In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]
(Circuit Court Case No. [redacted])

[redacted]
Appellant,

v.

INDYMAC BANK F.S.B.,

Appellee.

ON APPEAL FROM THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

Respectfully submitted,

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I. A Nonexistent Entity Should Not Be Permitted To Argue Before This Court.

The "Appellee's Answer Brief" was filed by Florida Default Law Group, P.L. ("FDLG") ostensibly on behalf of IndyMac Bank, F.S.B., an entity FDLG readily admits does not now exist. In fact, the attorneys for Appellee concede that their "client" has not existed since July 11, 2008—years before judgment was ever entered.[1] submits that the charade that "IndyMac" is appearing before this Court should not be tolerated. FDLG has made no appearance upon behalf of any entity that purports to be the new owner of the mortgage loan at issue. If the attorneys' actions are directed by someone with an interest in this litigation, the identity of such a "ghost litigant" should not remain concealed from the Court.

This is of particular significance here given that this very Court has found that "many, many mortgage foreclosures appear tainted with suspect documents" and that the judicial system's interest in preventing fraud is of great public importance. *Pino v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011); *see also Pino v. Bank of New York*, 76 So. 3d 927 (Fla. 2011). The brief filed by FDLG on behalf of a nonexistent entity should be rejected.

[1] Appellee's Answer Brief, p. 18.

II. Corrections to Statement of Facts

FDLG[2] tells this Court that "[t]he Appellant was individually served pursuant to Florida Statute at the subject property address on March 10, 2008." Whether [redacted] was ever served, however, is an issue very much in dispute. As acknowledged in FDLG's footnote to that statement, the trial court has not yet determined whether [redacted] was served.[3] The court ordered the matter be set for an evidentiary hearing, and as FDLG itself stated, overcrowded dockets make it difficult to obtain hearing times.[4]

[redacted] also acknowledges an accidental misstatement in her own Initial Brief. The date of dissolution of IndyMac Bank, F.S.B. was shortly after this case was filed, rather than before. This mistake was not in the original motion before the trial court.[5] And it is still true that FDLG never disclosed IndyMac's dissolution during the next two years that elapsed before judgment.

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[2] Because FDLG has not identified an actual client with the capacity to appear before this Court, the "Appellee" will be referred to throughout this brief as FDLG.

[3] Appellee's Answer Brief, p. 3, n. 2.

[4] Appellee's Answer Brief, p. 4.

[5] Defendant, [redacted] Motion for Rehearing of Summary Judgment under Rule 1.530. (R.116-25).

III. Standard of Review

A. The standard of review for summary judgments and legal issues is *de novo.*

The proper standard of review for this case is *de novo*. The cases cited by FDLG do not stand for the proposition that a rehearing for summary judgment is reviewed for an abuse of discretion. Rather, they hold that a trial court's decision not to consider a tardy affidavit is reviewed for an abuse of discretion.

Here the court's denial of the motion for rehearing was not based on the refusal to consider a tardy affidavit. The points raised on rehearing (and now on appeal) are legal issues, such as whether a credit agreement is a negotiable instrument or whether FDLG complied with Rule 1.510(e) Fla. R. Civ. P. There is no issue here as to whether an affidavit, tardy or otherwise, raised a disputed issue fact. *See Verneret v. Foreclosure Advisors, LLC*, 45 So. 3d 889, 891 (Fla. 3d DCA 2010) (legal conclusions are subject to *de novo* review).

Moreover, even if the trial court had rejected a late-filed affidavit from [redacted] FDLG's cases also hold that it is an abuse of discretion for the court not to consider such an affidavit where there are exigent circumstances for the late filing. *Dalrymple v. Franzese*, 944 So. 2d 1240, 1243 (Fla. 4th DCA 2006). Here, there exist the most compelling of exigent circumstances. [redacted] posits she was never on notice of the hearing because she was never served with the lawsuit.

