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Manuel Farach

Collins Asset Group, LLC v. Property Asset Management, Inc., --- So. 3d ----, 2016 WL 3702926 (Fla. 1st DCA 2016).
A Motion for Deficiency Judgment is not a foreclosure complaint so it does not need to comply with the complaint verification requirements of Florida Rule of Civil Procedure 1.115(e).

Bank of America, N.A. v. Kipps Colony II Condominium Association, Inc., --- So. 3d ----, 2016 WL 3766582 (Fla. 2d DCA 2016).
On rehearing, the Second District hold that a junior lienor cannot foreclose a superior lienor and a judgment purporting to do so is void under Florida Rule of Civil Procedure 1.540 (b) (5). Priority of real estate interests under Florida law is determined Florida Statutes sections 28.222(2) (which requires the Clerk of Court to record instruments and keep records of the recorded instrument), 695.11 (which states the sequence of recorded instruments shall determine priority), and 695.01 (which states that first in time is first in right). The community association could have foreclosed its claim of lien through a cross-claim as a result of its powers under Florida Statute section 718.116(6)(a).

Sanabria v. Pennymac Mortgage Investment Trust Holdings I, LLC, --- So. 3d ----, 2016 WL 3767181 (Fla. 2d DCA 2016).
The following affirmative defense is sufficient to meet the "specifically deny a signature" requirement of Florida Statute section 673.3081:

> With regard to all counts of the Complaint, the Plaintiff's claims are barred in whole or in part because the Defendants affirmatively question the veracity and authenticity of any possible endorsement made on any purported note or allonge the Plaintiff may produce pursuant to Fla. Stat. § 673.3081 (2011), assuming, without conceding, that such endorsement exists. Specifically, the Defendants question the veracity and authenticity of any possible endorsement because: (1) there is no mention in the Complaint as to who the endorser is; (2) there is no mention in the Complaint as to what authority the purported endorser may so endorse, (3) the indorsement wasn't on the documents attached to the original complaint, and (4) the copy of the note attached to the complaint does not contain Defendant's signature and is not the note signed by Defendant.

Aluia v. Dyck-O'Neal, Inc., --- So. 3d ----, 2016 WL 3766717 (Fla. 2d DCA 2016).
The venue provisions of the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (FDCPA), do not apply to deficiency actions arising out of Florida mortgage foreclosures because a final judgment of foreclosure is not a “debt” but instead a judgment in rem or quasi in rem arising out of a foreclosure proceeding. As a result, a deficiency suit is not a "legal action on" a promissory note, "an obligation of a consumer to pay money," nor a business dealing or consensual obligation and thus not subject to the FDCPA.

Annex Industrial Park, LLC v. Corner Land, LLC, --- So. 3d ----, 2016 WL 3745534 (Fla. 3d DCA 2016).
For purposes of temporary injunctions, “preserving the staus quo” means preserving the situation that existed prior to the actions that precipitated the request for injunction.

Medley Plaza, Inc. v. The Rama Fund, LLC, --- So. 3d ----, 2016 WL 3747134 (Fla. 3d DCA 2016).
Florida Rule of Judicial Administration 2.514(b) does not extend the time for filing an appeal to thirty-five days from date of rendition.

Wells Fargo Bank, N.A. v. Williamson, --- So. 3d ----, 2016 WL 3745477 (Fla. 4th DCA 2016).
A borrower who knowingly signs loan documentation that is materially incorrect as to income cannot later claim that the lender conspired or forced the incorrect amounts and thus claim unclean hands on the part of the lender as a defense to enforcement of the loan documents.

Miles v. Parrish, -- So. 3d ----, 2016 WL 3745490 (Fla. 4th DCA 2016).
The sixty day non-claim time requirement within which to contest ad valorem assessments does not begin to run until the real property taxes are “certified for collection” under Florida Statute sections 193.122(2) and 194.171(2.

Lucas Games, Inc. v. Morris AR Associates, LLC, --- So. 3d ----, 2016 WL 3745372 (Fla. 4th DCA 2016).
An intervening change in law which renders the purpose of a lease illegal renders the lease unenforceable.

Victory Christian World Ministries, Inc. v. MJP Distribution, LLC, --- So. 3d ----, 2016 WL 3745482 (Fla. 4th DCA 2016).
The lack of mutuality of obligation on the part of the seller in the following contract clause is “cured” by the attempts of the seller to perform under the contract:

> If Buyer fails to perform under this Contract, then, as Seller’s sole and exclusive remedy under this Contract, the Settlement Agent is hereby irrevocably immediately directed and instructed that the Initial Escrow Deposit and if delivered by Buyer, the Additional Escrow Deposit shall be forfeited and paid over to Seller as agreed liquidated damages in order to compensate Seller for the damages caused by such breach and not as a penalty.

> In the event of Seller's default under this Contract, Buyer's sole remedies shall be to receive the return of Buyer's Escrow Deposit(s), at which time the Contract shall cease and terminate and Seller and Buyer shall have no further obligations, liabilities or responsibilities to one another. Buyer shall not have any claim against Seller (nor shall Seller be liable) for damages (actual, special, punitive or otherwise) and hereby waives any such claims.

Cruz v. Citimortgage, --- So. 3d ----, 2016 WL 3745488 (Fla. 4th DCA 2016).
A party may serve another party with an "insurance summons," i.e., an additional summons when a party is not sure the first summons was effective, in order to ensure that the trial court has acquired jurisdiction over that party.

Dyck-O'Neal, Inc. v. Rojas, --- So. 3d ----, 2016 WL 3769012 (Fla. 5th DCA 2016).
A plaintiff acquiring long-arm jurisdiction over a defendant to foreclose a mortgage maintains the long-arm jurisdiction over the defendant for deficiency purposes, even if a separate action for deficiency is filed under Florida Statute section 702.06.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

COLLINS ASSET GROUP, LLC,

Appellant,

v.

PROPERTY ASSET MANAGEMENT, INC. and DELVERT CAMPFIELD, ET AL.,

Appellees.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D15-1254

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Opinion filed July 13, 2016.

An appeal from the Circuit Court for Leon County.
Charles A. Francis, Judge.

Mark Elliot Pollack, Pollack & Rosen, P.A., Coral Gables, for Appellant.

No Appearance, for Appellees.

PER CURIAM.

Collins Asset Group, LLC, appeals the trial court's post-decretal order denying its Motion To Substitute Party Plaintiff and Motion for Deficiency Judgment. Because the motion was facially sufficient to allege a basis for a post-

foreclosure sale deficiency judgment, the court denied the motion without a hearing, and because the trial court's stated reasons for denial were based on an inapplicable pleading requirement, the order is reversed and the cause remanded for further proceedings.

This appeal originated from foreclosure proceedings which concluded with the entry of the Final Summary Judgment in Foreclosure on January 27, 2009. A foreclosure sale was held, and the property sold for substantially less than the foreclosure amount. Accordingly, Appellant filed a post-judgment motion for deficiency judgment. § 702.06, Fla. Stat. The motion was properly filed as a continuation of the original foreclosure suit and not as a separate action. See Kinney v. Countrywide Home Loans Servicing, L.P., 165 So. 3d 691, 694 (Fla. 4th DCA 2015); TD Bank, N.A. v. Graubard, 172 So. 3d 550, 552 (Fla. 5th DCA 2015).

Appellant initially sought review of the trial court's order as a "non-final order entered after final judgment on an authorized motion," pursuant to rule 9.130(a)(4), Florida Rules of Appellate Procedure. However, the current version of the rule, effective January 1, 2015, no longer contains the sentence referring to "non-final orders entered after final order upon authorized motions." The Florida Supreme Court has recently opined that certain post-decretal, non-final orders formerly reviewable via appeal under rule 9.130(a)(4) are now subject to review upon petition for writ of certiorari as a result of the rule amendment. M.M. v. Fla. Dep't of

Children & Families, 189 So. 3d 134 (Fla. 2016) (post-dependency judgment orders subject to future modification for child welfare and parenting time-sharing are not final orders and are thus reviewable by certiorari, not as final appealable orders).

