In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

BAC HOME LOANS SERVICING, L.P.,

Appellee.

ON APPEAL FROM THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

I. Introduction

This case arises from a final judgment of foreclosure rendered in favor of BAC Home Loans Servicing ("the Bank"). [redacted] ("[redacted] is the owner of the property by way of a purchase from the Bankruptcy trustee.[1] The appeal presents two issues for the Court's consideration:

- Should the judgment be reversed because the trial court failed to strictly comply with Fla. R. Civ. P. 1.440?
- Should the order denying [redacted] motion to dismiss be reversed where [redacted] arguments were well taken and it never "abandoned" the motion?

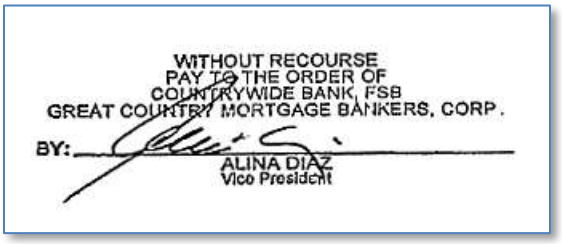
II. Appellant's statement of the facts

The Bank filed the instant mortgage foreclosure complaint alleging that it "owns and holds" the subject Note and Mortgage.[2] The Note attached to its

[1] Exhibit A to Defendant, [redacted] Motion to Dismiss Complaint, dated January 30, 2012 (R. 66-68).

[2] Complaint to Foreclose Mortgage and to Enforce Lost Loan Documents, filed January 5, 2010 ¶ 5 (R. 3).

pleading, however, was specifically endorsed to Countrywide Bank, FSB ("Countrywide Bank"):[3]



In addition, the Mortgage attached to the Complaint identified Mortgage Electronic Registration Systems, Inc. ("MERS") as the mortgagee.[4] No other document was attached to the Complaint which purported to transfer the Note from Countrywide Bank to the Bank or which purported to transfer the Mortgage from MERS to the Bank.[5]

The Bank thereafter moved for an *ex-parte* default against several defendants.[6] Although it sought a default against what the clerk of the court

[3] Exhibit B to Complaint to Foreclose Mortgage and to Enforce Lost Loan Documents, filed January 5, 2010 (R. 18).

[4] Exhibit A to Complaint to Foreclose Mortgage and to Enforce Lost Loan Documents, filed January 5, 2010 (R. 12).

[5] Complaint to Foreclose Mortgage and to Enforce Lost Loan Documents, filed January 5, 2010 (R. 3-19).

[6] Plaintiff's Ex-Parte Motion for Default, dated July 14, 2010 (R. 53).

termed defendant 002 ("defendant 002"), no default was entered against that party.[7]

made its first appearance on January 30, 2012 when it filed its motion to dismiss.[8] In relevant part, the motion argued the Complaint should be dismissed because the exhibits attached to it reflect that the Bank was not the real party in interest and because the Bank failed to attach a copy of the instrument it purported to sue upon.[9] Additionally, the motion put the Bank on notice that the Bank had failed to comply with the non-resident cost bond provision of Fla. Stat. § 57.011 and that if the Bank failed to comply with the statute within 20 days of service of the motion, this point would become ripe for argument and ruling.[10]

The Bank acknowledged motion and filed a response which argued generally that dismissal was improper while failing to touch upon many of the specifics of motion, including argument regarding the cost bond.[11]

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[7] Notice of Default Not Entered, dated July 19, 2010 (R. 54).

[8] Defendant, Motion to Dismiss Complaint, dated January 30, 2012 (R. 60-68).

[9] *Id.* (R. 61-63).

[10] *Id*. (R. 63-64).

[11] Plaintiff's Response to Defendant's Motion to Dismiss Complaint, dated April 12, 2012 (R. 69-72).

initially set its motion for hearing within a reasonable time after filing it, although the hearing did not occur.[12] Later, sought to disqualify the Bank's attorney of record due to a potential conflict of interest,[13] and also sought a stay pending this disqualification.[14] Without ruling on disqualification and stay motions, the trial court rendered an order deeming motion to dismiss "abandoned" and therefore denying same.[15]

Later, and for reasons not explained in the record, the trial court *sua sponte* rendered an order setting trial which was never served on [16] This was done even though the Bank had previously supplied the trial court with an updated service list that included the address for attorneys.[17]

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[12] Notice of Hearing on Defendant's Motion to Dismiss, dated September 27, 2012 (R. 84-86).

