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

REPLY BRIEF OF APPELLANT

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Key:

- The Appellee, PHH Mortgage Corporation, will be referred to as "PHH."
- The Appellant, [redacted] LLC, will be referred to collectively as "[redacted]

SUMMARY OF THE REPLY ARGUMENT

[redacted] clearly has a sufficient stake in the outcome of both this appeal and the litigation below for the Court to consider its position. At a minimum, [redacted] was entitled to notice of PHH's motion to strike. But it also has standing to appeal the final judgment because the judgment clearly adjudicated its rights in the property. Nor should the mere recording of a *lis pendens* act as a bar to litigation since [redacted] participation in the proceeding was not in derogation with the purpose of a *lis pendens* and because simple equity demands that the court hear its position.

Furthermore, PHH has not provided any grounds for affirmance under the "harmless error" standard it asks the Court impose. Indeed, when it unilaterally excluded [redacted] from the proceedings, it prevented [redacted] from creating a record which would be sufficient for reversal with instructions for an involuntary dismissal. And not only did it do this, but PHH also argues outside the scope of the record.

The judgment and the order granting PHH's motion to strike should therefore be reversed.

ARGUMENT

I. [redacted] had a vested interest in the litigation which could not be extinguished *ex parte*.

PHH does not dispute that it did not serve its motion to strike, the notice of hearing, or the notice of trial on [redacted] Rather, it unapologetically declares that no such notice was required. But since [redacted] clearly held a vested interest in the litigation which PHH sought to strike, [redacted] was at a minimum entitled to notice on PHH's motion.

A. [redacted] was entitled to notice of the hearing on PHH's motion to strike.

Citing to absolutely no authority whatsoever, PHH claims that since "Barndale [*sic*] was not a party to the action, PHH was not required to serve [redacted] with the motion to strike and the notice of hearing on the motion to strike."[1] PHH is wrong.

Indeed, if PHH believed its own argument it would never have moved to strike and would never have asked the trial court to rule on its motion. In PHH's own view, therefore, [redacted] had raised a sufficiently justiciable issue to require a court ruling. Yet it intentionally excluded [redacted] from participating in that determination. It now asks this Court to put the cart before the horse by suggesting

[1] Answer Brief, p. 26.

that PHH did not need to give [redacted] an opportunity to prove its standing, because…it had no standing.

The Rules of Procedure are clear that any written motion which may not be heard *ex parte* and a copy of the notice of hearing, must be served within a reasonable time specified for the hearing. Fla. R. Civ. P. 1.090(d). The Rule thus requires actual notice and time to prepare. *Harreld v. Harreld*, 682 So. 2d 635 (Fla. 2d DCA 1996); *Transp. v. Plunske*, 267 So. 2d 337, 339 (Fla. 4th DCA 1972). And Courts have not hesitated in finding notice violations when important interests were at stake. *See, e.g., Harreld*, 682 So. 2d at 636 (two days' notice of hearing on motion to hold nonresident husband in contempt was not notice given a "reasonable time" prior to hearing); *Anderson v. Sun Trust Bank/North*, 679 So. 2d 307 (Fla. 5th DCA 1996) (four days' notice of hearing not sufficient for an award of guardianship fees and costs); *Henzel v. Golstein*, 349 So. 2d 824 (Fla. 3d DCA 1977) (one working day's notice of hearing on motion to dismiss inadequate). *See also Reynolds v. Reynolds*, 187 So. 2d 372, 373 (Fla. 2d DCA 1966) (one day notice of hearing on order to show cause constitutes due process violation).

Here, [redacted] was not given any notice that PHH sought to remove its most important interest—the right to defend the lawsuit. And since no notice is clearly not actual notice, the trial court abused its discretion when it granted PHH's

motion. *Cf. Balch v. HSBC Bank, USA, NA*, 128 So. 3d 179, 181-182 (Fla. 5th DCA 2013) (no due process violation in foreclosure action where order reflected that the defendants were present and heard by the court.) It would appear to be elementary to any notion of due process that the person whose rights were affected by the motion to strike (whether it be a party or non-party), be invited to the hearing that determines those rights. Even non-parties are entitled to due process. *Trans Health Mgmt. Inc. v. Nunziata*, 159 So. 3d 850, 858 (Fla. 2d DCA 2014).