No additional judicial labor on Appellant's entitlement to a deficiency judgment is contemplated under the order on appeal here, thus, M.M. does not apply. For purposes of the finality of judgments and orders, Florida courts treat mortgage foreclosure actions and the attendant deficiency proceedings differently from typical civil actions because "foreclosures 'may involve two distinct but related proceedings that can result in more than one final judgment or order.'" Park Fin. of Broward, Inc. v. Jones, 94 So. 3d 617, 618 (Fla. 4th DCA 2011). The order before us is an appealable final order because it is dispositive of the deficiency judgment proceedings, completes the judicial labor on the deficiency proceedings, and there is no future additional avenue for appellate review upon any contemplated additional judgment. See Caufield v. Cantele, 837 So. 2d 371, 375 (Fla. 2002) (final judgment is one which ends the litigation between the parties such that "no more judicial labor is required"); Clearwater Fed. Sav. & Loan Ass'n v. Sampson, 336 So. 2d 78, 79-80 (Fla. 1976); Gache v. First Union Nat'l Bank, 625 So. 2d 86 (Fla. 4th DCA 1993).

We review an order granting or denying a deficiency judgment for an abuse of the trial court's discretion. Vantium Capital, Inc. v. Hobson, 137 So. 3d 497, 499 (Fla. 4th DCA 2014). Considering the grounds for the trial court's summary denial

of the motion for deficiency judgment stated in its order, the trial court abused its discretion by applying inapplicable pleading requirements to the motion and ruling before allowing Appellant an opportunity to be heard.

In its motion seeking a deficiency judgment, Appellant requested that it be substituted as the plaintiff and alleged that it was the owner and holder of the judgment by assignment. No assignment was attached to the motion or filed with the court, and no response to the motion was filed.[1] Without holding a hearing on the motion, the trial court denied the motion based on Appellant's "lack of standing in that Certificate of Title was issued to Property Management, Inc., and no document or verified pleading has been filed to indicate transfer of judgment."

The motion before the trial court was not a complaint for foreclosure. Accordingly, rule 1.115(c), Florida Rules of Civil Procedure, requiring copies of the note to be attached to a certification filed with the complaint, did not apply. Further, rule 1.115(e) requiring complaints for foreclosure to be verified does not apply to motions for deficiency judgment.

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[1] Appellant supplied this court with an appendix containing two consecutive assignments of the foreclosure judgment to bolster its allegation that it is the owner and holder of the judgment**.** Because this material does not appear in the trial court docket for case number 2007 CA 002228, the appendix is not part of the appellate record. Fla. R. App. P. 9.200(a)(1). These documents have no bearing on our appellate review because "[i]t is axiomatic that appellate review is confined to the record on appeal." Thornber v. City of Fort Walton Beach, 534 So. 2d 754, 755 (Fla. 1st DCA 1988).

Standing is an affirmative defense which is waived if not raised in a responsive pleading. Jaffer v. Chase Home Fin., LLC, 155 So. 3d 1199, 1202 (Fla. 4th DCA 2015). Furthermore, the motion seeking a deficiency judgment alleged that Appellant was the assignee of the judgment and was, therefore, like a complaint for other affirmative relief, "sufficient to indicate that a cause of action exists" and not required to "anticipate affirmative defenses." Thompson v. Martin, 530 So. 2d 495, 496 (Fla. 2d DCA 1988); Shahid v. Campbell, 552 So. 2d 321, 322 (Fla. 1st DCA 1989).

Appellant's motion filed in the trial court was facially sufficient to state a cause of action for a deficiency judgment and met the applicable pleading requirements.[2] Accordingly, the order on appeal is REVERSED and REMANDED for further proceedings on Appellant's motion.

ROBERTS, C.J., WOLF, and B.L.THOMAS, JJ., CONCUR.

[2] We note that Appellant bore some responsibility to notify the court that the action was ready for trial or hearing if it intended to file documents or submit additional proof to support its motion. See Fla. R. Civ. P. 1.440. The record does not indicate any reason Appellant failed to contact the trial court to set a hearing while the motion was pending.

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

July 15, 2016

BANK OF AMERICA, N.A., Appellant, v. KIPPS COLONY II CONDOMINIUM ASSOCIATION, INC., a Florida corporation not for profit; CHARLES C. KNIGHTON; and MEGAN A. KNIGHTON, Appellees.	)	Case No. 2D14-858 2D14-4436 CONSOLIDATED

BY ORDER OF THE COURT:

On its own motion, this court's opinion dated December 9, 2015, is withdrawn, and the attached opinion is issued in its place. A footnote has been added, and changes have been made to section II.B. No further motions for rehearing will be entertained in this appeal.

I HEREBY CERTIFY THE FOREGOING IS A

TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL, CLERK

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

BANK OF AMERICA, N.A., Appellant, v. KIPPS COLONY II CONDOMINIUM ASSOCIATION, INC., a Florida corporation not for profit; CHARLES C. KNIGHTON; and MEGAN A KNIGHTON, Appellees.	)	Case No. 2D14-858 2D14-4436 CONSOLIDATED

Opinion filed July 15, 2016.

Appeals pursuant to Fla. R. App. 9.130 from the Circuit Court for Pinellas County; Pamela A.M. Campbell, Judge.

Adam M. Topel, J. Randolph Liebler, and Tricia J. Duthiers of Liebler, Gonzalez & Portuondo, Miami, for Appellant.

Shawn G. Brown of Redding & Brown, PLLC, Tampa; and Lang & Raffa P.A., St. Petersburg, for Appellee Kipps Colony II Condominium Association, Inc.

No appearance for remaining Appellees.

BLACK, Judge.

In these consolidated appeals, Bank of America, N.A., challenges the trial court's rulings on two motions for relief from judgment. Bank of America raises multiple claims of error in the appeal from the denial of its Florida Rule of Civil Procedure

1.540(b) motion. Because we find merit in one of those arguments, requiring reversal of the order denying relief from judgment, we do not address the remaining claims. As to Bank of America's appeal from the denial of the rule 1.540(a) motion, we affirm without comment.

I. Background

Kipps Colony II Condominium Association filed a lien foreclosure action against Charles and Megan Knighton for failure to pay their condominium assessments. The Association's complaint named Bank of America as a defendant. The complaint alleged that Megan Knighton "may claim an interest in the Unit by virtue of that certain Mortgage on the Unit, recorded in O.R. Book 13524, Page 595, and that certain Mortgage on the Unit, recorded in O.R. Book 14385, Page 1957." The complaint also alleged that Bank of America "may claim an interest in the Unit by virtue of its mortgage recorded in O.R. Book 14385, Page 1957, which interest, if any, is inferior and subordinate to" the Association's lien. The complaint did not otherwise identify the mortgages on the condominium or expressly state that Bank of America held both the first and second mortgages on the property, only the second of which was inferior to the Association's lien. It did, however, allege that the Association was not required to give Charles Knighton notice of its intention to foreclose the lien because an action to foreclose a mortgage on the condominium was pending before the trial court. The Association requested that "the Defendants and all other persons who have any lien junior to the lien of [the Association] be barred and forever foreclosed of all right, title, interest, equity or redemption or lien in or to or against the [condominium unit]."

A default was entered against Bank of America. The Association then moved for summary judgment, and a final summary judgment of foreclosure was rendered December 19, 2011. Paragraph five of the uniform final judgment states:

> The lien of [the Association] is superior in dignity to any right, title, interest or claim of the defendants through or under the defendants and all persons, corporations, or other entities claiming by, through or under the defendants or any of them and the property will be sold free and clear of all claims of the defendant with the exception of any assessments that are superior pursuant to sections 718.116 or 20.3085, Florida Statutes.

