IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA, SECOND DISTRICT

GEORGE E. MERRIGAN,
Petitioner

v.

BANK OF NEW YORK MELLON,
FKA BANK OF NEW YORK,
Respondent.

Case No.: 2D11- 1728
L.T. Case No. 09-CA-055758

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OR WRIT OF PROHIBITION

Petitioner Georgi Merrigan, who faces the possibility of losing her home in a judicial proceeding, asks this Court for exceedingly narrow relief: an order re-assigning her case from a special docket that operates under alternative procedural rules. Ms. Merrigan has pointed to numerous procedural deficiencies of Lee County's mass foreclosure docket, the hallmark of which is the "docket sounding" system. Docket sounding orders, issued in every case on the mass foreclosure docket, proceed from the premise that cases are "at issue," whether or not they satisfy the conditions set out in Florida Rule of Civil Procedure 1.440.

Ms. Merrigan has extensively detailed how this novel system deprives her of a meaningful opportunity to be heard. On the trial court's sua sponte motion, Ms. Merrigan's case was placed onto a special docket sounding system and deemed "at issue," although it is not actually at issue under Rule 1.440. Assignment to the

docket sounding system undercuts Ms. Merrigan's ability to defend her case in several ways. The form order setting her case for docket sounding forbids discovery except "on the order of the court for good cause shown." Going forward on the mass foreclosure docket would also subject her to stripped-down summary judgment procedures, to extraordinary limitations on her ability to set and argue motions that could advance her case, and to widely acknowledged ex parte communications between foreclosing banks and the court.

In his response to Ms. Merrigan's petition, Chief Judge Cary nowhere asserts that Lee County's mass foreclosure docket adheres to the Florida Rules of Civil Procedure or meets constitutional muster. Rather, Respondent effectively concedes that, under the banner of "case management," he has set up an alternative system and that a central element of that system is to issue "uniform orders" treating cases as being "at issue." Defending this system as a method of "case management," however, cannot justify systematic departures from the rules of civil procedure, especially where those departures deprive Ms. Merrigan of due process. A writ of prohibition is an appropriate vehicle for this Court to use to provide prospective relief to Ms. Merrigan, because Respondent lacks the jurisdiction to devise an alternative judicial track operating outside the Florida Rules of Civil Procedure.

I. Prohibition Lies Where the Chief Judge Exceeds His Administrative Authority.

Ms. Merrigan's central claim, which Respondent never challenges, is that foreclosure cases in Lee County proceed under an alternative set of rules that are inconsistent with the dictates of the Florida Rules of Civil Procedure, including Rule 1.440's framework for treating cases as being "at issue." The question before this Court is whether Respondent exceeds his authority by exercising his administrative authority to establish, and assign Ms. Merrigan's case to, this alternative forum. Prohibition lies to remedy this unauthorized action.

Prohibition is appropriate to prevent an "inferior court or tribunal from exceeding jurisdiction or usurping jurisdiction over matters not within its jurisdiction." *English v. McCrary*, 348 So. 2d 293, 296 (Fla. 1977). "A party may file a petition for writ of prohibition in an appellate court to prevent a lower tribunal from the improper use of judicial power." Padovano, Florida Civil Practice § 29:3 (2009); *see also Scaife v. State*, 764 So.2d 827 (Fla. 2d DCA 2000) (granting prohibition to prevent prosecution that would violate double jeopardy); *Weiss v. Berkett*, 949 So.2d 1092 (Fla. 3d DCA 2007) (granting prohibition where trial court "exceeded its jurisdiction as the order under review does not comport with the requirements of Florida Rule of Civil Procedure 1.420(e) for dismissal for lack of prosecution").

