IN THE DISTRICT COURT OF APPEAL OF FLORIDA

FOURTH DISTRICT

JAMES OBER,

Appellant,

v.

TOWN OF LAUDERDALE-BY-THE-SEA, a Florida municipality,

Appellee.
_____/

CASE NO. 4D14-4597

L.T. CASE NO. 14-6782 (05)

ON APPEAL FROM THE CIRCUIT COURT OF FLORIDA,
SEVENTEENTH JUDICIAL CIRCUIT

BRIEF OF *AMICUS CURIAE* THE BUSINESS LAW SECTION OF THE FLORIDA BAR

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IDENTITY AND INTEREST

The Business Law Section of The Florida Bar ("BLS" or "Section") consists of almost six thousand members of The Florida Bar, and includes lawyers who routinely represent lenders as well as those who routinely represent borrowers. Using its expertise in business law, the BLS assists the Florida Legislature in drafting laws of interest to the public and the business community. The BLS likewise serves the Bar by producing sophisticated CLE (continuing legal education) programs on the panoply of issues faced by business law practitioners.

The BLS promotes the principles of duty and service to the public, emphasizes the importance of pro bono services, and promotes inclusion and mentoring. The BLS has an active mentoring program - the Fellows Program - which annually selects exceptional young attorneys for participation in a program which integrates them into the BLS's activities (the costs of participating in the program are subsidized by the BLS), and the BLS recently launched a Scholar's Program to support the engagement of students from Florida's twelve law schools who are interested in a career in business law.

While not routinely engaged in the practice of filing *amicus* briefs, the BLS has in the past filed briefs when requested to do so by courts, or when a particular issue risked creating uncertainty in the practice of business law. The BLS takes very seriously the presentation of its views on the issues facing the Court, and accordingly

asks the Court to note that it is presenting views on issues with which it has experience and of which it has knowledge.

Additionally, and due to the diversity of the practices of its membership and the corresponding diverse views arising therefrom, the BLS seeks only to present a position as an honest broker of the majority of the practices of its members, and does not take a position as to which party should prevail in this appeal. Finally, the BLS thanks the Court for the opportunity to assist in the determination of this case.

The filing of this brief was approved by the Business Law Section of The Florida Bar.[1]

[1] The Executive Council of the BLS approved the filing of this brief. Pursuant to Standing Board Policy 8.10, the Board of Governors of The Florida Bar (typically through its Executive Committee) must review a section's amicus brief and grant approval before a brief can be filed with the Court. Notwithstanding any approval by this Court to file an amicus brief, this brief is subject to final approval of the Florida Bar Board of Governors. The amicus brief will be submitted solely by the BLS and supported by the separate resources of this voluntary organization--not in the name of The Florida Bar, and without implicating the mandatory membership dues paid by Florida Bar licensees.

SUMMARY OF ARGUMENT

The financial, real estate and conveyancing industries served by the Section have traditionally understood the law to be that foreclosure sales, whether by operation of lis pendens, the foreclosure judgment and sale, or a combination thereof, served to extinguish all liens, claims and interests that appeared, were filed, were created or existed subsequent to the filing of the lis pendens in a foreclosure sale. The opinion of this Court in Ober present a radical departure from common practice and will have an enormous negative impact on the real estate industry in Florida.

Apart from the legal issues, the Ober decision presents practical problems. First, it is not possible in many situations to obtain a foreclosure sale within thirty days of entry of foreclosure judgment. Second, the decision creates the possibility of an endless stream of post-judgment liens, claims or interests that are not extinguished by lis pendens and foreclosure sales, which will require re-foreclosures and further clog the courts with more foreclosure suits. Third, the Court's opinion will place lenders in a quandary as to whether to extend sales as required by law or risk additional claims being placed on the property. The end result of these effects will be to bring the rehabilitation of distressed properties in Florida to a sharp stop, thereby harming the citizens of Florida and Florida businesses.

