In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] LLC,

Appellant,

v.

PHH MORTGAGE CORPORATION, et al.

Appellees.

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

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Rules

Statutes

Other Authorities

STATEMENT OF THE CASE AND FACTS

I. Introduction

This case arises from a final judgment of foreclosure rendered in favor of PHH Mortgage Corporation ("PHH"). [redacted] LLC ("[redacted] is the owner of the property by way of a purchase from the bankruptcy trustee.[1] [redacted] presents three 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 judgment and order setting trial be reversed as void?
- Should the order granting PHH's motion to strike be reversed for violation of [redacted] constitutional right to procedural due process?

II. Appellant's Statement of the Facts

PHH's one-count complaint for mortgage foreclosure named, amongst other individuals and entities, Sirsfredo Meneses ("Meneses") as a defendant.[2] PHH's

[1] Exhibit A to Defendant, [redacted] LLC's Motion to Dismiss Complaint, dated November 7, 2013 (R. 112-113).

[2] Complaint to Foreclose Mortgage, filed October 11, 2011 (R. 6-34).

pleading also explicitly joined as a defendant any unknown parties that might claim an interest in the subject property through Meneses.[3]

While the action was pending before the trial court, Meneses filed for bankruptcy and the trial court rendered an order staying the case until the automatic stay was lifted.[4] Nowhere in the record, however, is there a notice that the stay had been lifted or an order from the trial court removing the stay it imposed below.

first appearance in the case was its motion to dismiss in which it identified itself as the unknown party claiming through Meneses through its purchase of the property from Meneses's bankruptcy trustee.[5] While this motion was pending before the trial court, and without any notice that the automatic stay protecting Meneses had been lifted, the trial court *sua sponte* issued an order setting the case for trial which was never served on [6]

[3] Complaint to Foreclose Mortgage, filed October 11, 2011 ¶19 (R. 7).

[4] Order Granting Plaintiff's Motion for Continuance, dated May 1, 2013 (R. 99).

[5] Defendant, LLC's Motion to Dismiss Complaint, dated November 7, 2013 (R. 106-14).

[6] Order Setting Cause for Non-Jury Trial, and Trial Instructions, dated December 5, 2013 (R. 118-20).

PHH eventually responded to [redacted] motion to dismiss with a motion to strike which treated [redacted] as an intervenor in the action.[7] PHH, however, never served its motion on [redacted] (as demonstrated by the certificate of service attached to the motion).[8] PHH would later set a hearing on this motion but it never served [redacted] with a copy of the notice of hearing as demonstrated by the certificate of service attached to that document.[9] PHH was then able to procure an order from the trial court which granted its motion.[10] Like its motion to strike and its notice of hearing, PHH also failed to serve a copy of this order on [redacted] leaving [redacted] in the dark as to what had transpired against it.[11]

Not surprisingly, [redacted] did not appear at the trial in which the trial court rendered a final judgment of foreclosure in favor of PHH.[12] Once it learned of the final judgment, [redacted] timely filed its notice of appeal.[13]

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[7] Plaintiff's Motion to Strike [redacted] LLC's Motion to Dismiss and First Set of Interrogatories, dated December 31, 2013 (R. 128-34).

[8] *Id*.

[9] Notice of Hearing, dated March 10, 2014 (R. 147-55).

[10] Order Granting Plaintiff's Motion to Strike [redacted] Holding, LLC's Motion to Dismiss and First Set of Interrogatories, dated March 19, 2014 (R. 156-57).

[11] *Id.*

[12] Final Judgment of Foreclosure, dated March 24, 2013 (R. 259-64).

[13] Notice of Appeal, dated April 15, 2014 (R. 201-09).

SUMMARY OF THE 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 [redacted] had answered the complaint or been defaulted.

Additionally, the final judgment and the order setting trial should be reversed as void. The record is clear that the trial court stayed the action during the pendency of [redacted] bankruptcy but that no relief from stay was ever filed and the trial court never made a finding that the stay had been lifted. Therefore, both the order setting trial and the final judgment were actions taken in violation of the stay and must be reversed.

Finally, the trial court's order granting PHH's motion to strike must be reversed because: 1) [redacted] was never given notice and an opportunity to be heard on the motion before its substantive rights were adjudicated; 2) the motion incorrectly represented that [redacted] was an intervenor when it was actually a named defendant; and 3) that even if it sought intervention, the law does not necessarily prohibit [redacted] from seeking that remedy.