Although the Chief Judge is "responsible for the administrative supervision of the circuit courts and county courts in his circuit," Fla. Const. art. V § 2(d), only the Supreme Court of Florida has authority to adopt rules of practice and procedure (subject to legislative super-majority override), Fla. Const. art. V §2(a).[1] Yet, as Ms. Merrigan's petition sets forth, at every phase of a foreclosure case, Respondent has suspended many of the rules governing civil cases. Accordingly, prohibition lies to shield Ms. Merrigan from a set of prejudicial alternative rules that Respondent had no authority to promulgate.[2]

Respondent's argument that prohibition is inappropriate hinges almost entirely on *English v. McCrary*, 348 So.2d 293, 296 (Fla. 1977). (Response ("Resp.") at 17-19.) But the Court in *English* recognized that prohibition provides an appropriate remedy where a lower tribunal exceeds its jurisdiction by acting in a manner in which it "had no discretion" to act. 348 So. 2d at 296. Clearly, no

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[1] Petitioner does not challenge the administrative authority of the Chief Judge to establish a specialized sub-division of its civil division to adjudicate foreclosures, so long as that division comports with the Florida Rules of Civil Procedure. *See Physicians Healthcare Plans, Inc. v. Pfeifler*, 846 So. 2d 1129 (2003).

[2] Although Respondent has not set out the rules of the mass foreclosure division in an Administrative Order, a chief judge's establishment of a foreclosure division clearly represents an exercise of administrative, rather than adjudicative, authority. Other chief circuit judges, in establishing foreclosure divisions, have expressly grounded those actions in their administrative authority. *See, e.g.*, Administrative Order Establishing Circuit Civil Case Distribution, No. 2010-79-Civ. (17th Cir. Ct. Oct. 15, 2010), Supp. App. at 7; *In re: Foreclosure Division – "AW,"* Admin. Order 3.302-5/10 (15th Cir. Ct. May 5, 2010), Supp. App. at 3.

circuit court chief judge enjoys discretion to suspend the Florida Rules of Civil Procedure across an entire category of cases. Yet Respondent never denies the central assertion of the Petition: as a matter of de facto policy, an alternative set of rules applies in the mass foreclosure docket.

Finally, Petitioner notes that while prohibition *is* an appropriate remedy in this case, Ms. Merrigan alternatively sought a writ of certiorari, and the Court may find that the latter mechanism ultimately provides the appropriate remedy. *See, e.g., Kirchhoff v. South Fla. Water Mgmt. Dist.*, 805 So. 2d 848 (Fla. 2d DCA 2001) (granting writ of certiorari to remedy due process violation in "quick-take" proceeding); *Martin v. Circuit Court, Seventeenth Judicial Circuit*, 627 So. 2d 1298 (Fla. 4th DCA 1993) (issuing certiorari where chief judge's order limiting rights of pro se litigant to pursue litigation violated due process). Certiorari may also be appropriate if this Court ultimately determines that the challenged order is "in effect . . . an administrative practice which is based on an administrative order" that departs from the essential requirements of law. *Jimenez v. Rateni*, 967 So. 2d 1075, 1077 (Fla. 2d DCA 2007) (Canady, J.).

II. Respondent Exceeds His Administrative Authority By Suspending the Operation of the Florida Rules of Civil Procedure.

The hallmark of the mass foreclosure docket is the docket sounding system. Ms. Merrigan first received an order setting her case for docket sounding on

January 11, 2011. (App. 7.)[3] The first provision of this order states: "THE COURT ON ITS OWN MOTION DETERMINES THIS CAUSE IS AT ISSUE AND READY TO BE SET FOR TRIAL." *Id.* (emphasis in original). Ms. Merrigan's case, however, was not at issue, and she is prejudiced by Respondent's policy of prematurely "determining" otherwise.

Rule 1.440 provides that "[a]n action is at issue after any motions directed to the last pleading served have been disposed of or, if no such motions are served, 20 days after service of the last pleading." Fla. R. Civ. P. 1.440(a). Once a case is at issue, "any party may file and serve a notice that the action is at issue and ready to be set for trial." *Id.* at 1.440(b). "The rule is designed to safeguard the parties' right to procedural due process," and therefore "strict compliance with the rule is mandatory." *Brown v. Reynolds*, 872 So. 2d 290, 297 (Fla. 2d DCA 2004). In *Bennett v. Continental Chemicals, Inc.*, 492 So. 2d 724 (Fla. 1st DCA 1986), the First District Court of Appeal found noncompliance with the formal requirements of Rule 1.440 to be reversible error, adopting a "bright line approach," even while acknowledging the need to "improv[e] case management at all levels of the judiciary." 492 So. 2d at 728.

Ms. Merrigan's case is not at issue. The trial court has not ruled on her May

[3] References in this Reply to the Appendix submitted with the Petition are marked "App."; references to the Supplemental Appendix in Support of Reply Brief are marked "Supp. App."

