of New York Mellon, As Trustee vs. Galloway, Luther	Motion for Summary Judgment	Christine Green 800-807-1179
CX	09-CA-1679-K Tel, 5 min	The Bank Of New York Mellon vs. Tribushnaya, Marina	Motion for Summary Judgment	Christine Green 800-807-1179
CX	09-CA-2139-K Tel, 5 min	The Bank Of New York Mellon vs. Hyatt, Alice M	Motion for Summary Judgment	Christine Green 800-807-1179
CX	09-CA-2170-K Tel, 5 min	BAC Home Loans Servicing, Lp fka Countrywide Home Loans Servicing vs. Vazquez, Jose	Motion for Summary Judgment	Christine Green 800-807-1179
CX	10-CA-398-K Tel, 5 min	BAC Home Loans Servicing, vs. Witucki, Michael I	Motion for Summary Judgment	Christine Green 800-807-1179
CX	10-CA-398-K Tel, 5 min	BAC Home Loans Servicing, vs. Witucki, Michael I	Motion for Summary Judgment	Christine Green 800-807-1179
CX	10-CA-398-K Tel, 5 min	BAC Home Loans Servicing, vs. Witucki, Michael I	Motion for Summary Judgment	Christine Green 800-807-1179
CX	10-CA-454-K Tel, 5 min	BAC Home Loans Servicing, LP, vs. Robinson, Martha	Motion for Summary Judgment	Christine Green 800-807-1179
CX	07-CA-1288 K Tel, 5 min	Bank of New York, as Trustee for the Certificateholders Cwalt, I vs. Zoltan Boros	Motion for Summary Judgment	Christine Green 800-807-1179
CX	10-CA-475-K Tel, 5 min	The Bank Of New York Mellon vs. Krieger, Nathan & Tracy	Motion for Summary Judgment	Christine Green 800-807-1179
CX	10-CA-495-K Tel, 5 min	U.S. Bank National vs. Hancock, William A	Motion for Summary Judgment	Christine Green 800-807-1179
CX	10-CA-508-K Tel, 5 min	The Bank Of New York Mellon vs. Kilgore, Donna	Motion for Summary Judgment	Christine Green 800-807-1179
CX	10-CA-539-K Tel, 5 min	Greenpoint Mortgage Funding, LLC vs. Lopez, Eloy M, JR	Motion for Summary Judgment	Christine Green 800-807-1179

Update: 11/10/2010 4:34 PM

Monday, October 18, 2010 – Key West

SENIOR CIRCUIT JUDGE SANDRA TAYLOR

TIME	CASE NO.	CASE STYLE	NAME OF MOTION	ATTORNEY/PHONE
CX	08CA710-K Tel, 5min	Wells Fargo Bank vs. Benkoczy	Motion for Summary Judgment	Ryan D. Johnson 888.233.8338 x2076
CX	09-CA-129-K 5 min	U.S. Bank National Association vs. Cheryl Smith	Motion For Judicial Default	
CX	08CA-861-K Tel, 5 min	U.S. Bank National Association vs. Gruneisen, Albert, III	Motion for Summary Judgment	Christine Green 800-807-1179
CX	10-CA-686-K Tel, 5 min	The Bank Of New York Mellon as trustee vs. Martinez, Irenio	Motion for Summary Judgment	Christine Green 800-807-1179
CX	10-CA-819-K Tel, 5 min	Bank Of America, N.A. vs. Mayer, Lucy	Motion for Summary Judgment	Christine Green 800-807-1179
CX	10-CA-850-K Tel, 5 min	The Bank Of New York Mellon, vs. McBroom, Andrew	Motion for Summary Judgment	Christine Green 800-807-1179

Update: 11/10/2010 4:34 PM