In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] LLC,

Appellant,

v.

BAC HOME LOANS SERVICING L.P., 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, BAC Home Loans Servicing, L.P., will be referred to as "the Bank."
- The Appellant, [redacted] LLC, will be referred to collectively as "[redacted]
- The Eleventh Judicial Circuit's Administrative Memorandum 12-E will be referred to as "the Administrative Order."

SUMMARY OF THE REPLY ARGUMENT

The Bank does not dispute that it responded to [redacted] motion to dismiss, that the trial court ruled on [redacted] motion, or that the notice of trial was not served on [redacted] Rather, it unapologetically declares, for the first time in its answer brief, that [redacted] lacks standing to appeal. But under established law, waiting until the answer brief waived any possible right the Bank had to challenge [redacted] standing. And this principle is particularly relevant here where the final judgment adjudicated [redacted] interests in the property and where merely recording a *lis pendens* did not necessarily foreclose [redacted] right to defend the lawsuit.

Moreover, the Bank does not provide any basis for affirmance of either the final judgment or the order deeming [redacted] motion to dismiss abandoned. In fact, it does not even address [redacted] argument that the case was not at issue because a named defendant (other than [redacted] had neither answered the complaint nor been defaulted. Nor does it provide a reasonable basis for asserting that the complaint stated a cause of action where the note facially negated the foreclosure count. And finally, the Bank fails to assert any cognizable ground that [redacted] motion to dismiss should have been considered "abandoned."

Therefore, the orders under review should be reversed.

ARGUMENT

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

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

[redacted] *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 [redacted] as a party by ruling (albeit improperly) on its motion to dismiss.[1] *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 the Bank acquiesced to [redacted] participation in the lawsuit when it filed a written response to [redacted] motion to dismiss that responded substantively to [redacted] motion without any argument that [redacted] lacks standing.[2] The first (and only) time the Bank challenged

[1] Order Denying Motion to Dismiss, November 15, 2013 (R. 115-117).

standing was in its answer brief. Consequently, under the facts and circumstances of this case, has standing to appeal the orders under review. *Portfolio Invs. Corp.*

The final judgment adjudicated interests in the property.

And not only does have standing on the basis of the Bank's acquiescence below, but it also has standing because the final judgment's rulings directly impacted it. The complaint clearly joined as a defendant any unknown parties that might claim an interest in the subject property through Odalys and Rafael Garcia ("the Garcias").[3] And first appearance put the Bank on notice that it was a party claiming through the Garcias.[4]

The Bank also filed a Notice of Dropping Party Defendant which voluntarily dismissed its action against defendant John Doe (who was joined pursuant to a possible lease agreement).[5] 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

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[2] Response to Motion to Dismiss, April 13, 2012 (R. 69-72). Tellingly, the Bank actually refers to as "the defendant" in this lawsuit.

[3] Complaint, January 15, 2010, ¶ 13 (R. 4).

[4] Defendant, LLC's Motion to Dismiss Complaint, February 2, 2012 (R. 60-68).

[5] Notice of Dropping Party Defendant, July 15, 2010 (R. 34).

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 the [redacted] had no notice of trial and no opportunity to argue its standing. Stated differently, it is difficult to imagine that the rights of [redacted] (the holder of the deed to the property) have been adjudicated, if, as the Bank claims, [redacted] was never even a party. Indeed, this is the very reason that the Bank named a "catchall" defendant in the first place.

Furthermore, the judgment expressly ruled that the Bank held a lien on [redacted] property "superior to all claims or estates of the defendant(s)…"[6] 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…"[7] In other words, the judgment foreclosed (and thus adjudicated) the interests of anyone claiming through the Garcias since the filing of the *lis pendens* (which necessarily included [redacted]

[6] Final Judgment of Foreclosure, March 13, 2014, ¶ 3 (R. 191).

[7] Final Judgment of Foreclosure, March 13, 2014, ¶ 7 (R. 191-192).

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. Thus, [redacted] has standing to appeal the judgment.