[13] Defendant, Holding, LLC's Motion for Disqualification of Plaintiff's Counsel, dated April 11, 2013 (R. 95-102).

[14] Defendant, Holding, LLC's Motion to Stay Proceedings, dated May 22, 2013 (R. 109-11).

[15] Order Denying Defendant's Motion to Dismiss, dated November 12, 2013 (R. 115).

[16] Order Setting Cause for Non-Jury Trial, and Trial Instructions, dated January 27, 2014 (R. 128-30).

[17] Notice of Filing Updated Service List and Envelopes, dated October 25, 2013 (R. 112-14).

Not surprisingly, [redacted] did not appear at the scheduled trial and a final judgment of foreclosure was rendered.[18] In fact, [redacted] name does not even appear on the certificate of service for the final judgment.[19] Nevertheless, once it learned that judgment had been rendered, [redacted] timely filed its notice of appeal.[20]

[18] Final Judgment of Foreclosure, dated March 13, 2014 (R. 189-95).

[19] *Id*. (R. 195).

[20] Notice of Appeal, dated April 14, 2014 (R. 173-182).

STANDARD OF REVIEW

"[A]ppellate courts apply a *de novo* standard of review when the construction of a procedural rule ... is at issue." *Barco v. School Bd. of Pinellas Cnty.*, 975 So.2d 1116, 1121 (Fla.2008). Since the first issue presented deals with the construction of Fla. R. Civ. P. 1.440, the standard of review should be *de novo*.

Likewise, a trial court's decision on a motion to dismiss is reviewed *de novo*. *See e.g. Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 495 (Fla. 4th DCA 2001); *Mortgage Electronic Registration v. Azize*, 965 So.2d 151, 153 (Fla. 2d DCA 2007). Therefore, the second issue presented regarding the trial court's denial of [redacted] motion to dismiss should also be reviewed *de novo*.

SUMMARY OF ARGUMENT

Initially, the final judgment should be reversed because the trial court failed to strictly comply with Fla. R. Civ. P. 1.440 before setting the matter for trial. Specifically, the trial court failed to strictly comply with the Rule when it failed to give [redacted] notice of the trial and when it set the matter for trial before either [redacted] or defendant 002 had answered the Complaint or been defaulted.

Furthermore, the trial court erred in denying [redacted] motion to dismiss simply because it deemed the motion "abandoned." The exhibits attached to the Bank's Complaint materially conflicted with its allegations that it owned and held the Note and Mortgage. This variance is fatal and required dismissal of the pleading. Moreover, the motion should have been granted because the motion notified the Bank of its failure to post the non-resident cost bond required by Fla. Stat. § 57.011 and the Bank never actually posted the bond or even offered to tardily post it. [redacted] also never "abandoned" its motion. Even if it had, the administrative order the trial court referred to when determining the motion abandoned far exceeds the authority of such orders. Therefore, the motion should have been granted and the Complaint dismissed.

ARGUMENT

I. The trial court erred when it failed to strictly comply with Fla. R. Civ. P. 1.440.

In its *en banc* decision in *Bennett v. Continental Chemicals, Inc.*, 492 So. 2d 724 (Fla. 1st DCA 1986), the court explained that strict compliance with Fla. R. Civ. P. 1.440 regarding setting cases for trial is mandatory, and that the failure to do so constitutes reversible error, "so as to avoid appeals, such as this, that would not or should not have materialized if the rule had been strictly observed." *Id.* at 728. Unfortunately, failure to comply with Rule 1.440—substantially or otherwise—requires reversal here where: 1) [redacted] was not given notice of the trial and therefore deprived of its constitutional right to due process; and 2) the trial court set the cause for trial before it was at issue in contravention of Rule 1.440(a).

A. The trial court violated [redacted] constitutional right to due process when it failed to give it notice of the trial.

