In the District Court of Appeal
Fourth District of Florida

CASE NO.

(Circuit Court Case No.)

and LLC,

Appellants,

v.

CITIMORTGAGE, INC., et al.,

Appellees.

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

INITIAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Statutes

Rules

STATEMENT OF THE CASE AND FACTS

I. Introduction

[redacted] and [redacted] LLC (collectively, "the Homeowners") appeal the trial court's non-final order granting CitiMortgage, Inc.'s ("the Bank") motion *in limine* which found that the Homeowners were nonparties to the foreclosure action below and therefore excluded the Homeowners from further participation in the lawsuit. The Homeowners present three reasons why the trial court erred when it granted the Bank's motion:

- The Bank waived the right to contest the Homeowners' standing;
- The Homeowners were named parties to the lawsuit and therefore had standing to defend the foreclosure;
- Even if they were not named parties, the Homeowners' should not be prevented from intervening to defend.

II. Appellants' Statement of the Facts

The Bank initiated this action when it filed its two-count mortgage foreclosure and mortgage reformation complaint.[1] While the complaint alleged that the mortgage property was owned by Christopher Rayson,[2] it also named as defendants any unknown grantees, assignees, successors in interests, or other parties claiming an interest in the property by, through, or against Rayson.[3]

In the commencement paragraph of their answer, the Homeowners identified themselves as the "Unknown Parties" named in the Bank's complaint.[4] Attached to the Homeowners' answer was a copy of the certificate of title that was issued pursuant to a homeowners' association lien foreclosure filed against Rayson and which transferred title into the Homeowners' name.[5] According to this document, a certificate of sale was filed eight days after the Bank filed its complaint with title passing to the Homeowners nineteen days after the Bank filed its complaint.[6]

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[1] Complaint, July 21, 2011 (App.).

[2] Complaint, July 21, 2011, ¶ 6 (App.).

[3] Complaint, July 21, 2011, ¶ 12(App.).

[4] Commencement to Answer, November 14, 2011 (App.).

[5] Certificate of Title attached to Answer, November 14, 2011 (App.).

[6] *Id*.

The Homeowners also propounded discovery on the Bank.[7] When the Bank failed to respond to the discovery, the Homeowners sought,[8] and were granted,[9] an order compelling the Bank to respond. Two months later, the Bank sought leave to file a response to the Homeowners' answer and their discovery.[10] The Bank's motion specifically alleged that it needed additional time to respond to the Homeowners' answer and discovery without mentioning that the Homeowners lacked the ability to serve pleadings or propound discovery.[11]

Later, the Bank did respond to the Homeowners' request for production[12] and the Homeowners' interrogatories,[13] neither of which asserted any objection that the Homeowners were nonparties to the foreclosure action. Most importantly, the Bank also served a reply which did not allege as an avoidance that the Homeowners lacked standing to defend against the foreclosure or otherwise moved

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[7] Request for Production, November 14, 2011 (App.); Interrogatories, November 14, 2011 (App.).

[8] *Ex Parte* Motion to Compel Discovery, January 12, 2012 (App.).

[9] Order on *Ex Parte* Motion to Compel, January 18, 2012 (App.).

[10] Motion for Leave to File Response to Defendants' Answer to Complaint, *et al*., March 1, 2012 (App.).

[11] Motion for Leave to File Response to Defendants' Answer to Complaint, *et al*., March 1, 2012, ¶ 3 (App.).

[12] Response to Request for Production, June 19, 2012 (App.).

[13] Notice of Service of Answers to Interrogatories, July 3, 2012 (App.).

to strike the Homeowners' pleading on the grounds that they were non-parties to the foreclosure lawsuit.[14]

Discovery between the parties continued into the next year with the Homeowners serving a request for production regarding the amount of indebtedness the Bank was seeking.[15] The Bank initially moved for an extension of time to respond to this request[16] before filing a response.[17] And while the Bank's response asserted multiple objections to the discovery sought, none of these objections were on the grounds that the Homeowners were non-parties to the lawsuit.[18]

The Bank would also serve a copy of the order setting trial on the Homeowners, noting in its certificate of service list that the Homeowners were the former "Unknown Parties."[19] It was only after the Homeowners served a third

[14] Reply to Affirmative Defenses, June 19, 2012 (App.).