(Emphasis added.)

The property was sold on January 28, 2013, more than a year after entry of the final judgment. The parties have not provided an explanation for the delay from March 2012 to January 2013. Inland Assets, LLC, purchased the property at the foreclosure sale.[1] A certificate of title was issued in February 2013, and Inland Assets immediately filed a quiet title action against Bank of America and the Knightons. Bank of America again failed to appear,[2] and Inland Assets obtained a quiet title judgment on March 18, 2013. That judgment provides, in pertinent part:

> [Inland Assets] is the rightful and lawful owner of the Property, free and clear of any liens or encumbrances by [Bank of America] (or any persons claiming by, through, or under [Bank of America]) and to the exclusion of any claims, liens, or mortgages of [Bank of America], including but not limited to the mortgages recorded in the Official Records of Pinellas County, Florida at OR Book 13524, Page 595.

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[1]Inland Assets is not a proper party to this appeal; it was not a party in the proceedings below. See Fla. R. App. P. 9.020(g)(2) (defining "appellee").

[2]Bank of America filed motions in both the foreclosure lawsuit and the quiet title action seeking to quash service of process and arguing that the judgments were void for lack of service on the correct Bank of America entity.

(Emphasis added.)

Notably, although the complaint to quiet title does not specify the mortgages that may be at issue or give the O.R. Book and page number of any mortgage, the judgment specifically includes the O.R. book and page number of the first mortgage held by Bank of America. The appendices provided to this court do not include a copy of the motion for final judgment in the quiet title action. Thus, it appears that Inland Assets knew it had received a windfall via the language of the final judgment of foreclosure.

On the same date that the court issued the quiet title judgment, Bank of America filed a motion to quash service of process and vacate the clerk's default. Later, Bank of America filed a rule 1.540(b) motion to set aside the quiet title judgment alleging that the quiet title judgment was void for lack of service. Both motions were denied without prejudice.

On August 21, 2013, Bank of America filed a motion to quash service of process and to vacate default and set aside the summary final judgment of foreclosure in the foreclosure action. Citing rule 1.540(b)(4), the motion alleged both that the final judgment is void for lack of service and that it is void and erroneous as a matter of law insofar as paragraph five purported to foreclose the first mortgage.

The trial court held a hearing on the motion and orally denied it, finding no issue with service of process. When asked about the ruling as to the paragraph five issue, the court stated the motion was denied on the same grounds. The trial court's written order is boilerplate and provides no findings or conclusions. Bank of America appealed that order, commencing case number 2D14-858.

During the pendency of the appeal and before it was perfected, the Association, as an appellee in the case, asked this court to relinquish jurisdiction to allow the trial court to rule on the Association's motion to amend the final judgment pursuant to rule 1.540(a), which alleged that the foreclosure judgment contained a clerical error. This court relinquished jurisdiction. Bank of America joined in the Association's rule 1.540(a) motion. At the hearing on that motion, the Association argued that the final judgment failed to delineate which of Bank of America's mortgages the Association's lien was foreclosing and that this was a clerical error or misnomer, correctable via a rule 1.540(a) motion. The trial court denied the motion, finding that the complaint "only alleged the one Bank of America O.R. book and page of the mortgage," and "that there was no additional mortgage noted in the initial complaint." Therefore, the court ruled that it would be a substantive issue to amend the final judgment and not a clerical change. The court also found that "to the extent [the Association] complains that the Final Judgment improperly purports to eliminate a first mortgage of Bank of America, the [c]ourt is persuaded that said issue has already been litigated adverse to Bank of America in [the quiet title action]." However, the only issue before the court in the quiet title action was whether service on Bank of America was proper. Bank of America appealed the court's denial of the rule 1.540(a) motion, commencing case number 2D14-4436.[3]

II. Discussion

[3]The Association also appealed the court's denial of the rule 1.540(a) motion, which is being resolved separately. Kipps Colony II Condo. Ass'n v. Knighton, No. 2D14-4110.

An order denying relief under rule 1.540(b) is generally reviewed for an abuse of discretion. Leach v. Salehpour, 19 So. 3d 342, 344 (Fla. 2d DCA 2009). But "[a] decision whether or not to vacate a void judgment is not within the ambit of a trial court's discretion; if a judgment previously entered is void, the trial court must vacate the judgment." Wiggins v. Tigrent, Inc., 147 So. 3d 76, 81 (Fla. 2d DCA 2014). Here, the trial court abused its discretion in denying Bank of America's motion as to the judgment foreclosing its first mortgage on the "same grounds" that it denied the motion based on lack of service of process. Reversal is warranted on that basis alone. However, because the court later denied the rule 1.540(a) motion based, in part, on its finding that the issue of whether the judgment was void had been resolved against Bank of America in the quiet title action, we address the merits of Bank of America's claim that the foreclosure judgment is void.

A. Priority of interests

> The priority of interests in real estate under Florida law is generally determined by the operation of three statutes. Section 28.222(2), Florida Statutes (2004), requires the clerk of the circuit court to record instruments in the official records and to "keep a register in which he or she shall enter at the time of filing the filing number of each instrument filed for record, the date and hour of filing, the kind of instrument, and the names of the parties to the instrument." Section 695.11, Florida Statutes (2004), provides that "[t]he sequence of [official register numbers required under section 28.222] shall determine the priority of recordation" so that "[a]n instrument bearing the lower number in the then-current series of numbers shall have priority over any instrument bearing a higher number in the same series." The legal significance of priority of recordation comes into play in the context of the rule established in section 695.01(1), Florida Statutes (2004), which provides as follows: "No conveyance, transfer, or mortgage of real property, or of any interest therein . . . shall be good and effectual in law or equity against creditors or subsequent

> purchasers for a valuable consideration and without notice, unless the same be recorded according to law."

City of Palm Bay v. Wells Fargo Bank, N.A., 114 So. 3d 924, 927 (Fla. 2013). Thus, "Florida is . . . a 'notice' jurisdiction, and notice controls the issue of priority." Argent Mortg. Co., LLC v. Wachovia Bank N.A., 52 So. 3d 796, 799 (Fla. 5th DCA 2010). And under a notice recording statute, "the subsequent mortgagee cannot be without constructive notice if the prior mortgage has been recorded as of the time of execution of the subsequent mortgage." Id.

"The [l]egislature has, however, provided separately for the priority of certain liens over the priority established under chapter 695." City of Palm Bay, 114 So. 3d at 928. For example, section 718.116(5)(a), Florida Statutes (2011), provides:

> The association has a lien on each condominium parcel to secure the payment of assessments. Except as otherwise provided in subsection (1) and as set forth below, the lien is effective from and shall relate back to the recording of the original declaration of condominium, or, in the case of lien on a parcel located in a phase condominium, the last to occur of the recording of the original declaration or amendment thereto creating the parcel. However, as to first mortgages of record, the [condominium association's] lien is effective from and after recording of a claim of lien in the public records of the county in which the condominium parcel is located.

(Emphasis added.)

Here, Bank of America's first mortgage was recorded at O.R. Book 13524, Page 595, on April 23, 2004. The Association's claim of lien was recorded in O.R. Book 17154, Page 711, on February 8, 2011. The Association's lien was inferior to the first mortgage held by Bank of America.