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, the standard of review for a pure question of law is *de novo*. Because the second issue presented deals solely with a pure question of law, the standard of review is also *de novo*. *See D'Angelo v. Fitzmaurice*, 863 So.2d 311, 314 (Fla.2003) (*citing Armstrong v. Harris*, 773 So.2d 7 (Fla.2000)).

"The standard of review for an order granting a motion to strike is abuse of discretion." *Upland Dev. of Cent. Florida v. Bridge*, 910 So. 2d 942, 944 (Fla. 5th DCA 2005). Therefore, the standard of review for the third issue presented is abuse of discretion.

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. The failure to comply with Rule 1.440 requires reversal here where: 1) was not given notice of the trial and therefore was 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 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 the trial court did not give [redacted] notice of the trial as [redacted] name does not appear on the order's certificate of

service list.[14] In fact, [redacted] name does not even appear on the certificate of service for the final judgment.[15] Consequently, the trial court violated [redacted] constitutional right to due process.

Importantly, this Court only presumes that an order has been mailed to a litigant's counsel when the certificate of service of the order, pleading, or paper 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 of 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 and there is nothing in the record indicating that [redacted] was ever served

[14] Order Setting Cause for Non-Jury Trial, and Trial Instructions, dated December 5, 2013 (R. 118-20).

[15] Final Judgment of Foreclosure, dated March 24, 2014 (R. 263).

with a copy of the order setting trial, the interests of justice require reversal of the final judgment.

Further, where damages are unliquidated, the order setting trial must be served on parties in default. Fla. R. Civ. P. 1.440(c). Thus, where an action involves unliquidated damages, even a party which has been defaulted is entitled to notice of an order setting the matter for trial and the opportunity to defend. *Fiera. Com, Inc. v. Digicast New Media Group, Inc.*, 837 So. 2d 451, 452 (Fla. 3d DCA 2002) (*citing Pierce v. Anglin*, 721 So. 2d 781, 783 (Fla. 1st DCA 1998)). Unliqiduated damages are those which require the taking of testimony to ascertain their value. *Bowman v. Kingsland Development, Inc.*, 432 So. 2d 660, 662-63 (Fla. 5th DCA 1983).

Therefore, even if this Court holds that the order granting PHH's motion to strike somehow defaulted [redacted] was nevertheless entitled to notice of the order setting the trial since the foreclosure action involved unliquidated damages. Indeed, in the final judgment, PHH was awarded amounts for such things as pre-acceleration late charges, NSF charges, title search and examination charges, and property inspections.[16] The ascertainment of these exact sums required testimony. Therefore, these charges amounted to unliquidated damages.

[16] Final Judgment of Foreclosure, dated March 24, 2014 ¶ 1 (R. 259).

Consequently, [redacted] constitutional right to due process was violated when the Court failed to notify it of the trial and rendered judgment in PHH's favor. The judgment is therefore void *ab initio* and should be reversed.

B. PHH 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 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. While the trial court did render an *ex parte* order granting PHH's motion to strike [redacted] motion to dismiss,[17] this order failed to enter a default against [redacted]

Consequently, and in addition to violating [redacted] constitutional right to due process, PHH was not even entitled to a trial on the day the case was tried. This too requires reversal of the final judgment.

II. The final judgment and order scheduling trial should be reversed as void.

The filing of a bankruptcy petition triggers the "automatic stay" which halts

> the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. §362(a)(1) (emphasis added).

[17] Order Granting Plaintiff's Motion to Strike [redacted] Holding, LLC's Motion to Dismiss and First Set of Interrogatories, dated March 19, 2014 (R. 156-57).

The stay provision of §362 thus acts as a legislative injunction against any type of judicial proceeding against a debtor in bankruptcy. *Carver v. Moody*, 780 So. 2d 934, 936 (Fla. 1st DCA 1998) (*citing In re Panayotoff*, 140 B.R. 509, 511-512 (Bankr.D.Minn.1992). Consequently, any judicial act done in violation of the stay are void and without effect, even where the court has no actual notice of the stay. *McMahon v. Ryan*, 964 So. 2d 198, 200 (Fla. 5th DCA 2007).

In the case at bar, it is undisputed that the trial court rendered an order staying the action until the automatic stay protecting Meneses had been lifted.[18] The record is clear, however, that PHH never filed notice that it gained relief from stay or that the trial court ever determined that the stay had been lifted. Therefore, both the order setting the case for trial and the final judgment of foreclosure, are void and without effect. For that reason, the final judgment should be vacated and the caused remanded with instructions not to try the case until PHH proves that the automatic stay has been lifted.