[15] Defendants' Request for Production Regarding Indebtedness, September 14, 2012 (App.).

[16] Motion for Extension of Time to Respond to Request for Production, December 18, 2012 (App.).

[17] Plaintiff's Response to Defendants' Request for Production Regarding Indebtedness, January 17, 2013 (App.).

[18] *Id.*

[19] Certificate of Mailing Order Setting Trial, June 27, 2014 (App.).

discovery request on the Bank,[20] and nearly three years after the Homeowners made their first appearance in the case, did the Bank first assert that the Homeowners were "non-parties" to the lawsuit and therefore not entitled to propound discovery.[21]

The Bank followed this allegation with a motion *in limine* asserting that because the Homeowners had failed to intervene in the foreclosure lawsuit, they should be excluded from further participation in the matter without mentioning that the Bank had actively litigated the case against the Homeowners for almost three years.[22]

In a one-page order, the trial court granted the Bank's motion finding that the Homeowners were "non-parties" and therefore barred from participation at trial and striking everything the Homeowners had filed in the case.[23]

This appeal follows.

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[20] Request for Admissions, July 1, 2014 (App.); Notice of Service of Pre-Trial Interrogatories, July 1, 2014 (App.); Request for Pre-Trial Production, July 1, 2014 (App.).

[21] Motion to Strike Discovery, July 17, 2014, ¶ 5 (App.).

[22] Motion *in Limine*, August 12, 2014, (App.).

[23] Order on Plaintiff's Motion *in Limine*, September 9, 2014 (App.).

SUMMARY OF THE ARGUMENT

The trial court erred when it even considered the Bank's motion *in limine* because the Bank waived any challenge to the Homeowners' standing to contest the lawsuit. By actively litigating the case against the Homeowners for nearly three years, the Bank's own conduct, including its failure to assert in its reply that the Homeowners lacked standing, constituted a relinquishment of any "known right" it now claims to have had—which, in any event, it did not have—to challenge the Homeowners' standing.

Likewise, the trial court should have summarily disregarded the Bank's contention that the Homeowners were "nonparties" to the action below. Indeed, the Bank's own complaint alleged that any unknown parties claiming through the original property owner [redacted] were joined as party defendants. And since the Homeowners claimed an interest in the property through [redacted], they merely responded to the complaint as they were named in the pleading.

Finally, and assuming this Court views the Homeowners as intervenors to the action below, the law does not prohibit the Homeowners from intervening.

Therefore, the order under review should be reversed.

STANDARD OF REVIEW

While an appellate court normally reviews a lower court's ruling on a motion *in limine* for abuse of discretion, a true motion *in limine* merely suppresses evidence. *State v. Polak*, 598 So. 2d 150, 152 (Fla. 1st DCA 1992).

Where, as here, a court makes a ruling on a litigant's ability to bring or contest a lawsuit, it is making a ruling on a party's standing. *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1183 (Fla. 3d DCA 1985) ("In its broadest sense, standing is no more than having, or representing one who has, 'a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.'") And whether a party has standing is a question of law which must be reviewed *de novo*. *LaFrance v. U.S. Bank Nat. Ass'n*, 141 So. 3d 754, 755 (Fla. 4th DCA 2014); *Dixon v. Express Equity Lending Group, LLLP*, 125 So. 3d 965, 967 (Fla. 4th DCA 2013); *Westport Recovery Corp. v. Midas*, 954 So.2d 750, 752 (Fla. 4th DCA 2007).

Because the trial court's order granting the Bank's motion *in limine* effectively determined that the Homeowners had no standing to contest the foreclosure, the order must be reviewed *de novo*.

ARGUMENT

I. The Bank waived any challenge to the Homeowners' standing.

Waiver is either the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right. *Raymond James Financial v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005); *Aberdeen Golf & Country v. Bliss Const., Inc.*, 932 So. 2d 235 (Fla. 4th DCA 2005). Assuming that the Bank had some right to challenge the Homeowners' authority to contest the lawsuit, about which it knew or should have known, its own conduct through the course of the litigation clearly waived this right long before it filed its motion *in limine*.