In a case directly on point with the facts of this case, the Fifth District recently vacated a final judgment of foreclosure rendered after a trial where the defendant below was "never served with the notice of issue or the order setting the trial." *Stevens v. Nationstar Mortgage, LLC*, 133 So.3d 628, 629 (Fla. 5th DCA 2014). The Court explained that the requirement of serving every pleading on a party or its counsel is to satisfy the constitutional requirement of due process, and

since the foreclosing lender failed to serve notice of the order setting trial on Stevens, it violated Stevens's due process rights which required reversal. *Id.*

The holding in *Stevens* is neither new nor novel. In fact, this Court has repeatedly held that a judgment entered without notice to an affected party is void *ab initio*. *See e.g.Shields v. Flinn*, 528 So.2d 967, 968 (Fla. 3d DCA 1988) ("Since the trial court specifically found that Shields had not received notice of the trial, the judgment was void."). *See also State, Dept. of Rev. v. Thurmond*, 721 So. 2d 827 (Fla. 3d DCA 1998) (order denying State's motion to vacate order of dismissal reversed where State was not given notice of final hearing and therefore failed to appear); *Metropolitan Dade County v. Curry*, 632 So.2d 667 (Fla. 3d DCA 1994) (order denying Dade County's motion to set aside order for return of property vacated where Dade County was not given notice of hearing at which the trial court issued its order); *Falkner v. Amerifirst Federal Savings and Loan Ass'n*, 489 So.2d 758 (Fla. 3d DCA 1986) (order of dismissal was void for lack of notice where notice of hearing on motion was mailed to the wrong address.).

Here, the record is undisputed that [redacted] was not given notice of the order setting trial as its name does not appear on the certificate of service list.[21] Moreover, [redacted] name does not even appear on the certificate of service for

[21] Order Setting Cause for Non-Jury Trial, and Trial Instructions, dated January 27, 2014 (R. 130).

the final judgment.[22] This is critical because this Court only presumes that an order has been mailed to a litigant's counsel when the certificate of service of the order includes counsel's address. *World on Wheels of Miami, Inc. v. Intern. Auto Motors, Inc.*, 569 So. 2d 836, 837 n. 1 (Fla. 3d DCA 1990). Therefore, where a party is not listed in the certificate of service of an order and there is nothing in the record which suggests that the order was served on the party, the interests of justice require reversal of any adverse judgment thereafter rendered against that party. *Grahn v Dade Home Services, Inc.*, 277 So 2d 544 (Fla. 3d DCA 1973) (vacating default judgment where order requiring plaintiff to respond to discovery demands or else face dismissal did not contain a certificate of service of a copy the order on the plaintiff and nothing in the record indicated that service of the order was made). Since [redacted] attorney was not listed in the certificate of service of the order setting trial and the final judgment, and because there is nothing in the record indicating that [redacted] was ever served with a copy of the order or judgment, the interests of justice require reversal of the final judgment.

Most perplexingly, the trial court failed to notify [redacted] of both the trial and the final judgment despite [redacted] active participation in the litigation. [redacted] made its first appearance in the case over two years before the order

[22] Final Judgment of Foreclosure, dated March 13, 2014 (R. 194).

setting the trial date was rendered.[23] It also remained an active participant in the proceedings after service of its motion to dismiss by filing various motions and notices with the Court.[24] And perhaps most importantly, the Bank itself supplied the trial court with an updated service list that contained the name and address of attorney.[25]

Consequently, the trial court violated constitutional right to due process. The judgment is therefore void *ab initio* and should be reversed.

B. The Bank was not entitled to a trial because the case was not at issue.

In *Ocean Bank v. Garcia-Villalta*, 141 So. 3d 256 (Fla. 3d DCA 2014), this Court reversed an order dismissing a foreclosure case after trial, holding that the case was not at issue where two defendants to the lawsuit had neither answered the complaint nor been defaulted. *Garcia-Villalta* thus restates the general rule that a case cannot be set for trial unless and until all defendants to the litigation have

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[23] Defendant, Holding, LLC's Motion to Dismiss the Complaint, dated January 30, 2012 (R. 60-68).

[24] Defendant, Barndsale Holding, LLC's Motion for Disqualification of Plaintiff's Counsel, dated April 11, 2013 (R. 95-102); Notice of Hearing on Defendant's Motion to Disqualify Plaintiff's Counsel, dated April 23, 2013 (R. 103-05); Defendant, Motion to Stay Proceedings, dated May 22, 2013 (R. 109-11).

[25] Notice of Filing Updated Service List and Envelopes, dated October 25, 2013 (R. 112-14).

answered the complaint or been defaulted. *See e.g. Bennett*, 492 So. 2d at 727, n. 1 ("An answer must be served by or a default entered against all defending parties before the action is at issue." [emphasis added]); *Jones v. Volunteers of America North & Central Florida, Inc.*, 834 So. 2d 280, 281 (Fla. 2d DCA 2002) ("The case had to be at issue as to both defendants before it could be set for trial."); *Luckhardt v. Pardieck*, 145 So. 2d 542, 543 (Fla. 2d DCA 1962) (holding that "the instant cause was never at issue since certain parties defendant to the cause as described in the complaint had not answered or had decrees pro confesso entered against them."); *Rountree v. Rountree*, 72 So. 2d 794, 795 (Fla. 1954) ("Until all of the defendants had filed answers or had [defaults] entered against them, the cause was not at issue, and the plaintiffs could not be entitled to an order of reference for the taking of testimony.")