III. The trial court erred when it granted PHH's motion to strike.

The order granting PHH's motion to strike should also be reversed because it was entered without notice and opportunity to be heard in violation of Barndsale's constitutional right to due process. Additionally, the motion

[18] Order Granting Plaintiff's Motion for Continuance, dated May 1, 2013 (R. 99).

incorrectly represents that [redacted] purported to be an "intervenor" to the action below. Rather, [redacted] responded to PHH's complaint as it was named in that pleading. Finally, to the extent this Court views [redacted] as a third-party intervenor, [redacted] urges the Court to view its prior case law inapposite to the facts at hand and permit [redacted] to intervene in the action below.

C. The trial court denied [redacted] procedural due process when it granted PHH's motion without giving [redacted] notice and an opportunity to be heard.

The basic due process guarantee of the Florida Constitution provides that neither life nor liberty nor property will be deprived without due process of the law. Art. I, § 9, Fla. Const. Procedural due process acts as a medium that ensures fair treatment to all litigants through the proper administration of justice where substantive rights are at issue. *Department of Law Enf. v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991).

There is no bright-line rule that courts follow in determining whether the requirements of due process have been met in a particular case. *Hadley v. Department of Admin.*, 411 So.2d 184, 187 (Fla. 1982). However, at a minimum, procedural due process under the Florida Constitution contemplates that a litigant will be given notice and a real opportunity to be heard before the litigant's substantive rights are decided by the court. *General Elec. Capital Corp. v.*

Shattuck, 132 So. 3d 908, 911 (Fla. 2d DCA 2014). *See also State ex rel. Gore v. Chillingworth*, 171 So. 649, 654 (1936).

Here, there can be no dispute that the trial court violated [redacted] right to procedural due process when the court granted PHH's motion to strike. Initially, PHH did not serve [redacted] with a copy of its motion.[19] Likewise, PHH did not serve [redacted] with a copy of the notice of hearing on its motion.[20] And by far most troubling, PHH did not even bother to serve [redacted] with a copy of the order granting its motion.[21]

Thus, not only was [redacted] deprived of notice and an opportunity to be heard, it was not even given a copy of the trial court's decision. The trial court clearly abused its discretion which requires reversal of the order so that [redacted] will be given a real opportunity to defend against PHH's allegations before being deprived of its property.

[19] Plaintiff's Motion to Strike [redacted] LLC's Motion to Dismiss and First Set of Interrogatories, dated December 31, 2013 (R. 130).

[20] Notice of Hearing, dated March 10, 2014 (R. 147-148).

[21] Order Granting Plaintiff's Motion to Strike [redacted] Holding, LLC's Motion to Dismiss and First Set of Interrogatories, dated March 19, 2014 (R. 157).

D. [redacted] was not seeking intervention but rather responding to the complaint as it was named in that pleading.

In its motion to dismiss, [redacted] clearly identified itself as an unknown party claiming through Meneses, the original property owner, and as the term unknown party was used in PHH's lawsuit.[22] In fact, PHH's complaint explicitly alleged that any unknown parties claiming through Meneses were also joined as defendants to the lawsuit.[23] Therefore, the representations made in PHH's motion to strike that [redacted] was a third party intervenor were contrary to what it alleged in its Complaint.

PHH was not at liberty to run from the allegations of its complaint; rather it became bound by them. *United Bank v. Farmers Bank*, 511 So. 2d 1078, 1080 (Fla. 1st DCA 1987) ("Farmers Bank is thus bound by the allegations of the pleading it framed, and will not be permitted to alter its theory of the stated cause of action at the appellate stage in order to defeat United Bank's venue privilege."); *United States v. Century Fed. Sav. & Loan Ass'n of Ormond Beach*, 418 So.2d 1195, 1197 (Fla. 5th DCA 1982) ("The parties to an action are bound by the allegations in their pleadings....").

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[22] Defendant, [redacted] LLC's Motion to Dismiss Complaint, dated November 7, 2013 (R. 106).

[23] Complaint to Foreclose Mortgage, filed October 11, 2011 ¶ 19 (R. 7).