The Bank spent the better part of three years actively litigating the case against the Homeowners. In fact, in every document it filed prior to its motion to strike, it referred to the Homeowners as "defendants" to the lawsuit.[24] It did not move to strike the first two production requests or the interrogatories the Homeowners propounded nor did it serve any objection that the Homeowners

[24] *See e.g.* Motion for Leave to File Response to Defendants' Answer to Complaint, *et al.*, March 1, 2012,¶ 3 ("Plaintiff is in need of additional time to respond to Defendants' Answer to Complaint and Affirmative Defenses, Request for Production…and Mortgage Loan Ownership Interrogatories.") (App.); Defendants' Request for Production Regarding Indebtedness, September 14, 2012, ¶ 4 ("Plaintiff is in need of additional time to respond to Defendant' [*sic*] Request for Production Regarding Indebtedness." (App.).

lacked standing to propound such discovery.[25] Indeed, the Bank went so far as to serve the trial order on the Homeowners, asserting in the certificate of service list that the Bank considered the Homeowners the "Unknown Parties" identified in the complaint.[26]

Perhaps most importantly, the Bank did not assert that the Homeowners lacked standing to contest the foreclosure in its reply to the Homeowners' affirmative defenses.[27] And the failure to seek this avoidance in its reply acted as an official waiver of any subsequent right to assert that the Homeowners lacked standing to contest the foreclosure.

This is because standing is an affirmative defense. *Jaffer v. Chase Home Finance, LLC*, Case No. 4D13-1597 (Fla. 4th DCA January 7, 2015); *Phadael v. Deutsche Bank Trust Co. Americas*, 83 So. 3d 893, 895 (Fla. 4th DCA 2012). And when a party asserting affirmative relief seeks to avoid an affirmative defense (like the Bank did at trial), it must file a reply. Fla. R. Civ. P. 1.100(a) ("If an

[25] Response to Request for Production, June 19, 2012 (App.); Notice of Service of Answers to Interrogatories, July 3, 2012 (App.); Plaintiff's Response to Defendants' Request for Production Regarding Indebtedness, January 17, 2013 (App.).

[26] Certificate of Mailing Order Setting Trial, June 27, 2014 (App.).

[27] Reply to Affirmative Defenses, June 19, 2012 (App.).

answer…contains an affirmative defense and the opposing party seeks to avoid it, the opposing party shall file a reply containing the avoidance.").

In this sense, a reply is thought of as an affirmative defense to an affirmative defense. *Crosslands Properties, Inc. v. Univest Crossland Trace, Ltd.*, 516 So. 2d 320, 322 (Fla. 2d DCA 1987); *Hertz Commercial Leasing Corporation v. Seebeck*, 399 So. 2d 1110, 1111 (Fla. 5th DCA 1981). But where a party seeking affirmative relief fails to file a reply, it waives the right to later assert an affirmative defense to an affirmative defense. *See e.g. Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981) (holding that plaintiff seeking to avoid the defendant's statute of limitations affirmative defense on the grounds of tolling waived the "affirmative defense to the affirmative defense" by failing to assert it in a reply).

The Bank was put on notice that the Homeowners were contesting the lawsuit nearly three years before it filed its motion *in limine*. Nevertheless, the Bank's reply did not assert that the Homeowners lacked standing to contest the foreclosure or otherwise move to strike the Homeowners' pleading. Since the Bank failed to do this, it voluntarily and intentionally relinquished any challenge to the Homeowners' standing to contest the foreclosure.

II. The Homeowners responded to the lawsuit as they were named in the Bank's pleading.

In the commencement paragraph of its answer, the Homeowners clearly identified themselves as the unknown party as the term was used in the Bank's complaint.[28] In fact, the Bank's pleading explicitly alleged that any unknown parties claiming through any named defendant (including the alleged property owner) were joined as defendants to the lawsuit.[29] Therefore, the Bank's representations made in its motion *in limine* that the Homeowners were non-parties is contrary to its own allegations in the complaint.

And the Bank 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....").