The case was not at issue when the trial court rendered its order setting trial because [redacted] had not answered the Complaint and a default had not been entered against it. Additionally, the case was not at issue because the default sought against defendant 002 was not entered by the clerk of court.[26] Consequently, and in addition to violating [redacted] constitutional right to due

[26] Notice of Default Not Entered, dated July 19, 2010 (R. 54).

process, the Bank was not even entitled to a trial on the day the case was tried. This too requires reversal of the final judgment.

II. The trial court erred in denying [redacted] motion to dismiss.

The trial court also erred in denying [redacted] motion to dismiss because: 1) the exhibits attached to the Bank's Complaint materially conflicted with its allegations; 2) the Bank failed to comply with Fla. Stat. § 57.011; and 3) [redacted] did not "abandon" the motion.

A. The exhibits attached to the Bank's Complaint materially conflicted with its allegations.

"If an exhibit facially negates the cause of action asserted, the document attached as an exhibit controls and must be considered in determining a motion to dismiss." *Fladell v. Palm Beach County Canvassing Bd.*, 772 So.2d 1240 (Fla. 2000). *See also Health Application Systems v. Hartford Life*, 381 So. 2d 294, 297 (Fla. 1st DCA 1980) ("We parenthetically observe that under the Florida Rules of Civil Procedure, and case law interpreting the rule, exhibits attached to a pleading become a part for all purposes; and if an attached document negates the pleader's cause of action or defense, the plain language of the document will control and may be the basis for a motion to dismiss."). Most importantly, when a document attached to a complaint directly conflicts with the pleading's allegations, the

variance is fatal and the complaint should be dismissed. *Appel v. Lexington Ins. Co.*, 29 So. 3d 377 (Fla. 5th DCA 2010).

The Bank's Complaint unequivocally alleged that it "owns and holds the Note and Mortgage."[27] The Note attached to the Complaint, however, materially conflicts with this allegation because it contains a special endorsement to Countrywide Bank.[28] Additionally, the Mortgage attached to the Complaint materially conflicts with the Complaint's allegation because the Mortgage identifies MERS as the mortgagee.[29] No other document was attached to the Complaint which purported to transfer the Note from Countrywide Bank to the Bank or which purported to transfer the Mortgage from MERS to the Bank.[30] argued this point in its motion to dismiss, citing the long-held proposition that the exhibits attached to the Complaint control over the

[27] Complaint to Foreclose Mortgage and to Enforce Lost Loan Documents, filed January 5, 2010 ¶ 5 (R. 3).

[28] Exhibit B to Complaint to Foreclose Mortgage and to Enforce Lost Loan Documents, filed January 5, 2010 (R. 18).

[29] Exhibit A to Complaint to Foreclose Mortgage and to Enforce Lost Loan Documents, filed January 5, 2010 (R. 12).

[30] Complaint to Foreclose Mortgage and to Enforce Lost Loan Documents, file January 5, 2010 (R. 3-19).

allegations,[31] and that the Bank failed to attach any documents which would show a transfer of interest from the original lender to itself.[32]

The documents attached to the Bank's Complaint clearly conflict with the allegations and therefore required dismissal of the Bank's pleading. First, because the Note contained a "specific" endorsement to Countrywide Bank, it was therefore payable only to that party. *See* Fla. Stat. § 673.2051(1); *Dixon v. Express Equity Lending Group, LLP*, 125 So. 3d 965, 967 (Fla. 4th DCA 2013). Consequently, the Bank could not be considered the holder of the Note as alleged in the Complaint. *See* Fla. Stat. § 671.201(21)(a) (defining holder as "The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.").

Additionally, the Mortgage attached to the Bank's pleading identifies MERS as the mortgagee and there was no document attached to the Complaint which purported to transfer the security instrument from MERS to the Bank. *Cf. Jeff-Ray Corp. v. Jacobson*, 566 So. 2d 885 (Fla. 4th DCA 1990) (trial court erred in failing to dismiss action where assignment of mortgage was alleged but not attached to the complaint). *See also WM Specialty Mortgage, LLC v. Salomon*, 874 So. 2d 680

[31] Defendant, [redacted] Motion to Dismiss Complaint, dated January 30, 2012 (R. 61-62).