B. The filing of the *lis pendens* does not necessarily bar [redacted] participation in the case.

[redacted] responded to the lawsuit as it was named in the Bank's complaint.

As previously mentioned, the complaint named as a defendant all parties claiming through the Garcias—which [redacted] claimed to be. And the Bank is not free to run from the allegations in its complaint; rather, it becomes bound by them. *United Bank v. Farmers Bank*, 511 So. 2d 1078, 1080 (Fla. 1st DCA 1987); *United States v. Century Fed. Sav. & Loan Ass'n of Ormond Beach*, 418 So. 2d 1195, 1197 (Fla. 5th DCA 1982).

Therefore, when the Bank claimed 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 on the case.

The cases barring intervention are inapposite because they generally pertain to post-judgment transfers, transfers by mortgagors intended to defeat foreclosure, or abrogated intervention rules.

The primary thrust of the Bank's argument is encapsulated in this Court's holding 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 reveals that these cases are inapposite to this appeal.

In *Greenwald v. Graham*, 130 So. 608 (Fla. 1930), the first (and youngest) case the 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 determination's that the court could not issue a show 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 here, no judgment or decree has been rendered there is nothing for [redacted] 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 undercuts the Bank's 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 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's associations, or transfers from a bankruptcy trustee which is what occurred in this case. In fact, to hold otherwise would be to suggest that officers of the court (the judge and trustee of the bankruptcy court) had participated in an exchange which benefited the creditors of the estate, but in which the buyer (received nothing of value for its money. This sham purchase from the court would not be because mistakenly believed that the home's value exceeded the first mortgage, but because the court system declared that the deed it bought did not even entitle it to contest the amount of that lien or any other fact that a primary lienholder must establish.

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* should not bar [redacted] from defending the foreclosure below or seeking appellate review of the trial court's orders.

While *Peninsular Naval Stores Co. v. Cox*, 49 So. 191 (Fla. 1909), the third case cited by *Andresix*, 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 was cited in *Andresix*. More precisely, 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 a party defendant 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 or a second mortgagee, or an assignee of the original owner's right of redemption. Rather, [redacted] was the lawful owner of the property by virtue of the purchase from the trustee. Consequently, *Peninsular Naval Stores's* holding does not apply to it, and even if

it did, all it held was that [redacted] would have to 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 [redacted] 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.

In the more recent case of *U.S. Bank Nat. Ass'n v. Bevans*, 138 So. 3d 1185 (Fla. 3d DCA 2014), 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. But, again, no judgment had been rendered in the Bank's favor when [redacted] sought to defend the lawsuit. Thus, there was nothing for [redacted] to become bound by and the single fact that the Bank filed a *lis pendens* could not have terminated [redacted] ownership interest in the property.[8]

[redacted] participation does not defeat the purpose of a lis pendens.

There are two purposes to a *lis pendens*: 1) to protect future purchasers from becoming embroiled in a property dispute; and 2) to protect the plaintiff from

[8] In fact, this Court has recently held that in certain circumstances, a "purchaser *pendent lite*" can intervene in a foreclosure action. *Bymel v. Bank of America, N.A.*, 159 So. 3d 345 (Fla. 3d DCA 2015).

intervening liens that could impair or extinguish its property right. *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. does not need protection from being embroiled in the dispute—in fact, it wanted to become embroiled in the litigation. And defense of the action does not impair or extinguish any property right the Bank may have. At worst, defense would merely force the Bank to prove its case. If the Bank is indeed the rightful owner of the loan and is, in fact, entitled to the sum of money that it claims, it should not be burdensome (or lead to "protracted litigation") to require the Bank to bring its evidence.

Additionally, equity demands that is given its day in court. It is axiomatic that foreclosure is an equitable remedy. *See e.g.* § 702.01, Fla. Stat. (2010) (Equity). And equity is nothing more than doing what should be done. *Cain & Bultman, Inc. v. Miss Sam, Inc.*, 409 So. 2d 114, 119 (Fla. 5th DCA 1982); *Torres v. K-Site 500 Associates*, 632 So. 2d 110, 112 (Fla. 3d DCA 1994); *White v. Brousseau*, 566 So. 2d 832, 835 (Fla. 5th DCA 1990). In this case, it would be inequitable to allow the Bank to treat as a litigant, substantively respond to its motions, and then unilaterally exclude it from the proceedings.