B. The standard of review for FDLG's cross-appeal is abuse of discretion.

appeals the "Final Summary Judgment of Mortgage Foreclosure"[6] which was favorable for the Appellee. Appellee spends much of its brief attacking a prior order in which the trial court reissued the judgment to remedy the Clerk's failure to timely serve with the judgment.[7] FDLG argues that the trial court erred in granting motion and that, as a result, this appeal is untimely.[8]

This argument is, in reality, a cross appeal from an order different from that appealed by *See Florida Windstorm Underwriting v. Gajwani*, 934 So. 2d 501, 504 (Fla. 3d DCA 2005) (explaining that a cross-appeal calls into question trial court orders or rulings adverse to the appellee which either "merge" into or are an inherent part of the order or orders which are properly under review by the main appeal). And while raising this argument in its brief may be a substitute for the timely filing of a cross-notice of appeal, *Ash v. Coconut Grove Bank*, 448 So. 2d 605 (Fla. 3d DCA 1984), it cannot shift the burden associated with appellate review of the trial court order with which FDLG disagrees.

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[6] Notice of Appeal, filed February 8, 2011 (R. 153).

[7] Order on Defendant's Motion to Vacate and Reissue Final Judgment of Foreclosure, dated October 28, 2010. (R. 105-107).

[8] Appellee's Answer Brief, pp. 9-18.

The order vacating and reissuing the judgment comes to this court clothed in the presumption of correctness in favor and it is FDLG's burden to demonstrate error. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979); *Gross v. Hodor*, 870 So. 2d 829 (Fla. 3d DCA 2003) (applying abuse of discretion standard to cross-appealed order). Because the order turns on the application of Rule 1.540 Fla. R. Civ. P. and the court's jurisdiction to entertain such a motion, the proper standard of review is whether the trial court abused its discretion. *See Freemon v. Deutsche Bank Trust Co. Americas*, 46 So. 3d 1202, 1204 (Fla. 4th DCA 2010) (trial court is accorded broad discretion in determining Rule 1.540(b) motions); *Cruz v. Domenech*, 905 So. 2d 938, 940 (Fla. 3d DCA 2005) (a trial court's determination that it has jurisdiction to grant particular relief is evaluated by the abuse of discretion standard).

Moreover, because the order reissuing judgment turns, in part, on a factual determination (whether the Clerk failed to timely serve the judgment), it was incumbent upon FDLG to bring this Court a transcript of the hearing. *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d at 1152 (lack of a trial transcript was fatal to appeal). Instead, FDLG has actively opposed efforts to supplement the record with the transcript.

IV. The Trial Court Erred in Granting Summary Judgment.

A. IndyMac's lack of standing was not waived because [redacted] was not defaulted.

The fundamental defect with the judgment granted by the trial court is that IndyMac Bank, F.S.B. was a non-entity at the time the judgment was issued, and therefore had neither the capacity nor the standing to have a judgment entered its name. FDLG responds that [redacted] somehow waived IndyMac's lack of standing because it must be asserted by affirmative defense.[9] This argument turns the analysis on its head. Because FDLG never applied for a default against [redacted] FDLG was required to disprove any affirmative defense that [redacted] could have raised in an answer. Those affirmative defenses would have included lack of standing and lack of capacity.

Even if [redacted] had been defaulted, "a party in default does not admit that the plaintiff in a foreclosure action possesses the original promissory note." *Venture Holdings & Acquis. Group, LLC v. A.I.M. Funding Group, LLC*, 75 So. 3d 773, 776 (Fla. 4th DCA 2011). In order to be entitled to summary judgment, the bank must establish that it is the proper holder of the promissory note at the time of summary judgment. *Id*. FDLG could never make such a showing because, among other reasons, the credit agreement is not a negotiable instrument (thus there can be

[9] Appellee's Answer Brief, p. 21.

no "holder" under the Uniform Commercial Code), and a defunct company cannot "possess" anything.

And finally, it would be inequitable to hold that [redacted] waived an objection to IndyMac's standing, when FDLG never advised the court about IndyMac's demise or the alleged (but unproven) subsequent transfers. *See Beaumont v. Bank of New York Mellon*, No. 5D10-3471 (Fla. 5th DCA Feb. 17, 2012) (holding that homeowner was entitled to raise standing as a defense for the first time at summary judgment where he was not notified that ownership of the note had been transferred to a third party until more than three years into litigation). Having kept this alleged transfer hidden, a defunct entity cannot now be heard to complain that the opposing party waived the issue.