Therefore, when PHH alleged that certain unknown grantees (which [redacted] claimed to be) might claim an interest in the subject property by, through, under, or against any of the named defendants (which [redacted] did), it tacitly consented to [redacted] appearing in the case. Consequently, PHH's motion to strike should have been denied and therefore the order should be reversed on appeal.

E. To the extent this Court views [redacted] as an intervenor to the action below, it should nevertheless reverse the trial court's order.

To the extent this Court views [redacted] as an intervenor rather than a named defendant, the Court should nevertheless reverse the order granting PHH's motion to strike. [redacted] acknowledges that this Court has held that a purchaser of a property which is subject to a mortgage foreclosure action and accompanying *lis pendens* is not entitled to intervene in foreclosure action. *Andresix v. Peoples Downtown Nat. Bank*, 419 So. 2d 1107 (Fla. 3d DCA 1982). However, a close reading of the cases cited by *Andresix* in support of this proposition along with the facts of this case show how *Andresix* is inapposite to the case at bar.

In *Greenwald v. Graham*, 130 So. 608 (Fla. 1930), the first (and youngest) case this Court relied on in *Andresix*, a third party bought fixtures and furniture from a mortgagor after a foreclosure judgment had been rendered but prior to the

master's sale. *Id*. at 609. The issue presented for the Court's determination was whether the fixtures and furniture removed from the foreclosed property should be considered additional security for the foreclosed mortgage. *Id*. The Court ultimately held that the fixtures should be considered additional security while the furniture should not and reversed the lower court's determination that the court could not issue a cause order for the return of the property. *Id*. at 611. Notably, the trial court in *Greenwald* reasoned that it had no jurisdiction because the respondents were neither parties to the foreclosure suit nor purchasers of the fixtures at the "master's" sale. *Id.* at 609.

The salient fact in *Greenwald*, then, was that the third party purchased the fixtures and furniture after the final judgment had been rendered and therefore was "bound by the judgment or decree rendered against the party from whom he makes the purchases as much so as though he had been a party to the judgment or decree himself." *Id.* at 611. Where, as in [redacted] case, no judgment or decree had been rendered, there is nothing for the third-party to become bound by. Thus, while a party may not necessarily intervene in a foreclosure action after a judgment has been rendered, nothing in *Greenwald* suggests that the party cannot intervene before judgment.

Furthermore, *Intermediary Fin. Corp. v. McKay*, 111 So. 531 (Fla. 1927), the second case cited by the *Andresix* court, actually supports [redacted] position. Specifically, in *Intermediary Fin. Corp.* the Court explained that the doctrine of *lis pendens* is grounded in a theory that the parties to a lawsuit should not be permitted to withdraw or alienate the subject-matter of the lawsuit. *See also Seligman v. North American Mortg. Co.*, 781 So. 2d 1159, 1163 (Fla. 4th DCA 2001). In other words, the historical purpose behind a *lis pendens* is to prevent fraudulent or last minute conveyances by the litigants which would impede on the court's ability to adjudicate the suit. It was never intended to prohibit conveyances made by the judicial system itself—i.e. sales on the courthouse steps resulting from foreclosures of inferior liens (such as those of second mortgages or homeowner associations) or, as in this case, a sale by a bankruptcy trustee. Indeed, to hold otherwise, would be to suggest that officers of the court had participated in an exchange in which the buyer (the winner at a judicial auction) was buying nothing of value—not because the buyer was mistaken about the value, but because the court itself would later deny that buyer any rights of ownership.

As a practical matter, such a ruling would effectively end foreclosures by second lienholders because such lienholders would know that astute buyers would never attend a judicial auction where anyone claiming to be a first lienholder has

filed a *lis pendens*. It would be pointless to pursue such a foreclosure because the second lienholder would receive nothing at the sale—even if the *lis pendens* was fraudulent. Therefore, the conveyance of the property from the bankruptcy trustee after the filing of the *lis pendens* should not have barred [redacted] from joining and defending its property interest against the alleged interest of PHH.

While the third case cited by the *Andresix* court—*Peninsular Naval Stores Co. v. Cox*, 49 So. 191 (Fla. 1909)—does involve a purchaser of property at a foreclosure sale, the true holding of that case is much narrower than the broad proposition for which it is cited. More exactly, all *Peninsular Naval Stores* held was that, where a first mortgagee files suit for foreclosure, and the mortgagor subsequently confesses judgment in a different lawsuit, executes a second mortgage, or assigns the equity of redemption to a third party, the judgment creditor, second mortgagee, or assignee does not have to be joined as party defendants and can only gain title to the property by filing a subsequent lawsuit against the original property owner. *Id.* at 195.