II. The Bank has not provided any viable ground for affirmance.

A. The case was not at issue for two reasons.

The Bank asserts that "[redacted] argues that the pleadings were open by virtue of its pending motions."[9] While this statement is certainly true, it ignores a separate argument [redacted] made: that the case was not at issue because defendant 002 had neither answered the complaint nor been defaulted.[10] And it is for this additional reason that the case was also not at issue.

B. The trial court should have granted [redacted] motion to dismiss.

The copy of the note attached to the complaint negated the foreclosure count.

The Bank concedes that a copy of the note attached to its complaint did not contain "all the endorsements."[11] And in doing so, it must concede that its foreclosure count fails to state a cause of action since that claim asserted that it owned and held the note[12]—an instrument necessarily made payable to a different party. *Cf. Jaffer v. Chase Home Finance, LLC*, 155 So. 3d 1199 (Fla. 4th DCA 2015) (note attached to complaint did not negate foreclosure count because complaint alleged plaintiff was holder of the note or entitled to enforce it.).

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[9] Answer Brief, p. 21.

[10] Initial Brief, pp. 11-13.

[11] Answer Brief, p. 26.

[12] Complaint, January 15, 2010, ¶ 5 (R. 3).

The trial court had no authority to treat the motion as abandoned.

The Bank points to one line in *dicta* from *State Dept. of Revenue v. Kiedaisch*, 670 So. 2d 1058 (Fla. 2d DCA 1996) for the proposition that the trial court had authority to determine [redacted] motion to dismiss abandoned.[13] But in that case, the Second District ultimately concluded that "the father had not filed a proper pleading seeking modification and had not notified the mother that modification would be at issue in the hearing." *Id*. at 1059.

But even more importantly, the order denying [redacted] motion to dismiss conflicts with two decisions from this Court which have already held that the Eleventh Circuit's Administrative Order does not operate to dispose of motions with prejudice. *See* [redacted] *LLC v. Deutsche Bank Nat'l Trust Co.*, 150 So.3d 1247 (Fla. 3d DCA 2014); *Frau v. JP Morgan Chase Bank, Nat. Ass'n*, 159 So. 3d 362 (Fla. 3d DCA 2015).[14]

[13] Answer Brief, p. 23.

[14] Because these recent cases were *per curiam* affirmed, with instructions but without opinion, they are not cited here as authoritative precedent, but to provide guidance for consistency in this Court's decisions. *Frau* and [redacted] (cases which were briefed and argued by [redacted] undersigned attorney) dealt with motions to quash which had been deemed "abandoned" pursuant to the Eleventh Circuit's Administrative Order. While this Court affirmed both orders under review, it did so without prejudice to the appellants' right to assert insufficiency of service of process in their respective answers. [redacted] 150 So. 3d at 1247; *Frau*, 159 So. 3d at 362. And if the sufficiency of service was not considered

Finally, the Supreme Court recently approved the Local Rules Advisory Committee's opinion that the abandonment of motions was not a proper subject matter for a Circuit administrative order. As a result, the Supreme Court quashed the administrative order.[15]

CONCLUSION

The Court should reverse the judgment and the order deeming [redacted] motion to dismiss abandoned.

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permanently "abandoned" in those cases then it logically follows that [redacted] motion to dismiss could not be permanently deemed abandoned here—especially since it actively sought a court hearing on the motion. Notably, the "abandonment" issue is also before this Court in *Villanueva v. Deutsche Bank National Trust Company*, Case No. 3D15-0024.

[15] Order dated May 11, 2015 in *Administrative Order 3.314-4/14 of the Fifteenth Judicial Circuit Re: Timely Resolution of Motions in Foreclosure Division "AW"*, Case No. SC14-2387, available at:

https://efactssc-public.flcourts.org/casedocuments/2014/2387/2014-2387_disposition_131632.pdf

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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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