[redacted] recognizes that Rule 1.260(c) Fla. R. Civ. P. authorizes the court to decide whether an action may continue in the name of the original party even though it has transferred its interest to another. That rule does not, however, authorize a party (or nonparty) or the attorneys who appeared for the original party, to conceal the fact that such a transfer has occurred. Indeed, the fact that the rule gives the court the option of deciding whether the new party is to be substituted in the action or joined with the original party presupposes that parties and their counsel would advise the court that such transfers had occurred. Failure to notify

the court about transfers usurps the role of the court in the operation of Rule 1.260(c) and is a form of deceit that should be resoundingly condemned by the Court.

B. The credit agreement is not a promissory note.

FDLG raises little resistance to this point, resorting instead to repeatedly identifying the subject Home Equity Credit Line Agreement as a "Note" in the apparent hope that this repetitive mislabeling will make it so. FDLG misleadingly declares that "[t]he Note contains the sum certain of $39,600.00 [sic, actually $36,900.00] on its face" without addressing [redacted] point that this is merely a credit limit, not an amount borrowed. On its face, the credit agreement merely states that [redacted] can request a loan up to that amount and that the amount may be unilaterally increased by the lender at any time.[10] In the end, FDLG cited no cases in opposition to the caselaw cited by [redacted] that credit agreements are not negotiable instruments.

C. FDLG's attempt to blame the Clerk for the separation of the allonge from the credit agreement goes outside the record.

FDLG's response to the point that the allonge is not attached to the credit agreement is to blame the Clerk's office: "The fact the Allonge became separated

[10] Notice of Filing, July 9, 2010, p. 3 of the Home Equity Line of Credit Agreement (R. 45-66).

from the original documents in the lower clerk's file cannot be construed against Appellee."[11] The supposition that the allonge was attached before it reached the Clerk's office is beyond the record, and at best, merely raises an issue of fact, making summary judgment inappropriate.

FDLG then makes the fallback argument that its standing is established by an assignment of mortgage from MERS.[12] But it is beyond peradventure that it was "never offered into 'evidence,' by being attached to an affidavit for purposes of authentication" and as such, it is not competent evidence to support the summary judgment motion. *Beaumont v. Bank of New York Mellon*, Case No. 5D10-3471, p. 2, n. 2 (Fla. 5th DCA, February 17, 2012).

D. FDLG offers no excuse for failure to comply with Rule 1.510(e).

Perhaps the most basic argument raised by [redacted] is FDLG's failure to attach or serve sworn and certified copies of documents referred to in its summary judgment affidavit.[13] FDLG's response was limited to quoting the rule with emphasis on the words "referred to in an affidavit,"[14] as if no documents were

[11] Appellee's Answer Brief, p. 20.

[12] Appellee's Answer Brief, p. 20.

[13] Appellant's Initial Brief, p. 16.

[14] Appellee's Answer Brief, p. 24.

referenced in the affidavit. In reality, the affidavit references a plethora of documents: "the books of account," and "all books, records, and documents kept by INDYMAC BANK, F.S.B., concerning the transactions…"[15] Simply alleging personal knowledge of what, in reality, is the "best evidence" of the debt, does not excuse compliance with the plain wording of Rule 1.510(e) Fla. R. Civ. P.

E. FDLG's failure to serve [redacted] is an issue not yet before this Court.

In what appears to be an attempt to obtain preemptive review of a decision not yet been made, with respect to evidence not yet adduced, FDLG argues that the "weight of the evidence" supports its claim that it properly served [redacted] with the Complaint.[16] FDLG goes even further beyond the record to speculate that [redacted] received other notices by mail, such as a notice of hearing on its summary judgment motion.[17] Of course, actual notice of the lawsuit, even if proven, would not cure service of process that is defective or completely lacking. *Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So. 2d 1225, 1227 (Fla. 1986).