Here, [redacted] was not a judgment creditor, a second mortgagee, or an assignee of the original owner's right of redemption. Rather, [redacted] was the lawful owner of the property pursuant to the trustee's deed. Consequently,

Peninsular Naval Stores's holding does not apply to it and even if it did, all [redacted] would have to do is file a separate lawsuit to redeem the mortgage.

In any event, the Florida Supreme Court subsequently receded from both *Peninsular Naval Stores* and *Intermediary Fin. Corp* in another case cited by *Andresix* (with the introductory "*cf.*" signal): *Nelson Bullock Co. v. S. Down Dev. Co.*, 181 So. 365 (Fla. 1938). In *Nelson*, the Supreme Court acknowledged its prior holdings in *Peninsular Naval Stores* and *Intermediary Fin. Corp* but then asserted that the 1931 Chancery Act, Acts 1931, c. 14658, permitted the trial court judge in equity actions to entertain intervention motions at any time prior to final judgment. *Id*. at 366.

For its part, the 1931 Chancery Act "liberalized" the intervention rule to permit intervention in equity suits mainly because courts of equity abhor multiple lawsuits when the issues could all be tried in the same lawsuit. *Switow v. Sher,* 186 So. 519, 524 (Fla. 1939) (permitting intervention where intervenor was challenging the purported holder's ownership of the note with an allegation that the note was fraudulently endorsed). In short, the cases relied upon in *Andresix* never held that a party in [redacted] position had no right to challenge a foreclosure by a lienholder who had filed a *lis pendens*. They simply held that they could not make that challenge by intervening in the foreclosure action (rather than by filing a

separate suit and immediately consolidating). That bar to intervention as a means of challenging the foreclosure has since been abrogated because intervention is simply more efficient and better conserves judicial resources.

Here, [redacted] motion to dismiss clearly disputed PHH's allegation that it was the holder of the promissory note.[24] In this sense, [redacted] was asserting that PHH lacked standing to file suit and therefore [redacted] interest as property owner was superior to PHH's alleged interest as noteholder. For this reason, [redacted] was entitled to intervene under *Switow*.

Further, allowing this intervention would also comport with the longstanding principle holding that, if a foreclosing plaintiff lacks standing at the inception of the action, its case (and the *lis pendens*) must be dismissed and a new lawsuit must be filed. *See e.g. McLean v. JP Morgan Chase Bank Nat. Ass'n*, 79 So. 3d 170, 175 (Fla. 4th DCA 2012) ("if the evidence shows that the note was endorsed to Chase after the lawsuit was filed, then Chase had no standing at the time the complaint was filed, in which case the trial court should dismiss the instant lawsuit and Chase must file a new complaint."); *Jeff-Ray Corp. v. Jacobson*, 566 So. 2d 885 886 (Fla. 4th DCA 1990). *See also Progressive Exp. v. McGrath Chiropractic*, 913 So. 2d 1281, 1286 (Fla. 2d DCA 2005) ("Provider was without

[24] Defendant, [redacted] LLC's Motion to Dismiss Complaint, dated November 7, 2013 (R. 107-08).

standing when the action was filed, the PIP action was at best premature. A new lawsuit must be filed.")

Finally, [redacted] also acknowledges this Court's recent decision in *U.S. Bank Nat. Ass'n v. Bevans*, 138 So. 3d 1185 (Fla. 3d DCA 2014). In that case, however, the purchaser of the property subject to the *lis pendens* only filed a limited appearance in the foreclosure action for the purposes of vacating the final judgment of foreclosure. *Id.* at 1187. In this sense, the purchaser of the property was akin to the third-party purchaser in *Greenwald* who became bound by the foreclosure judgment or decree since it was not made a party prior to judgment. Here, and as previously noted, [redacted] defended the action before the final judgment was rendered. Therefore, PHH's foreclosure could not have terminated [redacted] ownership interest in the property.

Accordingly, and to the extent this Court views [redacted] as an intervenor to the action below, the Court should find that *Andresix* is inapposite to the case at hand and reverse the order granting PHH's motion to strike.

CONCLUSION

For the reasons and legal authorities set forth herein, this Court should reverse the final judgment of foreclosure and the order granting PHH's motion to strike with instructions that, on remand, the trial court hold a hearing on PHH's motion.

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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