[32] *Id*. (R. 62-63).

(Fla. 4th DCA 2004). And to the extent that "the mortgage follows the note," then the Mortgage would only be enforceable by Countrywide Bank and not the Bank.

Therefore, the Bank's allegation that it "owns and holds" the Note and Mortgage fatally conflicted with the copies of the Note and Mortgage attached to the Complaint. The Complaint therefore should have been dismissed.

B. BAC had failed to post the non-resident cost bond required of it pursuant to Fla. Stat. § 57.011.

Fla. Stat. § 57.011 provides that:

> When a nonresident plaintiff begins an action or when a plaintiff after beginning an action removes himself or herself or his or her effects from the state, he or she shall file a bond with surety to be approved by the clerk of $100, conditioned to pay all costs which may be adjudged against him or her in said action in the court in which the action is brought. On failure to file such bond within 30 days after such commencement or such removal, the defendant may, after 20 days' notice to plaintiff (during which the plaintiff may file such bond), move to dismiss the action or may hold the attorney bringing or prosecuting the action liable for said costs and if they are adjudged against plaintiff, an execution shall issue against said attorney.

Id. (emphasis added).

The purpose of the statute is to protect Florida residents from lawsuits enacted by non-resident litigants. *Lady Cyana Divers, Inc. v. Carvalho*, 561 So. 2d 612, 613 (Fla. 3d DCA 1990). Further, the statute is clear that upon notice to a plaintiff of its failure to comply and the plaintiff's subsequent failure to perform, the defendant is entitled to a dismissal. *See* § 57.011 (providing, in pertinent part,

that "the defendant may, after 20 days' notice to plaintiff….move to dismiss the action.") The remedy of dismissal has only been deemed "too harsh" where the plaintiff offers to post the bond, albeit tardy. *Waxman v. Schwarz*, 458 So. 2d 72, 73 (Fla. 3d DCA 1984).

motion to dismiss put the Bank on notice of its failure to comply with § 57.011 and alleged that within 20 days of the date of the motion, the Bank's failure to comply with the statute would be ripe for a ruling.[33] The Bank did not make any mention of this argument in its response to motion, much less offer to tardily post the bond.[34] In fact, nowhere in the record was the cost bond ever posted. Therefore, the trial court should have granted motion to dismiss.

C. did not abandon its motion to dismiss.

The only explanation given by the trial court for denying motion was that it "deem[ed] the Motion abandoned in accordance with the provisions of Administrative Memorandum 12-E."[35] Presumably, the order was predicated on the Eleventh Circuit's Administrative Memorandum 12-E entitled *In re:*

[33] *Id*. (R. 62-63).

[34] Plaintiff's Response to Defendant's Motion to Dismiss, dated April 12, 2012 (R. 69-72).

[35] Order Denying Defendant's Motion to Dismiss, dated November 12, 2013 (R. 115).

Residential Mortgage Foreclosure Cases[36] which was rendered on September 10, 2012. The memorandum provides, in relevant part, that:

> The Eleventh Circuit Civil Division continues to hold separate foreclosure motion calendars. For each judge's procedure, please consult the circuit website at: http://www.jud11.flcourts.org. All Motions must be promptly set for hearing upon filing. Failure to set motions for hearing may result in these motions being deemed abandoned or denied without hearing by the Presiding Judge.

Id. at 2 (emphasis added).

Administrative Memorandum 12-E makes no mention of how a motion can be considered "abandoned" absent a vague reference to "promptly" setting the motion for hearing. Additionally, [redacted] is unaware of any case law or rule which would define how or when a motion to dismiss would become "abandoned" absent an answer subsequently being filed. In any event, the record is clear that [redacted] never did anything to suggest it had abandoned its motion.[37]

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[36]This memorandum is available online at: http://www.jud11.flcourts.org/%5Cdocs%5CCIV12-E_AM_Foreclosure.pdf (last accessed November 10, 2014).