And to the extent the Court would even be tempted to consider FDLG's "evidence" of actual notice, it should be aware that [redacted] expects to prove that

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[15] Affidavit of Amounts Due and Owing, filed July 24, 2009, p.1.

[16] Appellee's Answer Brief, pp. 7-8.

[17] Appellee's Answer Brief, p. 8.

any hearing notices she may have received by mail would have been confused with another, concurrent case involving the same property and the same plaintiff.[18] will posit that, because she had hired counsel to vigorously defend the other case, such mailings regarding an "IndyMac" case were of no significance until one contained a judgment against her.

And FDLG's contention that waived personal service by moving to vacate the judgment[19] is equally without merit. The case cited by FDLG, *Golden State Indus., Inc. v. Cueto*, 883 So. 2d 817 (Fla. 3d DCA 2004), holds only that personal jurisdiction will be waived if it is not challenged at the first opportunity. did, in fact, challenge service at the first opportunity, and therefore, was entitled to defend on the merits.[20] *Babcock v. Whatmore*, 707 So. 2d 702, 704 (Fla. 1998) (motion to avoid a judgment is not a request for "affirmative relief" that would waive personal jurisdiction and such a motion may be joined with the jurisdictional challenge without waiver).

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[18] requests that this Court take judicial notice of the Circuit Court records showing a concurrent case of *IndyMac Federal Bank, F.S.B. v.* Case No. 50 2009 CA 006614XXXX MB (Palm Beach County). Appellee has also requested this Court to take notice of this same case.(Appellee's Answer Brief, p. 8 n. 4).

[19] Appellee's Answer Brief, p. 16.

[20] Defendant, Motion To Set Aside Final Judgment In Foreclosure, Motion To Quash Service Of Process And Motion To Arrest Judgment And Withhold Execution, dated September 20, 2010 (R. 67-77).

V. The Trial Court Did Not Abuse Its Discretion in Vacating and Reissuing the Judgment To Provide [redacted] Due Process.

A. FDLG cannot complain on appeal about a Clerk's affidavit to which it did not object below.

Because it is FDLG's burden to show that the trial court abused its discretion in vacating and reissuing the original judgment, and because it has sought to block efforts to supplement the appellate record with the transcript of those proceedings, its challenge to that order should be summarily rejected.

Nevertheless, in an abundance of caution, [redacted] will address FDLG's argument in the event this Court later grants [redacted] request to supplement the record with the transcript. Specifically, FDLG claims that the trial court erred in vacating and reissuing the judgment because the Clerk's affidavit filed by [redacted] was for another client of [redacted] counsel. The public records of the Fifteenth Judicial Circuit (of which this Court has been asked to take judicial notice), clearly show that [redacted] counsel filed two affidavits from the Clerk on the same day, one in this case and one in *Citimortgage Inc. v. Kelly*, Case No. 502008CA011032XXXXMB, Palm Beach County. The two affidavits were inadvertently transposed.[21]

[21] Notice of Filing of the Affidavit of Amy Stein, served October 12, 2010, *Citimortgage Inc. v. Kelly*, 502008CA011032XXXXMB, Docket Entry 29 (A. 1, 5).

Whether the trial court was presented with the correct affidavit at the hearing is beyond the record, but even the incorrect affidavit establishes that the Clerk's office was experiencing a backlog in the processing of foreclosure judgments at that time.[22] It explains how, in those days, the date of filing indicated in the docket and even on the judgment itself, was not the actual date that the judgment was finalized and docketed. The difference between the actual and apparent dates of filing was a matter of months.

If this Court grants [redacted] motion to supplement the record with the transcript of the hearing, it will become apparent that, if [redacted] counsel presented the incorrect affidavit at the hearing, FDLG failed to preserve that error for appeal. When the court asked FDLG if they had any objection to [redacted] motion to vacate, FDLG responded:

> MR. HARVEY [counsel for Appellee]: Your Honor, I can only attest to you that the judgment in this case was on the same date as they say that their client did, but whether there's a third-day backlog, I can't confirm that, *but I have no objection*.[23]

FDLG should not now be permitted to argue that the reentry of the judgment was based on the wrong affidavit when it made no objection to the affidavit at the

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[22] Affidavit of Amy Stein, ¶ 8.