B. Foreclosure

A foreclosure extinguishes the liens of any junior mortgagees, Abdoney v. York, 903 So. 2d 981, 983 (Fla. 2d DCA 2005), but it "does not terminate interests in the foreclosed real estate that are senior to the mortgage being foreclosed," U.S. Bank Nat'l Ass'n v. Bevans, 138 So. 3d 1185, 1187 (Fla. 3d DCA 2014) (quoting Garcia v. Stewart, 906 So. 2d 1117, 1120 (Fla. 4th DCA 2005)). "A prior mortgagee may elect for himself the time and manner of enforcing his security. He cannot be compelled to be a party to a suit by a junior encumbrancer foreclosing his lien." Citimortgage, Inc. v. Henry, 24 So. 3d 641, 643 (Fla. 2d DCA 2009) (quoting Cone Bros. Constr. Co. v. Moore, 193 So. 288, 290 (Fla. 1940)); accord Futrell Custom Pools, Inc. v. Sunshine Custom Builders, Inc., 112 So. 3d 653, 653 (Fla. 5th DCA 2013) (concluding that Cone Brothers is still good law and affirming the trial court's orders vacating in part the final judgment of foreclosure).

It is on that basis that Bank of America argued that the Association's action could not foreclose Bank of America's first mortgage and that the final judgment purporting to do so is void.

> A void judgment is so defective that it is deemed never to have had legal force and effect. In contrast, a voidable judgment is a judgment that has been entered based upon some error in procedure that allows a party to have the judgment vacated, but the judgment has legal force and effect unless and until it is vacated.

Sterling Factors Corp. v. U.S. Bank Nat'l Ass'n, 968 So. 2d 658, 665 (Fla. 2d DCA 2007) (emphasis added).

Because Bank of America's first mortgage is superior to the Association's lien as a result of prior recordation of the mortgage, the final judgment of foreclosure is "ineffectual" as to Bank of America's first mortgage insofar as it states that the

Association's lien "is superior in dignity to any right, title, interest or claim" of Bank of America and that "the property will be sold free and clear of all claims of the defendants." See Citimortgage, 24 So. 3d at 643. Because paragraph five of the judgment purports to foreclose Bank of America's first mortgage by stating that the Association's lien is superior to all rights of the defendants, including Bank of America's rights as the first mortgage holder, and that the property will be sold free and clear of all claims of the defendants, the judgment is void.[4] The court lacked jurisdiction to foreclose Bank of America's first mortgage; the final judgment is legally ineffective and a nullity, creating no binding obligation. See generally Sterling Factors, 968 So. 2d at 665 (stating that "[a] void judgment is so defective that it is deemed never to have had legal force and effect" and that a trial court's lack of jurisdiction, subject matter or personal, renders a judgment void).

We recognize that our reversal of the order denying the motion for relief from judgment will directly impact Inland Asset's interest in the property. In that regard, we note that Bank of America, as a superior lien holder, was not required to litigate its interest in the Association's foreclosure action. See Wells Fargo Bank, N.A. v. Rutledge, 148 So. 3d 533, 534 (Fla. 2d DCA 2014); Bevans, 138 So. 3d at 1187 ("The

[4]There is some argument regarding whether it is only paragraph 5 that is void; however, because paragraph 5 cannot be severed from the judgment such that the judgment is effectual, it is the entire judgment that is void. Cf. Gilman Paper Co. v. Newman, 398 So. 2d 887, 888 (Fla. 1st DCA 1981) ("No error is assigned to this part of the judgment and it being severable, that portion is affirmed."); State Rd. Dep't v. Hartsfield, 216 So. 2d 61, 65 (Fla. 1st DCA 1968) ("The law is equally well settled that where a judgment in favor of a party consists of two or more separate, distinct, and unrelated parts, the disposition of any one of which will not affect the decision as to any other, the successful party may appeal from one or more of the severable portions of the judgment even though he accepts the benefits of the other portions thereof.").

Association . . . could not name a superior lienholder like the Bank as a defendant in the Association's suit to foreclose on its junior lien."). In this instance, because the Association was already a party to Bank of America's foreclosure action—and therefore did not need to otherwise intervene in the action—the Association should have recorded its statutory claim of lien and filed a cross-claim.[5]

Moreover, the quiet title judgment did not resolve this issue. Rule 1.540(b)(5) provides that the court may relieve a party from a final judgment where "a prior judgment or decree upon which [the challenged judgment] is based has been reversed or otherwise vacated." The rule also "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court."

III. Conclusion

The trial court abused its discretion in denying Bank of America's motion for relief from judgment. The final judgment of foreclosure entered in favor of the Association is void because it purported to foreclose Bank of America's superior interest in the property and ordered the sale of the property free and clear of all claims by Bank of America. On remand, the trial court is directed to grant Bank of America's motion for relief from judgment pursuant to rule 1.540(b) and to vacate the final judgment of foreclosure.

Reversed and remanded with instructions.

[5]The Association may enforce its interests in the unpaid assessments through foreclosure of its claim of lien. § 718.116(6)(a).

CASANUEVA and SALARIO, JJ., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

LUZ SANABRIA and GAETANO PIRO, Appellants, v. PENNYMAC MORTGAGE INVESTMENT TRUST HOLDINGS I, LLC, Appellee.	)	Case No. 2D15-866

Opinion filed July 15, 2016.

Appeal from the Circuit Court for Manatee County; Thomas M. Gallen, Senior Judge.

Danny E. Eskanos, Clearwater, for Appellants.

Alen H. Hsu of Blank Rome, LLP, Boca Raton; and Michelle Gevias, Paul M. Messina and Manuel S. Hiraldo of Blank Rome LLP, Tampa, for Appellee.

LUCAS, Judge.

Luz Sanabria and Gaetano Piro (the homeowners) appeal the entry of a final judgment of foreclosure in favor of Pennymac Mortgage Investment Trust Holdings I, LLC (Pennymac Trust). The homeowners raise several issues on appeal. Although

we are precluded from reaching the merits of their arguments concerning Pennymac Trust's standing, we nevertheless reverse the final judgment of foreclosure because the circuit court erroneously found that the homeowners had failed to sufficiently plead a properly raised affirmative defense challenging the authenticity of Ms. Sanabria's signature on a promissory note.

I.

In 2007, in connection with the purchase of their home in Manatee County, Ms. Sanabria executed a promissory note in favor of American Lending Group, Inc., and, along with her husband, Mr. Piro, a mortgage securing that note in favor of Mortgage Electronic Service, as nominee for American Lending Group. In February 2012, Pennymac Trust filed a complaint against the homeowners, claiming that the homeowners had defaulted on the note and that Pennymac Trust had assumed the right to enforce their note and mortgage through various assignments that, for brevity's sake, we need not recount. The complaint proceeded, in a somewhat convoluted fashion, through different iterations until it reached the operative pleading, a second amended complaint, and the plaintiff filed what purported to be a copy of the borrower's original note.[1]

[1]There was, it seems, a degree of confusion on the plaintiff's part concerning the precise "Pennymac" entity—whether it was Pennymac Trust or a similarly named (but presumably separate) entity known as Pennymac Corporation—that had the right to enforce the homeowners' note and pursue this litigation. Through pleading amendments and an order of substitution, the plaintiff's identity vacillated back and forth at various times in the case below. We cannot attempt to unravel this confusion because the homeowners failed to adequately preserve the issue of plaintiff's standing in their motion for involuntary dismissal. See Franklin v. Patterson-Franklin, 98 So. 3d 732, 738 (Fla. 2d DCA 2012) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation

In response to the second amended complaint, the homeowners alleged, as their ninth affirmative defense, the following:

> With regard to all counts of the Complaint, the Plaintiff's claims are barred in whole or in part because the Defendants affirmatively question the veracity and authenticity of any possible endorsement made on any purported note or allonge the Plaintiff may produce pursuant to Fla. Stat. § 673.3081 (2011), assuming, without conceding, that such endorsement exists. Specifically, the Defendants question the veracity and authenticity of any possible endorsement because: (1) there is no mention in the Complaint as to who the endorser is; (2) there is no mention in the Complaint as to what authority the purported endorser may so endorse, (3) the indorsement wasn't on the documents attached to the original complaint, and (4) *the copy of the note attached to the complaint does not contain Defendant's signature and is not the note signed by Defendant*.