[37] Two related cases are currently pending before this Court on the "abandonment" issue. The first is [redacted] *v. Deutsche Bank National Trust Company*, Case No. 3D14-656 (Fla. 3d DCA), and the other is *Frau v. JPMorgan Chase Bank*, Case No. 3D13-2712 (Fla. 3d DCA). In [redacted] this court issued a ruling (without an opinion) on November 19, 2014 which affirmed the trial court's declaration that a motion to quash had been abandoned, but which also stated that the abandonment would be without prejudice to [redacted] raising the jurisdictional issue again in its answer. (available at: http://www.3dca.flcourts.org/opinions/3D14-0656.pdf)

First, [redacted] actually set its motion for hearing within a reasonable time after service of the motion.[38] Additionally, [redacted] moved to disqualify the Bank's counsel,[39] and also sought to stay the proceedings when it came to its counsel's attention that two of its law firm's former employees were now employees of the Bank's counsel.[40] Therefore, it cannot be said that [redacted] somehow simply gave up on its motion.

Even more to the point is the fact that the scope of Administrative Memorandum 12-E far exceeds the authority of the administrative judge of the circuit. The Rules of Judicial Administration provide a chief judge (who may delegate his or her authority to another judge) with the power to issue administrative orders for the purpose of managing the affairs of the court. Fla. R. Jud. Admin. 2.215(b)(2). But such orders cannot be inconsistent with court rules already approved by the Florida Supreme Court. Fla. R. Jud.Admin.2.120(c).

This Court held, therefore, that the Administrative Order's abandonment procedure has no teeth in that there is no actual waiver. While the Court should rule similarly in this case—that [redacted] did not waive its rights—an affirmance with leave to reassert the defense would be unworkable due to the difference in the procedural posture of this case—namely that this case comes to the Court after trial.

[38] Notice of Hearing on Defendant's Motion to Dismiss, dated September 27, 2012 (R. 84-86).

[39] Defendant, [redacted] Holding, LLC's Motion for Disqualification of Plaintiff's Counsel, dated April 11, 2013 (R. 95-102).

[40] Defendant, [redacted] Holding, LLC's Motion to Stay Proceedings, dated May 22, 2013 (R. 109-11).

Administrative orders that attempt to amend the rules, or undercut the overall scheme or design of the rules are invalid because they exceed the authority granted under the Florida Rules of Judicial Administration. *Payret v. Adams,* 471 So.2d 218, 220 (Fla. 4th DCA 1985) ("[C]ourts of this state are not empowered to develop local rules which contravene those promulgated by the Supreme Court. Nor may courts devise practices which skirt the requirements of duly promulgated rules.") (quoting *Berkheimer v. Berkheimer*, 466 So.2d 1219, 1221 (Fla. 4th DCA 1985)); *Obando v. Bradshaw*, 920 So. 2d 198, 200 (Fla. 4th DCA 2006) (same); *see also Melkonian v. Goldman*, 647 So. 2d 1008, 1009 (Fla. 3d DCA 1994) (administrative judge's memorandum order may not be inconsistent with local rules approved by the Florida Supreme Court); *United Services Auto. Ass'n v. Goodman*, 826 So. 2d 914, 915 (Fla. 2002) (order prohibiting defense counsel employed as full-time insurance company staff from using individual firm names in pleadings improperly encroached upon the Supreme Court's jurisdiction to adopt rules for the courts).

Invalid administrative orders include those that create time limits for a party to exercise a right where the rules of civil procedure have no such limits. In *Bathurst v. Turner*, 533 So. 2d 939, 941 (Fla. 3d DCA 1988), this Court granted a writ of mandamus which challenged an order which created a five-day time limit

for objecting to a referral to a magistrate. Because the rule of civil procedure required a party's "consent"—an affirmative, voluntary action—mere acquiescence through inaction during the five-day period was insufficient. While the opinion in this case addressed a trial court's order, this Court noted that the result would be the same if an existing administrative order were interpreted the same way. *Id*. at 941, n. 4.

Here, Administrative Memorandum 12-E creates a time limit for obtaining a ruling on motions that are timely under the rules, by instructing judges that the motions can be deemed "abandoned" or waived if not set by some undetermined date. This newly minted waiver through inaction undercuts the Rules of Civil Procedure in several ways.

Impermissible creation of a new waiver rule.

First, the Rules themselves provide what constitutes a waiver of matters that can be raised in preliminary, pre-answer motions, such as that filed in this case. Rules 1.140(b) and (h) of the Florida Rules of Civil Procedure specify that a party waives defenses and objections (such as insufficiency of service) if they are not raised in the answer or a pre-answer motion. The Rules provide time limits for raising these defenses—twenty days from service for the typical defendant, or ten days from the denial of a pre-answer motion. Fla. R. Civ. P. 1.140(a). The rules

also provide a method for waiving the right to file motions directed to the pleadings by way of an affirmative, voluntary action (reminiscent of the "consent" rule discussed in *Bathurst*)—the filing of a notice for trial. Fla. R. Civ. P. 1.440(a).

