In the District Court of Appeal
Second District of Florida

CASE NO. [redacted] (CONSOLIDATED)
(L.T. CASE NO. [redacted])

[redacted] as successor by merger to [redacted] of Florida,
Appellant,

v.

LDG SARASOTA CII, LLC, et al.,

Appellees.

ON APPEAL FROM THE TWELTH JUDICIAL
CIRCUIT IN AND FOR MANATEE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEES LDG SARASOTA CII, LLC, LDG SARASOTA CIII, LLC, ARTHUR A. SHAFRAN, LUSIA G. SHAFRAN AND ALS OF NAPLES HOLDING COMPANY, LLC

Respectfully submitted,

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PRELIMINARY STATEMENT

Throughout this Brief, the term the "Bank" refers to the Appellant, [redacted] as successor by merger to [redacted] of Florida. The term "Appellees" refers to LDG Sarasota CII, LLC ("CII"), LDG Sarasota CIII, LLC ("CIII"), Arthur A. Shafran ("A. Shafran"), Lusia G. Shafran ("L. Shafran"), and ALS of Naples Holding Company, LLC ("ALS"). The Bank's Appendix will be cited as "A. _." Appellee Earl L. Frye's ("Frye") Appendix will be cited as "B._." The Appellees' Appendix will be cited as "C._."

The facts outlined in Frye's initial brief are incorporated into this brief with the following additions. After the filing of the appeal, the sale took place pursuant to the court's order granting Appellees' objections and the certificate of sale was served on November 9, 2010.[1] The Appellees timely filed objections to the sale on November 18, 2010 which remain pending in the trial court.[2]

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[1] Certificate of Sale, dated November 9, 2010 (C. 1, 16).

[2] Defendants', LDG Sarasota CII, LDG Sarasota CIII, Arthur A. Shafran, Lusia G. Shafran and ALS of Naples Holding Company, LLC, Objections to Electronic Foreclosure Sale, Valuation of Property and Motion to Vacate Judicial Sale after Final Judgment, served November 18, 2010 (C. 4, 19).

ISSUE PRESENTED

Under Florida Law, objections to a sale must be filed within ten days of the filing of the certificate of sale. The clerk must serve all parties with the certificate of sale. The Bank provided the clerk with an erroneous service list. The clerk, using this erroneous service list, was unable to serve the parties with the certificates of sale depriving Appellees of their right to object to the sale. **Was the lower court correct in setting aside the sales to ensure that due process could be afforded to each of the parties?**

SUMMARY OF THE ARGUMENT

The sale was properly set aside. The parties had ten days from the filing of the certificate of sale to file an objection. The clerk, using an erroneous service list provided by the Bank, was unable to serve the parties with the certificate of sale as was required by Florida Statute section 45.031(4). As a result, the Appellees were deprived of their right to object to the sale because the period to object had lapsed by the time the Appellees found out the certificate of sale was filed. The trial court properly set aside the sale to preserve the Appellees' right to object.

It is an abuse of discretion not to grant relief in cases where a party loses a right without proper notice due to the clerk's mistake. Furthermore, this Court holds that relief from such mistakes must be sought in the lower court. The trial court did exactly what was required—it allowed for the preservation of objections which otherwise would have been waived due to the error by the clerk and the Bank. Under such circumstances there was no gross abuse of discretion. Therefore, this Court should affirm the trial court's orders.

ARGUMENT

I. The Standard of Review is Gross Abuse of Discretion.

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. *Ingorvaia v. Horton*, 816 So. 2d 1256, 1259 (Fla. 2d DCA 2002) (*quoting United Cos. Lending Corp. v. Abercrombie*, 713 So. 2d 1017, 1018 (Fla. 2d DCA 1998). While the Bank cites the *Ingorvaia* case to the Court for a different proposition, it fails to include a Standard of Review section in its brief, as required by Fla. R. App. P. 9.210(b)(5).

II. The Trial Court Properly Set Aside the Sales Because, Due To the Bank's Error, the Certificates of Sale Were Not Served On Appellees.

Before the clerk of court can issue a certificate of title, the clerk must serve all parties with the certificate of sale which notifies all interested parties that the sale actually occurred:

> **(4) Certification of sale.** - - After a sale of the property the clerk shall promptly file a certificate of sale and **serve a copy of it on each party** in substantially the following form....

§ 45.031(4), Fla. Stat. (2010). Objections to the sale must be served within ten days of the filing of the certificate of sale:

> **(5) Certificate of title.** - - If no objections to the sale are filed within 10 days after filing the certificate of sale, the clerk shall file a

> certificate of title and serve a copy of it on each party in substantially the following form....

§ 45.031(5), Fla. Stat. (2010). In Manatee County, it is the responsibility of the attorney for the plaintiff to provide the certificate of service to the clerk.[3] At the hearing on Appellees' objections to the sale, counsel for the clerk's office stated in no uncertain terms that the clerk's office relies "upon the certificate of service as it's given to [it] by the plaintiff's attorney and unfortunately [Appellant's counsel] did not update the service list."[4] Indeed, the Bank's counsel admitted that he understood it was his duty to provide the clerk of court with the correct information in order to serve all the parties with a copy of the certificate of sale, but that he failed to do so.[5]

Absent proper notice of the certificate of sale, the clock could not start to tick for the ten day deadline to file an objection to the sale that is set forth in Florida Statutes Section 45.031(5). *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) ("It is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole.")