[23] Transcript of Hearing before the Honorable Jack H. Cook held on October 28, 2010 (A. 20) (emphasis added). *See also* Order Vacating and Reissuing Judgment, October 28, 2010 (R. 105-07).

hearing. Had FDLG made such an objection, [redacted] would have had an opportunity to correct the inadvertent switch. Waiting until now to point out the mistake is a "gotcha" stratagem of the worst sort. But opposing [redacted] request to supplement the record with a transcript that reveals FDLG's waiver of this issue is flatly disingenuous and misleading.

B. The requirement that [redacted] receive due process necessitated reissuance of the final judgment.

Leaving aside FDLG's gamesmanship, the truly disturbing element of its argument is this: FDLG would have this Court hold that a party's right to an appeal may be stripped away by an overworked or inattentive Clerk of the Court. Not surprisingly, the cases cited by FDLG do not so hold.[24]

[24] *David M. Dresdner, M.D., P.A. v. Charter Oak Fire Ins. Co.*, 972 So. 2d 275 (Fla. 2d DCA 2008) (distinguishes itself from cases from the First, Fifth, and Fourth Districts which all hold that relief under Rule 1.540(b) is appropriate when "a party's ability to file a notice of appeal in a timely manner was stymied or hindered by action attributable to the trial court or the clerk."); *Maxfly Aviation Inc. v. Capital Airlines Ltd.*, 843 So. 2d 973 (Fla. 4th DCA 2003) (holding that only material amendments to judgments will restart the appeal clock, not that a judgment may not be reissued to correct Clerk's failure to timely serve and docket the judgment); *Betts v. Fowelin*, 203 So. 2d 630 (Fla. 4th DCA 1967) (same); *Clara P. Diamond, Inc. v. Tam-Bay Realty, Inc.*, 462 So. 2d 1168 (Fla. 2d DCA 1984) (addressing extensions of time for rehearing, not vacating and reissuing a judgment); *Catsicas v. Catsicas*, 669 So. 2d 1126 (Fla. 4th DCA 1996) (same); *Feinberg v. Feinberg*, 384 So. 2d 1304 (Fla. 4th DCA 1980) (same as to extension of time to file motion for new trial); *Larkin v. Buranosky*, 25 So. 3d 685 (Fla. 4th DCA 2010) (trial court did not abuse its discretion in refusing to issue a new final

After five pages discussing these cases, FDLG eventually concedes that the appellate courts—including this Court—found it appropriate to vacate and reenter an earlier final judgment so that a timely appeal could be taken when the complaining party missed the deadline due to an "event outside the party's control."[25] *Woldarsky v. Woldarsky*, 243 So. 2d 629 (Fla. 1st DCA 1971) (trial court authorized to re-date the judgment where it had been rendered without notice to the losing party); *Rosso v. Golden Surf Towers Condo. Ass'n*, 711 So. 2d 1298 (Fla. 4th DCA 1998) (trial court abused its discretion by refusing to vacate an order that had not been served in time to allow appeal); *Gibson v. Buice*, 381 So. 2d 349 (Fla. 5th DCA 1980) (same). The Clerk's delay in serving notice of the judgment was an event outside of [redacted] control.

CONCLUSION

Accordingly, this Court should reverse the final summary judgment and remand to the trial court for further proceedings.

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judgment, because the error in providing notice of the judgment was not attributable to the court and because appellant still had two weeks to file appeal when she learned of judgment); *Corvette Country, Inc. v. Leonardo*, 997 So. 2d 1272 (Fla. 4th DCA 2009) (holding that "errors that affect the substance of a judgment, must be corrected within ten days," but that clerical errors may be corrected at any time).

[25] Appellee's Answer Brief, p. 15.

Dated February 27, 2012

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this February 27, 2012, on all parties on the attached service list. Additionally, this document was electronically filed with this Court pursuant to Administrative Order No. 2011-1.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully 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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