(Emphasis added.) Pennymac Trust filed a reply to this defense which, with respect to the issue of Ms. Sanabria's signature, asserted that the homeowners had failed to plead an issue of "fraud" with sufficient particularity and that there is no proof "that any signature . . . is fraudulent." The case then proceeded to a nonjury trial on October 14, 2014.

The homeowners' case-in-chief focused squarely on their claim that Pennymac Trust's note was not the one Ms. Sanabria signed. The homeowners called as a witness Michael Infanti, Esq., an attorney with the law firm that had performed their original mortgage closing when they purchased the home. Mr. Infanti produced a copy

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if it is to be considered preserved." (quoting Sunset Harbour Condo. Ass'n v. Robbins, 914 So. 2d 925, 928 (Fla. 2005))). We trust that, on remand, the circuit court will attend to the question of the plaintiff's standing at the time the lawsuit was filed, should it be raised again. See Corrigan v. Bank of America, N.A., 41 Fla. L. Weekly D345, D346 (Fla. 2d DCA Feb. 5, 2016). For ease of reference, in this opinion we will simply refer to the plaintiff below as Pennymac Trust, the appellant in the case at bar.

of the note kept by his law firm from the closing. The copy of the note produced by Mr. Infanti contained five pages, with Ms. Sanabria's signature appearing on the fifth page. In contrast, the copy of the note produced by Pennymac Trust contained six pages, and Ms. Sanabria's signature appeared on the sixth page. Ms. Sanabria then testified that the signature and initials appearing on Pennymac Trust's copy of the note were not hers and that its note contained different language than what was in Mr. Infanti's copy of the note. Finally, the homeowners attempted to call as an expert witness a forensic document examiner, Ms. Jean J. Berrie-Perrino. The court precluded Ms. Berrie-Perrino from testifying, ruling that the homeowners' defense had not been adequately pleaded. According to the court, the homeowners had essentially waived any defense regarding the authenticity of the note's signature by failing to specifically plead that issue, citing in support of its ruling the case of Riggs v. Aurora Loan Servs., LLC, 36 So. 3d 932 (Fla. 4th DCA 2010). However, the homeowners proffered the substance of Ms. Berrie-Perrino's testimony, which would have been that Ms. Sanabria's signature on Pennymac Trust's copy of the note and the signature of Ms. Sanabria on Mr. Infanti's copy of the note from the closing were not executed by the same person.

II.

The circuit court's ruling, which deemed the homeowners' authenticity defense as having been improperly pleaded, was premised on the sufficiency of their pleading. We review such an issue de novo. See Ladner v. AmSouth Bank, 32 So. 3d 99, 103 (Fla. 2d DCA 2009) ("The determination of the sufficiency of a pleading is a matter of law and subject to a de novo review."); Mercedes Lighting & Elec. Supply, Inc. v. Dep't of Gen. Servs., 560 So. 2d 272, 277 (Fla. 1st DCA 1990) ("[A] decision whether

a pleading or motion is legally sufficient involves a question of law subject to de novo review by the appellate court.").

Throughout the proceedings below and in this appeal, the parties and the circuit court have framed the sufficiency of the homeowners' defense in terms of section 673.3081, Florida Statutes (2012). Cf. Riggs, 36 So. 3d at 933 (quoting statute and affirming summary judgment in favor of loan servicing company where authentication of the note was not at issue). That statute, a part of Florida's Uniform Commercial Code, includes what is arguably a heightened civil pleading requirement when a dispute over a signature's authenticity is raised in connection with a negotiable instrument such as a mortgage note. Section 673.3081(1) reads, in relevant part:

> In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted *unless specifically denied in the pleadings*. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature.

(Emphasis added.)

Pennymac Trust likens the statute's passing reference to "specifically" denying a signature's authenticity to the specificity required to plead a cause of action for fraud under Florida Rule of Civil Procedure 1.120(b): "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit." The circuit court—and to a large measure, the homeowners, as well—appeared to accept Pennymac Trust's underlying premise that section 673.3081(1) alters civil pleading practice by imposing a heightened

specificity requirement when the authenticity of a note's signature is challenged. Proceeding under that assumption, the homeowners argue that they met this heightened standard of pleading with their ninth affirmative defense.

At the outset, we note the peculiar dilemma of applying a statutory provision that purports to prescribe an aspect of civil practice or procedure. Cf. Massey v. David, 979 So. 2d 931, 937 (Fla. 2008) ("Moreover, where [the Florida Supreme Court] has promulgated rules that relate to practice and procedure, and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict."); Caple v. Tuttle's Design-Build, Inc., 753 So. 2d 49, 53 (Fla. 2000) ("The distinction between substantive and procedural law is neither simple nor certain . . . ."); In re Commitment of Cartwright, 870 So. 2d 152, 158 (Fla. 2d DCA 2004) ("The fact that a statutory provision could appropriately be labeled 'procedural' does not necessarily mean that it violates article V, section 2(a) [of the Florida constitution]."); Adhin v. First Horizon Home Loans, 44 So. 3d 1245, 1251 (Fla. 5th DCA 2010) (recognizing that where "a statute contains some procedural aspects, but those provisions are intimately intertwined with the substantive rights created by the statute, the statute will not be viewed as impermissibly intruding on the practice and procedure of the courts in a constitutional sense").[2]

Regardless, under either a general or a heightened, "specific" pleading standard, we are satisfied that the authenticity of Ms. Sanabria's signature was an issue

[2]We note that nothing within rule 1.110 (governing answers), rule 1.120 (pleading "special matters," including fraud), or the relatively recently enacted rule 1.115 (pleading mortgage foreclosures) mentions a heightened or more specific pleading standard in cases where a litigant wishes to challenge the authenticity of a signature.

that was adequately pleaded and presented for adjudication. None of the cases Pennymac Trust cites in support of affirmance persuades us otherwise. Indeed, the few Florida decisions to address the pleading requirement that section 673.3081(1) appears to impose only arise in the context of a defendant who failed to plead the issue of authenticity as an affirmative defense. See, e.g., Davis v. Timeshare Travel Int'l, Inc., 489 So. 2d 47, 48-49 (Fla. 2d DCA 1986) (noting, in dicta, that guarantor's equivocating testimony about her signature could not overcome statutory presumption of its validity where she had only pleaded a general denial to the lender's claims within her answer); Riggs, 36 So. 3d at 933 ("Nothing in the pleadings placed the authenticity of Alday's signature at issue."); Lipton v. Se. First Nat'l Bank of Miami, 343 So. 2d 927, 928 (Fla. 3d DCA 1977) (holding that general denials in response to a bank's complaint failed to meet the requirements of section 673.307(1) and so the borrower's signatures were deemed admitted); Ferris v. Nichols, 245 So. 2d 660, 661 (Fla. 4th DCA 1971) (observing that defendant, who asserted no affirmative defenses, failed to plead the issue of a signature's authenticity; "[h]ad the defendant desired to deny that he signed the note, he should have done so by a specific denial addressed to the appropriate allegations in the complaint").

Here, however, the homeowners fashioned an affirmative defense that plainly denied the authenticity of Ms. Sanabria's signature on a specific document: "the copy of the note attached to the complaint does not contain Defendant's signature and is not the note signed by Defendant." The court and the parties were adequately apprised by this defensive pleading that the homeowners were challenging the veracity of Ms. Sanabria's signature on the note Pennymac Trust sought to enforce in

foreclosure. Cf. VonDrasek v. City of St. Petersburg, 777 So. 2d 989, 991 n.1 (Fla. 2d DCA 2000) (quoting commentary to rule 1.110: "The contents of a pleading . . . should clearly and adequately inform the judge and the opposing party . . . of the position of the pleader"). The homeowners sufficiently alleged their denial of a signature's authenticity in their affirmative defense, and they were entitled to have that issue decided in their case.