Service of a certificate of sale is governed by Florida Rule of Civil Procedure 1.080(b), which dictates that service be effectuated as follows:

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[3] Transcript of Hearing held before the Honorable Janette Dunnigan on September 29, 2010 (A. 295-97).

[4] *Id.*

[5] *Id;* Initial Brief, p. 11, 14.

> "[w]hen service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court. **Service on the attorney or party shall be made by delivering a copy or mailing it to the attorney or the party...**"

Fla. R. Civ. P. 1.080(b); *cf. Fincham v. Fincham*, 443 So. 2d 312, 313 (Fla. 4th DCA 1983) (holding that because the notice of sale prepared by counsel for the husband was a paper filed in the cause in the trial court, Fla. R. Civ. P. 1.080 required that it be served on each party).

Further, because the certificates of sale were not served as required by Florida Rule of Civil Procedure 1.080(b) and Florida Statute section 45.031(4), the clerk should never have issued a certificate of title pursuant to Florida Statutes Section 45.031(5). Despite this fact, the Bank relies on Florida Statute section 45.031(6) which states, "when the certificate of title is filed the sale shall stand confirmed" to argue that finality in the public sale process should trump the requirement to serve all parties with the certificate of sale. The Bank's argument misses the point. The language in section 45.031(6) necessarily assumes the certificate of sale was properly served under section 45.031(4). Furthermore, proper service of a certificate of sale is a prerequisite to the filing of a certificate of title. In other words, a certificate of title cannot be properly filed until the certificate of sale is properly served. Here, there was no service of the certificate of sale, therefore, the certificate of title could not be properly filed.

III. The Court was Required to Grant Relief to Allow the Appellees to Object.

Courts routinely grant relief from service errors by the clerk. In fact, when a party is not served with an order or paper, it is an abuse of discretion not to grant relief to allow the party to appeal the order or to file objections. *Gibson v. Buice*, 381 So. 2d 349, 350-51 (Fla. 5th DCA 1980) (abuse of discretion not to vacate judgment to allow direct appeal where court failed to serve the judgment); *Rosso v. Golden Surf Towers Conominium Ass'n*, 711 So. 2d 1298, 1299-1300 (Fla. 4th DCA 1998) (holding that trial court abused its discretion in not vacating an order where movant was not served with a copy of the order in time to allow appeal).

The focus in the above cases is on service of the order or paper because the deadlines in such cases are dictated by statute, as is true in this case. For that reason, the attorney's knowledge of the oral pronouncement or scheduled event is irrelevant. That the attorneys knew that the sale was scheduled to go forward is not equivalent to knowledge that the sale had taken place. Were it so, there would be no need for service of a certificate of sale. Courts should avoid readings that would render part of a statute meaningless. *American Home Assur. Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 367-68 (Fla. 2005). It cannot be assumed that the legislature meant to create a nullity by requiring the clerk to serve the certificate of sale on all parties. § 45.031(4), Fla. Stat. (2010). The better reading is that service is strictly required to ensure that parties can object within the ten day window.

Appellees's counsel was not served with the certificates of sale as required by Florida Statutes Section 45.031(4). The trial court consequently did what was required—it allowed for the preservation of objections which otherwise would have been waived due to the error by the clerk and the Bank. To not grant this relief would have been an abuse of discretion. *See Cohen v. Majestic Distilling Co.*, 765 So. 2d 276, 278-79 (Fla. 4th DCA 2000) (holding that it was error for a trial court to deny an extension of time to file an objection to a claim which it had no notice of due to the clerk's error). As a result, the Appellees subsequently exercised their right and objected to the sale.[6]

IV. The Trial Court Had Jurisdiction.

This Court holds that relief must be sought in the lower court from orders that were not served which cause an improper waiver of rights. *A.W.P., Sr. v. State, Dep't of Children & Family Servs.*, 973 So. 2d 1133 (Fla. 2d DCA 2008). The trial court did just that by setting aside the sale to ensure the certificate of sale would be served on all the parties to ensure that no party improperly loses its right to object.

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[6] Defendants', LDG Sarasota CII, LDG Sarasota CIII, Arthur A. Shafran, Lusia G. Shafran and ALS of Naples Holding Company, LLC, Objections to Electronic Foreclosure Sale, Valuation of Property and Motion to Vacate Judicial Sale after Final Judgment, served November 18, 2010 (C. 4, 19).