1, 2009 motion to dismiss. (App. 2-4). Accordingly, a motion directed to the last pleading served has not been disposed of, and the criteria in Rule 1.440 have not been satisfied. *See* Fla. R. Civ. P. 1.440(a); *Soler v. Secondary Holdings, Inc.*, 771 So. 2d 62, 73 (Fla. 3d DCA 2000) ("By 'motions directed to the last pleading' Rule 1.440 is talking about motions to dismiss . . . . "). Respondent never asserts that Ms. Merrigan's case is actually at issue; nor does Respondent, who acknowledges that Ms. Merrigan's case was determined to be at issue via a "form order" (Resp. at 11), deny that this determination emanates from an administrative policy applicable to all residential foreclosure cases. Indeed, Respondent defends the docket sounding system as a mode of "case management." Respondent merely emphasizes that "[t]he form order does ***not*** set a trial date." *Id.* (emphasis in original). That proposition is accurate, but beside the point; by determining Ms. Merrigan's case to be at issue and setting it for docket sounding, Respondent violates Rule 1.440 and causes Ms. Merrigan substantial prejudice.

Rule 1.440 serves to protect a party's "right to a full and fair evidentiary hearing at which evidence from both parties relating to all the disputed issues [can] be fully developed and presented." *Skyway Trap & Skeet Club, Inc. v. Sw. Fla. Water Mgmt. Dist.*, 854 So. 2d 676, 680 (Fla. 2d DCA 2003) (Canady, J.). Thus, failure to comply with the rule constitutes a violation of a party's due process rights. *Id.* Violation of the rule impairs Ms. Merrigan's ability to effectively

develop and present arguments in her foreclosure case.

Having issued a docket sounding order, the court has declared that (with 30 days notice) it may set a trial date at any time. (App. 7.) The order prejudices Ms. Merrigan for several reasons. First, the court may set a trial date while her motion to dismiss remains unresolved, thereby forcing her to defend herself at trial before the court has ruled on the legal sufficiency of the complaint. Second, the docket sounding order expressly impedes her ability to adequately prepare for trial: "All discovery shall be completed prior to the docket sounding. The conduct of discovery subsequent to the docket sounding shall be permitted only on the order of the Court for good cause shown and which will not delay the trial of this cause." *Id.* at 8. In other words, while Ms. Merrigan's motion to dismiss was pending, the court sua sponte issued an order that truncated discovery. Third, while motions for summary judgment and motions to continue may be heard at a docket sounding, "[n]o other motions will be heard." *Id.* at 7. In the foreclosure context, summary judgment is overwhelmingly a plaintiffs' motion. This restriction therefore has grave consequences for Ms. Merrigan's ability to defend her case: it means that she must attend recurring docket soundings at which her adversary may obtain a final judgment but which provide her with no opportunity to be heard on other motions that would advance her defense.

In addition to the unfair procedures apparent on the face of the docket

sounding order, the mass foreclosure docket suspends many of the rules of civil procedure in a manner that severely prejudices Ms. Merrigan. Strikingly, although the suspension of the normal rules is the gravamen of Ms. Merrigan's petition, Respondent never even asserts that the Florida Rules of Civil Procedure apply in the mass foreclosure docket. To briefly recapitulate the systematic deviations from the Rules of Civil Procedure described in the Petition –

- The docket sounding system forces cases prematurely toward resolution where issues have not been developed and discovery has not been completed, including granting plaintiffs' motions for summary judgment where discovery is outstanding (Pet. at 17-21);

- Trials routinely occur when a defendant has outstanding discovery requests and has sought a motion to compel, or when plaintiffs have simply failed to comply with the trial order's requirements regarding submission of witness and exhibit lists (Pet. at 24);

- Notwithstanding the clear dictates of Rule 1.510, summary judgment is regularly granted where crucial evidence is filed less than 20 days before a hearing, or even on the day of the hearing itself, or where evidence purportedly supporting the motion is never submitted (Pet. at 26-27);

- Judges routinely rule on plaintiff-initiated motions filed ex parte, and the court, in administering its docket, collaborates on an ex parte basis with large law firms that represent banks in foreclosure cases (Pet. at 29-31).