III.

The circuit court erred when it ruled that the issue of Ms. Sanabria's signature's authenticity had not been adequately pleaded for the court's determination. Accordingly, we reverse the final judgment of foreclosure and remand this case for further proceedings.

Reversed and remanded.

CRENSHAW, J., Concurs.
KHOUZAM, J., Concurs specially with opinion.

KHOUZAM, Judge, Concurring specially.

I agree fully with the result of the majority opinion. I write only to note that the majority's discussion of the constitutionality of section 673.3081(1) has no bearing on the outcome of this case in light of our determination that the homeowners sufficiently raised and pleaded their authenticity defense under either pleading standard.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

MICHEAL ALUIA, Appellant, v. DYCK-O'NEAL, INC., Appellee.	)	Case No. 2D15-2059

Opinion filed July 15, 2016.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Lee County; Michael T. McHugh, Judge.

David W. Fineman of The Dellutri Law Group, P.A., Fort Myers, for Appellant.

Susan B. Morrison of Law Office of Daniel C. Consuegra, P.L., Tampa (withdrew after briefing); Susan B. Morrison of Law Office of Susan B. Morrison, P.A., Tampa (substituted as counsel of record), for Appellee.

BLACK, Judge.

Micheal Aluia appeals the order denying his motion to dismiss Dyck-O'Neal, Inc.'s action seeking a deficiency decree. He contends that pursuant to the federal Fair Debt Collection Practices Act proper venue is in Michigan and not Florida.

Dyck-O'Neal, Inc. (DONI), brought an action for a deficiency decree against Mr. Aluia based on a Florida final judgment of foreclosure, the sale price of Mr. Aluia's vacation home in Florida, and the property's appraised value. In its complaint, DONI alleged that a final judgment of foreclosure was entered in the amount of $299,252.95, the property was sold for $100, and the property has an appraised value of $115,000. DONI further alleged that subsequent to the foreclosure sale, the final judgment was assigned to it from the original judgment creditor. A copy of the assignment of the judgment was attached to the complaint, along with the final judgment. The final judgment of foreclosure provides that the circuit court retained jurisdiction to enter deficiency judgments. DONI initiated its action pursuant to section 702.06, Florida Statutes (2014).

Mr. Aluia filed a motion to dismiss the complaint, alleging improper venue. He argued that venue in Florida was improper pursuant to the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (2014) (FDCPA). A hearing was held on Mr. Aluia's motion, and the court denied it.[1] The order denying the motion did not include any findings or conclusions and stated only that the motion to dismiss was denied.

Mr. Aluia contends on appeal, as he did in his motion to dismiss below, that the FDCPA's venue provision requires DONI to bring its deficiency judgment action in Michigan where Mr. Aluia "signed the contract sued upon" and where he resides. Mr. Aluia alleges that he is a resident of Michigan and that the note and mortgage were

[1]We have not been provided with a transcript of the hearing. Mr. Aluia contends, and we agree, that a transcript is unnecessary to resolve the legal question presented.

executed in Michigan. He also contends that DONI is a debt collector under the terms of the FDCPA and that the suit for a deficiency decree is a legal action on a consumer debt under the terms of the FDCPA.

The circuit court correctly denied Mr. Aluia's motion. His argument fails for multiple reasons.

Florida's general venue provision, section 47.011, Florida Statutes (2014), provides that "[a]ctions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located. This section shall not apply to actions against nonresidents." "[B]y removing nonresidents from the scope of the legislatively created venue privilege, a nonresident over whom personal jurisdiction can be obtained consistent with constitutional considerations can, at a plaintiff's election, be sued in any county in this state, subject only to the doctrine of forum non conveniens." Metnick & Levy, P.A. v. Seuling, 123 So. 3d 639, 642 (Fla. 4th DCA 2013) (quoting Holton v. Prosperity Bank of St. Augustine, 602 So. 2d 659, 662 n.2 (Fla. 5th DCA 1992)).

Here, "the well-pleaded allegations of the amended complaint," which were undisputed by Mr. Aluia's verified motion to dismiss, "were sufficient to bring the action within the ambit of Florida's long-arm statute—section 48.193, Florida Statutes. Federal due process concerns were satisfied by [Mr. Aluia's] prior conduct, the final judgment of foreclosure, and the foreseeable future consequence of a deficiency judgment." See Dyck-O'Neal, Inc. v. Huthsing, 181 So. 3d 555, 555 (Fla. 1st DCA 2015); see also § 48.193(1)(a)(3), Fla. Stat. (2014) ("A person . . . submits himself . . . to the jurisdiction of the courts of this state for any cause of action arising from . . .

[o]wning, using, possessing, or holding a mortgage or other lien on any real property within this state."). Mr. Aluia reasonably should have anticipated "being haled into court" in this state. See Huthsing,181 So. 3d at 555 (quoting Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 500 (Fla. 1989)); see also Hilltopper Holding Corp. v. Estate of Cutchin, 955 So. 2d 598, 601 (Fla. 2d DCA 2007) (stating that constitutional due process requirements are satisfied where the defendant "has committed acts with an effect in Florida such that [he] would anticipate being haled into Florida's courts" (first citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); and then citing Res. Healthcare of Am., Inc. v. McKinney, 940 So. 2d 1139, 1141 (Fla. 2d DCA 2006))). Thus, the circuit court has personal jurisdiction over Mr. Aluia, and venue is proper in Lee County where the deficiency action was filed. See Metnick & Levy, 123 So. 3d at 642; see also Holt v. Wells Fargo Bank, N.A., 32 So. 3d 194, 195 (Fla. 4th DCA 2010) (concluding that circuit court had personal jurisdiction over defendant for purposes of deficiency judgment).

Moreover, although not argued by DONI, it is apparent that Mr. Aluia's motion was also correctly denied based on the retention of jurisdiction in the final judgment of foreclosure. Florida's deficiency decree statute, section 702.06 "binds a plaintiff [in a mortgage foreclosure action] to a deficiency decree once the plaintiff sets the deficiency process in motion, but expressly provides that 'the complainant shall also have the right to sue at common law to recover such deficiency,' " except in one limited circumstance. Royal Palm Corp. Ctr. Ass'n, Ltd. v. PNC Bank, NA, 89 So. 3d 923, 931 (Fla. 4th DCA 2012) (quoting § 702.06, Fla. Stat. 2008)). It would defy logic to say that—solely because DONI elected to file the statutorily permitted independent action to

pursue the deficiency—venue no longer lies in Florida but that if DONI had been substituted party plaintiff in the foreclosure action and filed its motion for deficiency therein venue in Florida would be indisputable.[2] Venue cannot simply be "lost" because DONI brought a new action to recover the deficiency rather than proceeding within the foreclosure suit.

Our conclusion that venue lies in Lee County is unchanged by consideration of Mr. Aluia's argument regarding the venue provision of the FDCPA. As Mr. Aluia points out, the Florida Legislature has expressly stated that Florida courts should give effect to the FDCPA:

> Nothing in this part shall be construed to limit or restrict the continued applicability of the federal Fair Debt Collection Practices Act to consumer collection practices in this state. This part is in addition to the requirements and regulations of the federal act. In the event of any inconsistency between any provision of this part and any provision of the federal act, the provision which is more protective of the consumer or debtor shall prevail.