B. [redacted] has standing to pursue this appeal.

At a minimum, [redacted] has the right to seek review of the order striking its motion to dismiss and discovery requests.

Standing is nothing more than having a sufficient stake in the outcome of a litigation to obtain a judicial resolution of that controversy. *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1182 (Fla. 3d DCA 1985). Thus, at the bare minimum, [redacted] has the right to seek review of the order which struck its motion to dismiss and its discovery requests since it clearly has a sufficient stake in the outcome of that controversy. PHH has provided no cognizable argument otherwise, choosing instead to simply cling to its brash posture that it was never required to give [redacted] notice of anything.

The final judgment adjudicated [redacted] interests in the property.

But not only does [redacted] have standing to seek review of the order striking its filings, but it also has standing to seek review of the final judgment. The complaint clearly joined as a defendant any unknown parties that might claim an interest in the subject property through Sirsfredo Meneses ("Meneses").[2] And [redacted] first appearance put PHH on notice that it was a party claiming through Meneses.[3]

Later, PHH filed a Notice of Dropping Party Defendant which voluntarily dismissed its action against Gifford Lane Condominium Association, Inc.[4] It did not file a similar notice as to the unknown party (actually a now-known party) claiming through a named defendant even though it was on notice, not only that [redacted] was such a party, but that it had actually appeared in the case as such a party. Accordingly, the use of "*et al*." in the judgment's caption describing the parties whose rights are adjudicated by that document necessarily includes "catchall" defendants—including [redacted] despite the fact that [redacted] had no notice of trial and no opportunity to argue its standing. Stated differently, it is

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

[3] Defendant, [redacted] LLC's Motion to Dismiss Complaint, November 7, 2013 (R. 106-114).

[4] Notice of Dropping Party Defendant, February 3, 2012 (R. 75).

difficult to imagine that the rights of [redacted] (the holder of the deed to the property) have been adjudicated, if, as PHH claims, [redacted] was never even a party. Indeed, this is the very reason that PHH named a "catchall" defendant.

Furthermore, the judgment expressly ruled that PHH held a lien on [redacted] property "superior to all claims or estates of the defendant(s)…"[5] and that once a certificate of sale had been filed, then "defendant[s] and all persons claiming under or against defendant[s] since the filing of the Notice of Lis Pendens shall be foreclosed of all estate or claim in the property…"[6] In other words, the judgment foreclosed (and thus adjudicated) the interests of anyone claiming through Meneses since the filing of the *lis pendens* (which necessarily included [redacted]

Importantly, because [redacted] was the owner of the property, it owned the "right of redemption"—that is, the right to prevent a foreclosure sale upon payment of the amount of the debt specified in the foreclosure judgment. §45.0315, Fla. Stat. (2013). But [redacted] could only exercise this right (and thereby prevent foreclosure of its interest in the property) if it was given notice of the judgment. And since it was not, its rights were clearly adjudicated without notice to it.

[5] Final Judgment of Foreclosure, March 25, 2014, ¶ 3 (R. 260).

[6] Final Judgment of Foreclosure, March 25, 2014, ¶ 7 (R. 261).

was not a stranger to the record.

While so-called "non-parties" are considered "strangers to the record," this Court has held that where a party not necessarily named in the foreclosure lawsuit actively participates in the lawsuit and the plaintiff, by its action or otherwise, acquiesces to this, the non-party has standing to appeal even without a formal motion to intervene. *Portfolio Invs. Corp. v. Deutsche Bank*, 81 So. 3d 534 (Fla. 3d DCA 2012).

Here, the trial court trial court treated as a party by ruling on its motion to compel compliance with discovery.[7] *Cf. Portfolio Invs. Corp.*, 81 So. 3d at 536 ("Further, the trial court treated Portfolio as party to the litigation by ruling on Portfolio's motions…"). And PHH acquiesced to participation in the lawsuit where, in response to motion to dismiss for failure to post the non-resident cost bond, it actually posted the bond.[8]

participation does not defeat the purpose of a lis pendens.

There are two purposes of a *lis pendens*: 1) to protect future purchasers from becoming embroiled in a property dispute; and 2) to protect the plaintiff from intervening liens that could impair or extinguish its property right:

[7] Motion & Order to Compel, February 9, 2014 (R. 143-146).