The same is true in other districts. For instance, in *Surratt v. Fleming*, 309 So. 2d 614, 615 (Fla. 1st DCA 1975), the First District held that a trial court had jurisdiction to consider a motion to vacate and set aside a mechanic's lien foreclosure sale even though time had expired to appeal the judgment because courts of equity have general jurisdiction over judicial sales made under their orders and may set aside or vacate sales *even after confirmation.*

Florida law holds that a trial court has the inherent power to control its own judgments. *See e.g., American Sav. & Loan Ass'n of Fla. v. Saga Dev. Corp.*, 362 So. 2d 54, 54 (Fla. 3d DCA 1978). Indeed, in *Hyte Dev. Corp. v. General Electric Credit Corp.*, 356 So. 2d 1254, 1255 (Fla. 3d DCA 1978), the Third District Court of Appeal held that the trial court abused its discretion for *not* vacating a sale (in which the certificate of title had already been issued) where the legal description of the property to be sold contained a mistake. In that case, the Third District stated that the proper procedure was for the trial court to cause the property to be resold pursuant to the applicable statutory provisions for such sales. *Id.*

In *Nationsbanc Mortgage Corp. v. Gardens North Condo. Ass'n, Inc.*, 764 So. 2d 883, 884 (Fla. 4th DCA 2000), a certificate of title was issued pursuant to a foreclosure sale ordered as part of a final default judgment obtained by a lienor. However, it was later determined that service of process was not properly obtained over the debtor. *Id.* Therefore, the Fourth District held that because service was

improper, the trial court should have vacated the default judgment and set aside the certificate of title. *Id.*; *see also Zimmerman v. Vinylgrain Indus. of Jacksonville, Inc.*, 464 So. 2d 1353 (Fla. 1st DCA 1985) (reversing a trial court for not setting aside a default, summary judgment, sale, and certificate of title where sufficient allegations of misrepresentation existed to entitle the party to relief under Fla. R. Civ. P. 1.540(b)). In fact, Florida courts commonly vacate certificates of title in connection with motions to set aside judgments pursuant to Fla. R. Civ. P. 1.540. *See e.g., Powers v. ITT Fin. Services Corp.*, 662 So. 2d 1343, 1344 (Fla. 5th DCA 1995) (affirming a trial court's order vacating a certificate of title, foreclosure sale, and final summary judgment of foreclosure obtained by default when a party was able to show excusable neglect and the existence of a meritorious defense).

Furthermore, in *Sterling Factors Corp. v. U.S. Bank Nat'l Ass'n*, 968 So. 2d 658, 664-65 (Fla. 2d DCA 2007) this Court resolved a similar issue in favor of permitting a rehearing *after* issuance of the certificate of title. Specifically, the issue in *Sterling Factors Corp.* was whether Florida Statutes Section 702.07[7] deprived a circuit court of jurisdiction to set aside or reconsider a foreclosure judgment once a foreclosure sale had been held. This Court answered that it did

[7] Florida Statues Section 702.07 provides: "The circuit courts of this state, and the judges thereof at chambers, shall have jurisdiction, power, and authority to rescind, vacate, and set aside a decree of foreclosure of a mortgage of property at any time before the sale thereof has been actually made pursuant to the terms of such decree, and to dismiss the foreclosure proceeding upon the payment of all court costs."

not and stated "it is our opinion that the circuit court had the jurisdiction to entertain the rehearing after issuance of the certificate of title." Therefore, any argument that the issuance of a certificate of title is the be-all and end-all in a foreclosure sale is erroneous.

Further, to preclude a party from being able to assert an objection to a judicial sale when the opposing party controls that party's notice that the judicial sale actually occurred would create massive opportunities for fraud and collusion, thereby violating the intent of Florida Statute section 45.031.

V. The Bank's Case Law Is Inapplicable.

The *Confederate Point Partnership, Ltd. v. Schatten*, 278 So. 2d 661, 662 (Fla. 1st DCA 1973), decision concerned a plaintiff who was attempting to circumvent orders of a trial court in one case by filing a separate action. Therefore, the First District properly held that the claims could have and should have been made only in the action which gave rise to the sale wherein the party's rights were determined. *Id.* at 662. In this case, the objections to the certificates of title were properly filed before the trial court in this case in order to do exactly what the First District urged the party in *Confederate* to have done—act hastily to protect its rights after discovery of the problem. Therefore, the *Confederate* decision cannot be used to support a reversal of the trial court's October 7, 2010 orders.

The case of *Weinstein v. Park Manor Constr. Co.*, 166 So. 2d 842, 844-45 (Fla. 2d DCA 1964) concerns the sufficiency of certain evidence presented at a deficiency hearing and has nothing whatsoever to do with the issues in this case. *Id.* at 844-45. The *Emmanuel v. Bankers Trust Co.*, 655 So. 2d 247, 249 (Fla. 3d DCA 1995) is inapplicable as well. In that case, the Third District Court of Appeal ruled that Florida Statutes Section 45.0315 governs the time, manner, and circumstances in which redemptive rights may be claimed or elected. This appeal does not concern the interpretation of Florida Statutes Section 45.0315. It concerns the failure to comply with Florida Statutes Section 45.031(4) which resulted in a due process violation.

CONCLUSION

Based upon the foregoing facts and authority, the trial court did not abuse its broad discretion in setting aside the certificates of title. This Court should affirm the trial court's orders.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing along with the appendix to the answer brief was served by U.S. Mail this February 22, 2011 to all parties on the attached service list.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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