These deficiencies are not occasional mistakes. They represent a pervasive administrative policy designed to accelerate the rate at which the Twentieth Circuit clears its docket of foreclosure cases. (Pet. 13-16.)

Moreover, Respondent's description of Lee County's efforts to promote "case management" (Resp. at 6-13) does not address the core issues of the Petition.

Respondent cites no authority – and surely none exists – for the proposition that the goal of "case management" authorizes departure from the Florida Rules of Civil Procedure in an entire category of civil cases. Further, Respondent's defense of the "case management" techniques deployed in Lee County rests on false premises. For example, Respondent asserts that "[t]he defendants in the vast majority of foreclosure cases do not respond, resulting in defaults being entered against them." (Resp. at 10.) That is incorrect. Analysis of Lee County's dockets reveals that, of 33,465 foreclosure cases filed between January 1, 2009 and May 25, 2011, a motion to dismiss or answer was filed in 19,691 of those cases – in other words, 59% of foreclosure cases were contested. Second Aff. of Michael Olenick, Supp. App. at 2.

Similarly, Respondent asserts that "where the defendants do appear and defend, the liability issue is usually straightforward and summary judgment is often appropriate to determine if the mortgage has been paid." (Resp. at 11.) But proper disposition of foreclosure cases often requires determining more than whether "the mortgage has been paid"; in addition to any number of affirmative defenses a homeowner may present, widely-reported disarray in the mortgage securitization market means that foreclosure cases often present complicated questions concerning a plaintiff's standing. (Pet. 31-35.) Untangling the standing issues arising from mortgage securitization would require careful fact-finding

under any circumstances. But rigorous judicial proceedings are especially vital where, as the Fourth District Court of Appeal recently noted, "many, many mortgage foreclosures appear tainted with suspect documents." *Pino v. Bank of N.Y. Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011).[4]

III. Petitioner's Appendix Is Properly Before this Court.

Respondent argues that some substantial portion of the Appendix submitted pursuant to Florida Rule of Appellate Procedure 9.220 is not properly before the Court. (Resp. at 3-6.) Respondent presents absolutely no authority that would call into question the propriety of the Appendix submitted in this proceeding. Respondent's categorical assertion that an appendix may only contain materials from the record of a lower tribunal finds no support in the context of a case like this – an original proceeding challenging an administrative act by a chief judge that exceeds the bounds of his administrative authority.

Respondent argues that only materials in the trial court record may be included in an appendix supporting a petition for a writ of prohibition.[5] (Resp. at

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[4] Respondent also asserts that circuit courts were "required by the Trial Court Budget Commission" to reduce pending foreclosure cases by 62%. (Resp. at 9 n.5.) But that understanding is inconsistent with memoranda from Chief Justice Canady and TCBC Chair Judge John Laurent to chief judges of the state's circuit courts, which state that "[t]he 62% rate is not a quota," (App. 278) but "simply a goal set by TCBC to help measure the courts' progress" (App. 272).

[5] Respondent also points out that some hearing transcripts submitted in the Appendix do not include the court reporter's certification. (Resp. at 5.) Though

3-4.) No authority is ever offered, however, to support that categorical assertion in the context of a petition for a writ of prohibition challenging an administrative act.[6] A petition seeking prospective relief from an administrative act will not benefit from a lower tribunal's record the way that an appeal of an erroneous judicial ruling will – indeed, there often will be no record from the lower tribunal supporting an administrative act. In other words, while it is typically improper to review an adjudicative decision based on evidence that was not before the lower tribunal in reaching that decision, administrative acts are often not based on a closed administrative record. Original proceedings in the appellate court reviewing administrative acts, therefore, will often turn on factual material submitted in appendices that did not originate in a lower tribunal's record.

Respondent neither challenges the factual assertions supported by those transcripts nor provides any reason to believe that they are unreliable, in an abundance of caution, certified copies of court hearing transcripts included in the original Appendix are submitted in the Supplemental Appendix supporting this reply. *See* Supp. App. at 9-77.