[28] Commencement to Answer, November 14, 2011 (App.).

[29] Complaint, July 21, 2011, ¶ 12(App.).

Therefore, when the Bank alleged that certain unknown grantees (which the Homeowners claimed to be) might claim an interest in the subject property by, through, under, or against any of the named defendants (which the Homeowners did), it tacitly consented to the Homeowners appearing in the case. Consequently, the Bank's motion *in limine* should have been denied and therefore the order should be reversed on appeal.[30]

III. To the extent the Court views the Homeowners as intervenors to the action below, it should nevertheless reverse the trial court's order.

To the extent this Court views the Homeowners as intervenors rather than named defendants, the Court should nevertheless reverse the order granting the Bank's motion *in limine*. The Bank in its motion *in limine* asserts the Homeowners should have intervened. While not explicitly cited in the Bank's motion, the case many financial institutions cite when alleging that purchasers *pendente lite* are not entitled to intervene in the underlying foreclosure action is the Third District's one-paragraph decision in *Andresix v. Peoples Downtown Nat. Bank*, 419 So. 2d 1107 (Fla. 3d DCA 1982).

The paucity of facts in *Andresix* provides little guidance—it states only that Andresix obtained the property after the foreclosure commenced and that the trial

[30] Not only did the Bank name any "unknown parties" claiming through Rayson, but it also acknowledged that the Homeowners were these parties in the certificate of service of every document it filed in the case prior to its motion to strike.

court did not allow Andresix to intervene—a result which the Third District affirms. The decision is even more difficult to square with the numerous cases it cites without comment. These cases do not seem to actually support the conclusion, and more importantly, do not apply to the facts of this case, suggesting that *Andresix* is itself inapplicable here.

The cases cited by Andresix are inapposite.

In *Greenwald v. Graham*, 130 So. 608 (Fla. 1930), the first (and youngest) case relied upon by the *Andresix* court, 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 here, 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 the Homeowners' position. Specifically, in *Intermediary Fin. Crop.* 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. the sales on the courthouse steps resulting

from foreclosures of inferior liens (such as those of second mortgages or homeowner associations) which occurred here. 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 mere fact that the Bank recorded a *lis pendens* mere days before title passed to the Homeowners in the homeowners' association foreclosure should not have barred the Homeowners from joining and defending its property interest against the alleged interest of the Bank.

While *Peninsular Naval Stores Co. v. Cox*, 49 So. 191 (Fla. 1909) does involve a purchaser of the property at a foreclosure sale, the true holding of that case is much narrower than the broad proposition for which it is cited in *Andresix*. 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, the Homeowners were not judgment creditors, second mortgagees, or assignees of the original owner's right of redemption. Rather, the Homeowners were the lawful owners of the property pursuant to the certificate of title issued in the homeowners' association foreclosure. Consequently, *Peninsular Naval Stores's* holding does not apply to it and even if it did, all the Homeowners 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. Crop* 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. Crop* 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 the Homeowners' 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.

This Court, therefore, should follow the cases cited in *Andresix*, rather than the conclusion that *Andresix* appears to mistakenly draw from those decisions. Indeed, nothing about the history and intent of a *lis pendens* was intended to grant its filer an unassailable right to foreclose by barring any challenge from third parties. The mere filing notice of lis pendens does not of itself create any superior

rights for the litigant who files the notice. *Nat'l Bank of Sarasota v. Dugger*, 335 So. 2d 859, 861 (Fla. 2d DCA 1976).

This Court correctly noted that such notices have two purposes, to protect purchasers and to protect plaintiffs from liens that could impair their property rights:

> "Notices of *lis pendens* are recorded for two purposes: to protect future purchasers or encumbrancers of the property from becoming 'embroiled' in the dispute, and to protect the plaintiff from 'intervening liens that could impair any property rights claimed and also from possible extinguishment of the plaintiff's unrecorded equitable lien.'" *Fischer v. Fischer*, 873 So.2d 534, 536 (Fla. 4th DCA 2004) (quoting *Chiusolo v. Kennedy*, 614 So.2d 491, 492 (Fla.1993)).