The Administrative Memorandum 12-E now adds another method of waiver never approved by the Florida Supreme Court and establishes a new time limit (for obtaining a hearing on preliminary motions) not found in the Rules. However, the Florida Supreme Court's express declaration describing the manner in which defenses may be waived through inaction implies the exclusion of other methods. *See Subirats v. Fid. Nat. Prop.*, 106 So. 3d 997, 999 (Fla. 3d DCA 2013) (applying the "expressio unius est exclusio alterius" rule of construction to conclude that the Florida Department of Financial Services exceeded its rulemaking authority when it created a five-day waiver rule).

Accordingly, a chief judge (or appointed administrative judge) has no authority to invent new rules which can operate to waive a party's rights.

Impermissible shifting of burden to prosecute.

Second, an underlying theme in the design of the Rules of Civil Procedure is that the plaintiff bears the burden of prosecuting the case. Rule 1.420(e) provides that an action may be dismissed after a period of inactivity of one year. A defendant, therefore, is entitled to a dismissal if a plaintiff does not set a pending

pre-answer motion for hearing for a year (provided the parties or the court take no other action in the interim). *Patton v. Kera Tech., Inc.*, 895 So. 2d 1175, 1178 (Fla. 5th DCA 2005) *approved,* 946 So. 2d 983 (Fla. 2006) ("The plaintiff bears responsibility to expedite litigation and Plaintiff's failure to take steps within Plaintiff's control to resolve the case or to ensure prompt dispatch of court orders warrants dismissal."); *see Dashew v. Marks*, 352 So.2d 554 (Fla. 3d DCA 1977) (court's failure to enter a written order on an oral decision did not relieve plaintiff of the duty to proceed and did not affect the defendant's right to dismiss the case for lack of prosecution); *Sewell Masonry Co. v. DCC Const. Inc.*, 862 So.2d 893 (Fla. 5th DCA 2003) ("it is not the duty of the trial judge to schedule hearings on motions for parties who do not themselves seek rulings on their pleadings").

Administrative Memorandum 12-E, however, impermissibly shifts the burden to the defendant to prosecute the plaintiff's action against him or her. Because the purpose of the "abandonment" administrative order is to "clear the foreclosure backlog," the order eviscerates the existing lack of prosecution rule, ensuring that no foreclosure plaintiff can suffer dismissal for failure to prosecute. Given that the purpose of Administrative Memorandum 12-E is clearing the court's dockets of a backlog of stagnant foreclosure cases, stripping away the potential to dismiss cases for lack of prosecution is seemingly self-defeating.

This is not to say that attorneys do not have a professional responsibility to "make reasonable efforts to expedite litigation consistent with the interests of the client." R. Regulating Fla. Bar 4-3.2. But the Comment to the Rule, and the cases applying it, make clear that it applies when an attorney neglects the client, routinely delays proceedings for personal reasons, or files frivolous motions that do not have "some substantial purpose other than delay. Comment to R. Regulating Fla. Bar 4-3.2. It would not apply to require an attorney to expedite litigation inconsistent with the interests of the client, such as helping an opponent prosecute its case against the client or taking unnecessary action that extinguishes the opportunity for the case to be dismissed for lack of prosecution. In fact, it is arguably derelict of duty for an attorney to strip away a potential dismissal from a client. Administrative Memorandum 12-E, therefore, cannot be supported by reference to the Rules of Professional Conduct.

Impermissible deviation from the requirement that pre-answer motions be determined by hearing.

Third, the Rules of Civil Procedure already specify the manner in which preliminary motions must be determined. Fla. R. Civ. P. 1.140(d) unequivocally states that pre-answer motions "shall be heard and determined before trial on application of any party unless the court orders that the hearing and determination

shall be deferred until the trial." (emphasis added). The directive that the courts "shall" hear and determine such motions leaves no room for a new rule that allows the court to dispose of them without a hearing by deeming them abandoned. *See S. R. v. State*, 346 So. 2d 1018, 1019 (Fla. 1977) (in statutory interpretation, "shall," is normally meant to be mandatory).

Impermissible deviation from the established method by which the courts manage their cases.

Fourth, while the plaintiff bears the burden of prosecuting its case, the trial court has the concomitant responsibility to prevent cases from languishing on its docket. It is therefore the judge's, and not the attorneys', duty to ensure that litigation proceeds through the system correctly. *Fuster-Escalona v. Wisotsky*, 781 So. 2d 1063, 1066 (Fla. 2000) (Harding, J., specially concurring).