ARGUMENT

I. The Panel Opinion Represents a Radical Departure from Existing Law

It has long been understood that liens, claims and interests appearing on the title record after the recording of a lis pendens in a foreclosure case are eliminated by the dual operation of the lis pendens and foreclosure sale of the subject property. Without restating the arguments of others, two significant points stand out that demonstrate the panel opinion departs from existing law.

First, the Florida Supreme Court approved the form of the foreclosure judgment when it adopted Rule 1.996 (a) in 1971. *See In re Florida Rules of Civil Procedure*, 253 So. 2d 404 (Fla. 1971). The form has been reviewed and revised numerous times by the Florida Supreme Court since 1971, including most recently in January of this year. *See In re Amendments to Florida Rules of Civil Procedure*, 190 So. 3d 999 (Fla. 2016). In its most recent opinion, the Court revised the very paragraph of Rule 1.996 that is at issue in this case to incorporate various changes to section 45.0315, Florida Statutes, and reaffirmed that claims, liens and interests appearing after a lis pendens is recorded are extinguished by the foreclosure sale. Form 1.996 reflects the understanding of the state of the law by the Florida Supreme Court and the Civil Rules Committee of the Florida Bar, and the panel decision conflicts with numerous opinions of the Florida Supreme Court on these issues.

The panel opinion's misunderstanding will affect title insurance companies operating in Florida as well. For example, Attorneys' Title Insurance Fund Title Note 18.06.02 states as follows: "If the code enforcement lien is recorded after the lis pendens filed in the foreclosure action, the lien may be treated as eliminated by the lis pendens provided the foreclosure is completed through certificate of title. *Id.* (citing AGO Op. 93-77 (Nov. 4, 1993))." Title companies have operated for years on the understanding that liens filed after a lis pendens are extinguished by foreclosure sales and have written countless title policies based on this understanding; the panel opinion calls those policies into question.

II. The Panel Decision Presents Practical Problems in Implementation

The panel decision also states, in effect, that foreclosure sales must be conducted within thirty days of final judgment otherwise the foreclosure judgment does not extinguish liens that appear on the title record subsequent to the final judgment. Apart from the fact that the panel opinion conflicts with Section 45.031(1)(a), Florida Statutes ("In the order or final judgment, the court shall direct the clerk to sell the property at public sale on a specified day that shall be not less than 20 days or more than 35 days after the date thereof, on terms and conditions specified in the order or judgment"), the opinion creates practical problems to implementation.

The panel opinion presumes it is the foreclosing lender that sets the foreclosure sale date, but that is not correct. The trial court judge and the clerk of court are the parties that set the sale date, not the foreclosing lender, and the foreclosing lender may only ask that sale be set on a specific date. In fact, the experience of many members of the BLS is that foreclosure sales can be set by the court many months after the entry of a foreclosure judgment despite the request of the lender for a quick foreclosure sale date. Thus, the panel opinion unknowingly invites conflict with the realities of the foreclosure process as currently conducted.

Further, even if a lender does obtain a sale date within thirty days of final judgment, the panel opinion will place lenders between a rock and a hard place. For instance, regulations affecting the residential lending industry require that lenders cancel foreclosure sales when a borrower presents a qualifying package for loan loss mitigation. At that point, the lender will have a difficult choice of accepting the package and cancelling the sale (and thus incurring additional costs of re-foreclosure if a new judgment, lien or claim is filed post-judgment), or proceeding to foreclosure sale at the risk of violating these regulations. Lenders will be dis-incentivized to cancel foreclosure sales, thus hurting borrowers. Likewise, the appearance on the record of post-judgment liens that are not extinguished by a foreclosure sale will cloud title (because "clean" title will not be able to be delivered through the issuance

of a Certificate of Title due to the post-judgment liens) and therefore will drive down the bidding at foreclosure sales and hurt borrowers in two ways.