U.S. Bank Nat. Ass'n v. Quadomain Condominum Ass'n, Inc., 103 So. 3d 977, 978-79 (Fla. 4th DCA 2012). Neither of these purposes is implicated by this case. With regard to the first, the Homeowners need no protection from being "embroiled" in the foreclosure—they took ownership fully aware of, and subject to, the mortgage with every intent of insuring that the first lienholder was limited to the fair value of whatever legitimate lien interest it held. With regard to the second, the Homeowners are not establishing any intervening lien that could impair the Bank's property rights.

It is a crucial distinction that the Homeowners are not affirmatively attempting to enforce a claimed priority over the Bank. They are simply owners

defending the foreclosure just as the original owner would have. This distinguishes the condominium association's lien foreclosure in *Quadomain* from the Homeowners' defensive posture here. It also means this issue is not governed by § 48.23, Fla. Stat. (the *lis pendens* statute) because it bars only the "enforcement of interests and liens." *Id*. (emphasis added). It does not bar defending against the enforcement of the claim for which the *lis pendens* was filed.

Notably, a party claiming through a named defendant does not change the task to which the plaintiff sets itself when it files its complaint and *lis pendens*. Its pleadings and proofs are the same as if the named defendant had himself opposed the relief requested. Consequently, the heart of the issue posed by this appeal is not whether the Bank should be required to prosecute its action against a new incarnation of the owner-defendant, but whether it should be given free rein to establish the amount of its judgment without opposition, such that the Homeowners' right to the property, or any excess value of its property, is completely extinguished. Every dollar beyond the true amount which would have made the Bank whole comes directly from the Homeowners' pockets, even though the Homeowners never had their day in court to contest the Bank's claim to be the rightful lienholder or its claim as to what that true amount of the lien is.

Equity demands that the Homeowners are given their day in court.

As previously mentioned, the Bank recorded its *lis pendens* mere days before the certificate of title was transferred into the Homeowners name. The Bank also actively litigated the case against the Homeowners for years. The closeness in time between the homeowners' association auction and the recordation of the *lis pendens* combined with the Bank's own conduct therefore creates an independent equitable ground on which the Homeowners' defense to the foreclosure should stand.

Undoubtedly, foreclosure is an equitable remedy. *See e.g.* § 702.01, Fla. Stat. (2010) (Equity) ("All mortgages shall be foreclosed in equity. In a mortgage foreclosure action, the court shall sever for separate trial all counterclaims against the foreclosing mortgagee. The foreclosure claim shall, if tried, be tried to the court without a jury."). So, the question goes, what exactly is equity?

Perhaps the best definition of equity is simply doing what should be done. *Cain & Bultman, Inc. v. Miss Sam, Inc.*, 409 So.2d 114, 119 (Fla. 5th DCA 1982) ("A maxim of equity is to the effect that equity treats that as being done which should be done."). *See also generally Torres v. K-Site 500 Associates*, 632 So.2d 110, 112 (Fla. 3d DCA 1994) ("Equity abhors forfeiture, and a party entitled to a forfeiture may be estopped from asserting that right, if the result would be

unconscionable."); *White v. Brousseau*, 566 So.2d 832, 835 (Fla. 5th DCA 1990) ("Equity disregards all form and looks to the substance and essence of every matter.").

Applying this definition to the case at hand, this Court should find that recording a *lis pendens* only days before title was transferred into the Homeowners' name combined with the Bank's active litigation against the Homeowners below creates an equitable ground permitting the Homeowners to defend the foreclosure. Holding otherwise condones the Bank's conduct of "gotcha tactics" since the Bank only asserted its "right" to exclude the Homeowners from the foreclosure proceedings at the last minute. This Court has routinely decried its disdain for such litigation tactics. *See e.g. Nicholson-Kenny Capital Mgmt. v. Steinberg*, 932 So. 2d 321 (Fla. 4th DCA 2006) and cases cited therein.

Therefore, the order under review should be reversed.

CONCLUSION

The Court should reverse the order under review with instructions requiring that the trial court consider the Homeowners' position on the merits.

Dated: February 28, 2015

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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 February 28, 2015 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 February 28, 2015.

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