To that end, the Rules of Civil Procedure already provide a mechanism for the courts to manage their cases—a method that does not involve deeming that litigants have abandoned their motions. Rule 1.200(a) Fla. R. Civ. P. provides that the court may order a status conference so that it may "determine…matters that may aid in the disposition of the action." The court, therefore, may call a status conference and, with notice to the parties (and coordination with their schedules), rule upon any pending motions directed to the pleadings. *See also*, Fla. R. Civ. P.

1.090(d) (Notice of hearing for motions which may not be heard *ex parte* must "be served a reasonable time before the time specified for the hearing.").

Administrative Memorandum 12-E, however, creates a new shortcut to the established rules, inviting judges to dispose of pre-answer motions without spending the time to read them, hear argument on them, rule upon them, and enter orders on them. Such automated resolution of disputed issues, where the rules contemplate case-by-case decision-making by judges, is itself a basis for declaring an administrative order null and void. *Tallahassee Democrat, Inc. v. Willis*, 370 So. 2d 867 (Fla. 1st DCA 1979) (Blanket administrative order requiring all deposition transcripts in all cases to be sealed quashed as in conflict with the Rules of Civil Procedure which contemplate case-by-case consideration.)

Impermissible attempt to shield rulings from appellate review.

Fifth, the Rules of Civil Procedure and the Rules of Appellate Procedure, as well as the Florida Constitution were specifically and carefully designed to provide litigants with a fundamental right of due process—appellate review. Art. I, §§ 9, 21, Fla. Const.; Art. V, § 4, Fla. Const. The entire edifice of the judicial system presumes that the trial courts will determine motions on their merits and erroneous decisions can be rectified by the appellate court. *See Combs v. State*, 420 So. 2d 316, 317 (Fla. 5th DCA 1982) *approved*, 436 So. 2d 93 (Fla. 1983) (equating

rulings that effectively deny appellate review with violations of due process rights).

Administrative Memorandum 12-E, however, constructs a method by which the trial court can dispose of motions without deciding them upon their merits. Deeming them "abandoned" when there was no such intent, falsely clothes these decisions with the appearance of a waiver, which could prevent appellate review. *See e.g. Melara v. Cicione*, 712 So. 2d 429, 430 (Fla. 3d DCA 1998) (issue not preserved for appellate review where there was a "clear waiver or abandonment").[41]

Given that the trial courts could use case management conferences to call up and rule on the merits of the motions (or even request that the parties brief the issues so that the judges could rule upon them from the bench), Administrative Memorandum 12-E's suggestion that the judges instead deny them as abandoned suggests a predisposition against any such motions. This implication of pre-determination, even though unintended, runs afoul of the judiciary's obligation to avoid even the appearance of impropriety. That these pre-determined rulings should also be immune from appellate review presents an even greater danger of

[41] As noted in fn. 37, above, this Court has already ruled that the Administrative Order cannot create such a waiver.

eroding the public's confidence in the integrity of the judiciary. *See*, Commentary to Canon 2A of the Code of Judicial Conduct.

In sum, it appears that the express intent of Administrative Memorandum 12-E is to "clear the foreclosure" backlog and move cases towards trial. But by unilaterally deciding that a motion may be "abandoned" simply because an unspecified amount of time has passed and therefore denying it without considering the motion's merits, the trial court will not have considered the underlying dynamics of the litigation. The motion may not have been set because mediation was scheduled between the parties, or because the borrower entered into a trial modification repayment plan, or because, as was the case here, there was a potential conflict of interests for the attorneys representing opponent that would require the disqualification of counsel. could not move forward with a hearing on its motion to dismiss while the disqualification issue was pending.

Therefore, the motion should not have been considered "abandoned" and should have been considered on its merits. Since the merits clearly revealed that the exhibits attached to the Complaint conflicted with the pleadings' allegations and that the Bank failed to post the non-resident cost bond, the Complaint should have been dismissed.

CONCLUSION

For the reasons and legal authorities set forth herein, this Court should reverse the final judgment of foreclosure under review with instructions that, on remand, the trial court grant [redacted] motion to dismiss and dismiss the Complaint or, alternatively, withhold any trial on the merits until the case is at issue.

Dated: November 20, 2014

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby 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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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this November 20, 2014 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin.at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this November 20, 2014.

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