[6] Respondent relies principally on cases involving direct appeals. *See Willis v. Romano*, 972 So. 2d 294 (Fla. 5th DCA 2008) (direct appeal from final injunction); *In re Poteat*, 771 So. 2d 569 (4th DCA 2000) (direct appeal in guardianship proceeding); *Ullah v. State*, 679 So. 2d 1242 (Fla. 1st DCA 1996) (direct appeal in criminal case); *Altchiler v. Dep't of Prof. Regulation, Div. of Professions, Bd. of Dentistry*, 442 So. 2d 349 (Fla. 1st DCA 1983) (order imposing sanctions where "counsel intentionally disregarded an order of [the] court"). Respondent also cites two cases arising on petitions for writ of certiorari, but both of those cases involved review of contested adjudicative rulings, rather than administrative actions. *See M.B. v. Dep't of Children and Family Servs.*, 985 So. 2d 1178 (Fla. 3d DCA 2008); *Keller Indus., Inc. v. Yoder*, 625 So. 2d 82 (Fla 3d DCA 1993).

Respondent's categorical argument fails to capture the ordinary practice in original proceedings challenging administrative acts, including the administrative acts of judicial officers. For example, in *Media General Convergence, Inc. v. Chief Judge of the Thirteenth Judicial Circuit*, 840 So. 2d 1008 (Fla. 2003), media organizations petitioned the district court of appeal for a writ of mandamus ordering the chief circuit judge to disclose certain public judicial records. The Supreme Court of Florida noted that, while none of the requested records had been produced, it could "determine additional material facts based on the appendices filed by both parties before the Second District and made a part of the record in this case. These appendices include records supplied by the Judicial Qualifications Commission ('JQC') to the petitioners." *Id.* at 1011. The Court clearly relied on inspection of these records in reaching its decision. *See id.*, at 1016. Similarly, in *Chiles v. Phelps*, 714 So. 2d 453 (Fla. 1998), the Supreme Court of Florida entertained consolidated extraordinary writ petitions brought by the Governor, as well as a medical clinic and a physician, challenging the validity of a legislative override of the Governor's veto. Although the petitions were filed directly in the Supreme Court, so there was no underlying record to consult, the Court had no qualms about looking to Petitioners' factual assertions about the impact of the legislature's action on their medical practices. *Id.*, at 455.

Petitioner does not argue that non-record materials may in all instances be

introduced via the appendix to a petition seeking an extraordinary writ. But where, as here, a petition invokes the appellate court's original jurisdiction to challenge an administrative action which did not rely on an underlying record, the appendix required by Rule 9.100(g) may include materials that were not introduced in a lower tribunal's record.

This understanding is reflected in the structure of the rules of appellate procedure. Where the rules require an appendix to be strictly limited to the record before the lower tribunal, they say so explicitly. Rule 9.220 outlines the requirements for appendices in actions petitioning for writs of certiorari or prohibition. *See* Fla. R. App. P. 9.100(g). That rule states that the appendix shall contain "a conformed copy of the opinion or order to be reviewed and may contain any other portions of the record and other authorities." Fla. R. App. P. 9.220. Construing that provision within the broader context of the rules of appellate procedure reveals the fallacy in Respondent's categorical position. Rule 9.190, which governs judicial review of agency decisions, provides that a petitioner or appellant "shall submit an appendix in accordance with rule 9.220," and then adds that "Appendices may not contain any matter not made part of the record in the lower tribunal." If Rule 9.220 categorically prohibited materials not included in the record in the lower tribunal, then the latter provision in Rule 9.190 would be entirely superfluous.

Petitioner has already suggested that the Court might appoint a special master if it believes that additional fact-finding is necessary. (Pet. at 8.) Commissioning a special master for this purpose is solidly within this Court's inherent authority. *State ex rel. Davis v. City of Avon Park*, 117 Fla. 565, 577 (1934); *see also State v. Trowell*, 739 So. 2d 77, 81-82 (Fla. 1999). In light of the Twentieth Circuit's response, however, such a course now seems unnecessary. A special fact-finding mechanism may be a necessary adjunct to the appellate court's original jurisdiction where factual disputes emerge, but Respondent has not contested any of the factual assertions in Ms. Merrigan's petition. Here, in the absence of a single contested factual assertion, the Court should decide the petition on the appendices and briefs before it.

IV. Conclusion

For the reasons stated herein and in the Petition, this Court should issue any writ necessary to remove Ms. Merrigan's case from the mass foreclosure docket.

Respectfully Submitted,

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