[8] Non Resident Cost Bond, January 14, 2014 (R. 135).

> 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.

U.S. Bank Nat. Ass'n v. Quadomain Condominum Ass'n, Inc., 103 So. 3d 977, 978-79 (Fla. 4th DCA 2012) (citations omitted).

But neither purpose is applicable here. [redacted] does not need protection from being embroiled in the dispute—in fact, it wanted to become embroiled in the litigation. And [redacted] defense of the action does not impair or extinguish any property right PHH may have. At worst, [redacted] defense merely forced PHH to prove its case.

Equity demands that [redacted] ***is given its day in court.***

As previously mentioned, PHH refused to give [redacted] notice that it was attempting to exclude it from the litigation. This conduct therefore creates an independent equitable ground on which [redacted] defense to the foreclosure—and its maintenance of this appeal—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."). This raises the question: 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 the active litigation against [redacted] below (without any notice to it) creates an equitable ground permitting [redacted] to defend the foreclosure. Holding otherwise condones PHH's conduct of "gotcha tactics" since PHH asserted its "right" to exclude [redacted] from the foreclosure proceedings without any notice (and, apparently, without any legal authority to do so). Courts have 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.

II. PHH has not provided any viable ground for affirmance.

A. Since it purposefully excluded [redacted] from participation, PHH evaded any meaningful review of the judgment.

PHH is correct that in order for it to have proven a *prima facie* case for foreclosure at trial, it was required to prove its contractual standing at inception, a default, proper acceleration of the debt to maturity, and damages.[9] What is incorrect is the notion that it somehow proved this by competent, substantial evidence when it unabashedly excluded [redacted] from participation in testimony and evidence. Whatever "evidence" it provided the trial court, due to PHH's machinations, [redacted] was not present to object to admissibility, cross-examine the witness, or provide contradictory evidence.

Had [redacted] been given notice of the trial, it could have defeated PHH's claim that it owned and held the note on the day the lawsuit was filed—a fact which would have required involuntary dismissal of the action. *Joseph v. BAC Home Loans Servicing, LP*, 155 So. 3d 444 (Fla. 4th DCA 2015). Likewise, [redacted] could have shown that PHH's witness was unqualified to lay the business records exception for the payment history. *Henderson v. Deutsche Bank Nat. Trust Co.*, 158 So. 3d 705, 705 (Fla. 4th DCA 2015). And this too would

[9] Answer Brief, p. 21.

have obligated the trial court to dismiss. *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 153 So. 3d 280, 283 (Fla. 2d DCA 2014).

B. PHH impermissibly argues outside the record.

And not only does PHH seek to trample all over [redacted] due process rights, but it also asks the Court to impermissibly look beyond the record on appeal while doing so.

Specifically, [redacted] argued in its initial brief that the judgment should be reversed because, while there was an order staying the case until the automatic stay imposed by the debtor's bankruptcy had been lifted,[10] there is nothing in the record suggesting that the stay had, in fact, been lifted. In its answer brief, PHH suggests that because the debtor received a discharge in bankruptcy on November 26, 2012, the stay was lifted.[11] But attaching to its brief a purported bankruptcy discharge it did not file in the trial court cannot make this document a part of the record on appeal. *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000) ("The appellate record is limited to the record presented to the trial court.") And since this document exists outside the record, this Court cannot review it on appeal. *Hughes v. Enterprise Leasing Co.*, 831 So. 2d 1240, 1240 (Fla. 1st DCA 2002) ("As it is not a part of the record but merely attached to appellee's brief, this Court cannot

[10] Order Staying Case Until Bankruptcy is Lifted, May 1, 2013 (R. 99).

[11] Answer Brief, p. 25.

review the document on appeal."); *accord CD v. Agency for Persons with Disabilities*, 95 So. 3d 383 (Fla. 3d DCA 2012).

But not only is the purported discharge not a part of the record on appeal, it allegedly occurred nearly six months before the trial court rendered its order staying the case. If the discharge actually occurred as PHH said it did, there would have been no need for the trial court's order staying the place in the first case. Therefore, the purported bankruptcy discharge provides no basis to affirm the judgment.

CONCLUSION

The 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: May 27, 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 May 27, 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 May 27, 2015.

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