§ 559.552, Fla. Stat. (2014). The Florida Consumer Collection Practices Act, §§ 559.55-.785, does not have a venue provision. However, the venue provision of the FDCPA, 15 U.S.C. § 1692i, provides, in relevant part:

> (a) Venue
>
> Any debt collector who brings any legal action on a debt against any consumer shall—

[2]The assignee of a final judgment which includes a reservation of jurisdiction to enter a deficiency may be substituted as a party plaintiff to proceed with a deficiency claim in the foreclosure lawsuit. See One S. Ocean Drive 2000, Ltd. v. One Ocean Boca, LLC, 182 So. 3d 872, 874 (Fla. 4th DCA 2016); cf. Barry v. Vantium Capital, Inc., 40 Fla. L. Weekly D2075 (Fla. 2d DCA Sept. 4, 2015); SVI Capital, LLC v. Coon, 182 So. 3d 932 (Fla. 4th DCA 2016).

> (1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or
>
> (2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity—
>
> (A) in which such consumer signed the contract sued upon; or
>
> (B) in which such consumer resides at the commencement of the action.

By it terms, the FDCPA's venue provision governs legal action "on a debt" brought by a "debt collector." "Debt" is defined by the FDCPA as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5).

> [T]he FDCPA applies "only when an obligation to pay arises out of a specified transaction." Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1371 (11th Cir. 1998); see also Oppenheim [v. I.C. Sys., Inc.], 627 F.3d [833,] 837 [(11th Cir. 2010)] ("The statute thus makes clear that the mere obligation to pay does not constitute a 'debt' under the FDCPA.").

Surber v. McCarthy, Burgess & Wolff, Inc., No. 15-12296, 2015 WL 9583479, at *1 (11th Cir. Dec. 31, 2015). And "at a minimum, a 'transaction' under the FDCPA must involve some kind of business dealing or other consensual obligation." Oppenheim, 627 F.3d at 838 (quoting Hawthorne, 140 F.3d at 1371).

The FDCPA defines "debt collector," in pertinent part, as "any person who [(1)] uses any instrumentality of interstate commerce or the mails in any business the

principal purpose of which is the collection of any debts, or [(2)] who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6) (emphasis added).

Mr. Aluia claims the deficiency judgment suit is a legal action on a debt because the note secured by the mortgage meets the FDCPA's definition of debt. We disagree. A deficiency suit is not a "legal action on" the note; it is an action on the final judgment of foreclosure. The final judgment of foreclosure is not "an obligation . . . of a consumer to pay money," nor does it arise from a business dealing or consensual obligation. The final judgment of foreclosure is a judgment in rem or quasi in rem which arises from the foreclosure proceeding. As such, the venue provision of the FDCPA does not apply to a claim for a deficiency decree.

Under Florida law, a suit for a deficiency decree is an equitable action on the final judgment entered in a foreclosure action in the state where the real property at issue is located. See Royal Palm, 89 So. 3d at 932 (stating that a plaintiff may bring a "separate law action[] on the foreclosure judgment[] for the deficiency" (emphasis added)); see also § 702.06. The suit for deficiency is an action to enforce or satisfy the final judgment of foreclosure, which encompassed both a remedy at law and the equitable remedy of mortgage foreclosure, directing the sale of real property. See Grand Cent. at Kennedy Condo. Ass'n, Inc. v. Space Coast Credit Union, 173 So. 3d 1089, 1091 (Fla. 2d DCA 2015) (agreeing with the Third District's conclusion that the language in a final judgment of foreclosure "retained jurisdiction to enforce—via writs of possession and deficiency judgments—the final judgment entered in the matter" (quoting Cent. Mortg. Co. v. Callahan, 155 So. 3d 373, 376 (Fla. 3d DCA 2014))).

"Once a trial court enters judgment of foreclosure, the judgment 'fixe[s] the validity, priority and extent of [the] debt.' No additional proof of the debt amount is necessary." TD Bank, N.A. v. Graubard, 172 So. 3d 550, 553 (Fla. 1st DCA 2015) (alterations in original) (quoting Ahmad v. Cobb Corner, Inc., 762 So. 2d 944, 946-47 (Fla. 4th DCA 2000)). Thus, the final judgment of foreclosure itself is the alleged obligation at issue in the deficiency proceeding. Id. at 554.

That judgment is not, however, an obligation to pay money. A judgment of foreclosure is a judgment in rem or quasi in rem that directs the sale of the mortgaged property to satisfy the mortgagee's lien. See generally Georgia Cas. Co. v. O'Donnell, 147 So. 267, 292 (Fla. 1933). As such, it "applies only to the property secured by the mortgage, and does not impose any personal liability on the mortgagor." Royal Palm, 89 So. 3d at 929-30 (quoting Kepler v. Slade, 896 P. 2d 482, 485 (N.M. 1995)). To obligate the mortgagor to pay money, the mortgagee must seek the legal remedy of a deficiency decree based on the judgment of foreclosure.

Thus, the deficiency proceeding, rather than being an action on a consumer debt that has been reduced to judgment, is actually an action to enforce the result of a foreclosure proceeding and obtain a money judgment. See Royal Palm, 89 So. 3d at 928, 929-30; cf. § 45.031(1)(a), Fla. Stat. (2014); Whitehurst v. Camp, 699 So. 2d 679, 682 (Fla. 1997) ("Thus, upon the entry of the judgment, the judgment does not bear interest as a debt or a cause of action, but as a judgment. As a result, on entry of the judgment the lender can no longer charge the contractual interest, but is entitled only to statutory interest." (emphasis omitted) (citing Sciandra v. First Union Nat'l Bank of Fla., 638 So. 2d 1009, 1010 (Fla. 2d DCA 1994) (Altenbernd, J., concurring))). This

is unique to mortgage foreclosure cases and is unlike the reduction to judgment of a consumer debt unrelated to real property that is directly converted from that debt to a money judgment upon it. See § 702.01 ("All mortgages shall be foreclosed in equity."); cf. ch. 55, Fla. Stat. (2014); § 56.29, Fla. Stat. (2014). "Before a cause of action for deficiency can accrue, there must be a final judgment of foreclosure and a sale of the assets to be applied to the satisfaction of the judgment." Chrestensen v. Eurogest, Inc., 906 So. 2d 343, 345 (Fla. 4th DCA 2005); see also Singelton v. Greymar Assocs., 882 So. 2d 1004, 1007 (Fla. 2004) (stating that "a necessary predicate for a deficiency is an adjudication of foreclosure" (quoting Capital Bank v. Needle, 596 So. 2d 1134, 1138 (Fla. 4th DCA 1992))).

The final judgment is the instrument on which the deficiency action is based because the note and mortgage merge into the foreclosure judgment where the foreclosure suit is both an action at law for the balance due under the note and an action in equity to foreclose the mortgage. See Manley v. Union Bank of Fla., 1 Fla. 160, 214 (Fla. 1846) ("[A] [person entitled to enforce the note] has, at common law, three remedies, all of which he may pursue at the same time, viz: that he may bring suit at law, upon the bond or note secured by the mortgage; institute an action of ejectment, to put himself in possession of the rents and profits of the estate[;] and file a bill in Chancery, to foreclose the mortgage." (emphasis added)); Royal Palm, 89 So. 3d at 929-30 (concluding that the action on a promissory note and the action to foreclose the mortgage may be done simultaneously in one action, as is the common case in Florida, leaving only the deficiency action if the sale fails to satisfy the final judgment). "The doctrine of merger provides that when a valid and final judgment is rendered in favor of

a plaintiff, the original debt or cause of action upon which an adjudication is predicated merges into the final judgment, and, consequently, the cause's independent existence terminates." Weston Orlando Park, Inc. v. Fairwinds Credit Union, 86 So. 3d 1186, 1187 (Fla. 5th DCA 2012); cf. § 702.08 ("Whenever a decree of foreclosure has been so rescinded, vacated, and set aside . . . the mortgage, together with its lien and the debt thereby secured, shall be, both in law and equity, . . . fully restored in all respects to the original status of the same . . . .").