First, there will be less of a chance of a foreclosure sale price that pays the outstanding judgment in full, and therefore borrowers will have a higher chance of a lender seeking a deficiency against the borrower. Second, the fact that lower prices will be obtained at foreclosure sales hurts borrowers in that borrowers (technically, the property owner as of the date of filing of the lis pendens under Florida Statute section 45.032) are the first in line to receive surplus foreclosure sale proceeds. The panel decision will hurt both lenders and borrowers alike.

The panel opinion also unwittingly creates a renewed foreclosure crisis. Under the scenario set forth by the panel opinion, any lien filed more than thirty days after final judgment is not extinguished by the foreclosure sale itself. Members of the BLS have expressed concern that the panel opinion has given unscrupulous borrowers a weapon to use to delay foreclosure sales. Specifically, the panel opinion authorizes the filing of liens subject to the foreclosure judgment and holds that those post-judgment liens are not extinguished by the foreclosure sale. It requires little imagination to conceive that a borrower intent on maintaining their property will file liens just before the foreclosure sale as a delay tactic, thus requiring the lender to start the foreclosure process all over again in order to foreclose out the new lien. And once that lien is foreclosed and a new sale is set, the panel decision permits an

unscrupulous borrower to file yet another lien requiring yet another new foreclosure. This process could continue for several rounds (technically into infinity), and thus delay the lender obtaining title to the property that served as security for the loan.

The result of the panel decision will be that the rehabilitation of distressed properties will be sharply curtailed, and that lenders, borrowers, title insurers and others in the real estate industry will be hurt. Additionally, the panel decision will discourage workouts and depress sale prices (including financing) and harm borrowers on both fronts.

CONCLUSION

For the reasons set forth above, the BLS believes the Court should rehear its Ober opinion, revisit the opinion *en banc*, or certify a question or questions of great public importance regarding whether claims, liens or interests subsequent to the filing of a lis pendens are extinguished by foreclosure sale, and rule that all interests, claim and liens that appear subsequent to a lis pendens are extinguished by a foreclosure sale.

Respectfully Submitted,

/s/ Irwin R. Gilbert, Esq.
IRWIN R. GILBERT, ESQ.
Florida Bar No. 0099473
KELLEY KRONENBERG
1475 Centrepark Blvd., Suite 275
West Palm Beach, Florida 33401
Tel: (561) 684-5956; Fax (561) 684-5753
For The Florida Bar Business Law Section

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was served, this 26th day of September, 2016, via electronic mail to Susan L. Trevarthen, Esq., Laura K. Wendell, Esq., Eric P. Hockman, Esq., Weiss Serota Helfman Cole Bierman & Popok, P.L., 2525 Ponce de Leon Boulevard, Suite 700, Coral Gables, FL 33134 strevarthen@wsh-law.com; nsalgado@wsh-law.com; lwendell@wsh-law.com; lmartinez@wsh-law.com; ehockman@wsh-law.com; isevilla@wsh-law.com. Alexander L. Palenzuela, Esq., Law Offices of Alexander L. Palenzuela, P.A., 1200 Brickell Avenue, Suite 1230, Miami, FL 33131-3255 alp@alp-law.com; and Heather J. Judd, Esq., and Jordan R. Wolfgram, Esq., Assistant City Attorney, City of St. Petersburg, FL 33731, eservice@stpete.org; heather.judd@stpete.org, and jorgan.wolfgram@stpete.org; Manuel Farach, McGlinchey Stafford, One East Broward Blvd., Suite 1400, Ft. Lauderdale, FL 33301 mfarach@mcglinchey.com and nalicea@mcglinchey.com.

CERTIFICATE OF FONT COMPLIANCE

I certify that this brief complies with the font requirement of rule 9.210 (a) (2), Florida Rules of Appellate Procedure.

By: /s/ Irwin R. Gilbert, Esq.
Irwin R. Gilbert