"Thus, any action based upon the mortgage note in this case was extinguished by the judgment of foreclosure and, consequently, an action for deficiency is not based upon the mortgage note, but instead arises from the final judgment entered and subsequent foreclosure sale." Chrestensen, 906 So. 2d at 345 n.4; see also Weston Orlando Park, 86 So. 3d at 1187 ("[A] subsequent action for the same cause on the notes and mortgages is barred."); One 79th St. Estates, Inc. v. Am. Inv. Servs., 47 So. 3d 886, 889 (Fla. 3d DCA 2010) (citing Nack Holdings, LLC v. Kalb, 13 So. 3d 92, 94 n.2 (Fla. 3d DCA 2009)); see also Whitehurst, 699 So. 2d at 682 (applying the doctrine of merger in foreclosure actions).[3] The action to enforce the note and foreclose

[3]We are cognizant of federal district court opinions finding either that "the doctrine of merger does not apply to mortgages or affect the enforceability of a mortgage obligation," Rojas v. Law Offices of Daniel C. Consuegra, P.L., No: 6:14-cv-1374-Orl-22GJK, 2015 WL 6777609, at *4 (M.D. Fla. Apr. 22, 2015) (quoting Restatement (Third) of Prop.: Mortgs. § 8.5 (1997)), or that "[t]he doctrine of merger notwithstanding, however, Florida courts have made clear that a deficiency action is a separate action 'to collect the balance due *under the note*,' " Huthsing v. Law Offices of Daniel C. Consuegra, P.L., No: 8:14-cv-2694-T-36JSS, 2015 WL 6777466, at *2 (M.D. Oct. 27, 2015) (quoting Clements v. Leonard, 70 So. 2d 840, 844 (Fla. 1954)). However, the cases relied upon in the federal decisions are cases where only one of a mortgagee's remedies was sought—foreclosure of the mortgage—see, e.g., Clements, 70 So. 2d 840; Gober v. Braddock, 131 So. 407 (Fla. 1930), cases where personal guarantees also secured the debt, see Weston Orlando Park, 86 So. 3d at 1187, or are

the mortgage concluded in the entry of the final judgment that, by its terms, accounted for the payments made under the note prior to default and orders the sale of the property; it is therefore not the same debt evidenced by the note. Cf. Royal Palm, 89 So. 3d at 933 (discussing Farah v. Iberia Bank, 47 So. 3d 850 (Fla. 3d DCA 2010), and distinguishing between money judgments and foreclosure judgments). The final judgment is a foreclosure decree and judgment, establishing an obligation independent of the mortgage and note.[4] See T.D. Bank, 172 So. 3d at 553.

That the final judgment of foreclosure is the instrument on which the action is based is supported by the requirements to obtain a deficiency judgment. A plaintiff seeking a deficiency must establish "1) entry of final judgment of foreclosure; 2) sale of the foreclosed property pursuant to the judgment; [and] 3) issuance of a certificate of title for the property." Frohman v. Bar-Or, 660 So. 2d 633, 636 (Fla. 1995). Where a motion for deficiency decree is filed in the original foreclosure case, the plaintiff must also establish "a reservation of jurisdiction by the trial court for later determination of a deficiency judgment." Id. A deficiency judgment is calculated by subtracting the fair market value of the property, as determined by the court, from the amount of the final

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otherwise factually distinguishable. And "[a]lthough the reporters of the Restatement seem to believe that section 702.06 is something of a one-action rule, see Restatement (Third) of Property (Mortgages) § 8.2 cmt. b (1997), neither its language nor its history or purpose support that reading." Royal Palm, 89 So. 3d at 931. Notably, neither Rojas nor Huthsing cite Royal Palm or Whitehurst. Nor do they cite any of the Florida cases stating that a deficiency action is an action on the final judgment.

[4]The final judgment is the resolution of the foreclosure of the mortgage, an action in equity, and the enforcement of the note, an action at law. The mortgage and note cannot be "unmerged" for any purpose absent a setting aside of the final judgment pursuant to section 702.08.

judgment. Empire Developers Grp., LLC v. Liberty Bank, 87 So. 3d 51, 53 (Fla. 2d DCA 2012).[5]

Mr. Aluia's motion was also correctly denied because he failed to sufficiently plead and prove that DONI is a "debt collector" as defined within the FDCPA. See Inverness Coca–Cola Bottling Co. v. McDaniel, 78 So. 2d 100, 102 (Fla. 1955) (stating that a defendant challenging the plaintiff's venue selection has "the burden of pleading and proving that the venue is improper"); Loiaconi v. Gulf Stream Seafood, Inc., 830 So. 2d 908, 909-10 (Fla. 2d DCA 2002) (same). Notwithstanding the fact that, under Florida law, "a foreclosure judgment is a judicial document ending the lender-borrower relationship and imposing the even less cordial status of judgment creditor and judgment debtor upon the parties," Nack Holdings, 13 So. 3d at 96, Mr. Aluia did not allege that DONI's principal purpose is the collections of any debts, see Davidson v. Capital One Bank (USA), N.A., 797 F.3d 1309, 1313 (11th Cir. 2015). And because the deficiency sought is owed to DONI and not another, the second definition of "debt collector" under the FDCPA is inapplicable. See id. at 1315-16.

Based on the foregoing, we affirm the denial of the motion to dismiss.

KHOUZAM and SALARIO, JJ., Concur.

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[5]While we agree that the monetary portion of the final judgment of foreclosure is based in part on the debt owed on the promissory note, see Baggett v. Law Offices of Daniel C. Consuegra, P.L., No. 3:14-cv-1014-J-32PDB, 2015 WL 1707479, at *5 (M.D. Fla. Apr. 15, 2015), it is apparent that the final judgment "seeks" nothing and that the promissory note is irrelevant to the plaintiff's burden of proof in a deficiency action.

Third District Court of Appeal

State of Florida

Opinion filed July 13, 2016.
Not final until disposition of timely filed motion for rehearing.

No. 3D15-1565
Lower Tribunal No. 14-23118

Annex Industrial Park, LLC,
Appellant,

vs.

Corner Land, LLC, et al.,
Appellees.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Antonio Marin, Judge.

Armas Bertran, and J. Alfredo De Armas and Eduardo E. Bertran, for appellant.

Taylor Espino Vega & Touron, P.A., and Alejandro Espino and Vanessa A. Van Cleaf; Gaebe, Mullen, Antonelli & DiMatteo, and Elaine D. Walter and Mark R. Antonelli, for appellees.

Before ROTHENBERG, SALTER and SCALES, JJ.

SCALES, J.

Appellant, defendant below, Annex Industrial Park, LLC appeals the trial court's non-final order that granted Appellee, plaintiff below, Corner Land, LLC's motion for a temporary injunction. We affirm the trial court's order and write only to clarify that a trial court does not abuse its discretion by enjoining an alleged continuing trespass, even if the injunction disturbs, rather than preserves, the status quo.

I. Facts

The relevant facts are not in dispute. Annex and Corner Land own adjacent commercial parcels in Hialeah, Florida. For several years, Annex, with the permission of Corner Land (and its predecessors), used a portion of Corner Land's property for vehicular access to Annex's heavy-equipment storage business.

In September of 2014, Corner Land withdrew its permission and demanded that Annex cease and desist Annex's use of Corner Land's property. Annex continued to use Corner Land's property, and Corner Land filed suit in circuit court seeking damages and a permanent injunction. Corner Land also filed a motion for a temporary injunction seeking to enjoin Annex's use of Corner Land's property through and until the conclusion of the case.

In July of 2015, the trial court conducted a three-day evidentiary hearing on Corner Land's motion and entered the order on appeal that temporarily enjoined

Annex from using Corner Land's property.[1] We have jurisdiction pursuant to rule 9.130(a)(3)(B) of the Florida Rules of Appellate Procedure.

II. Standard of Review

Normally, we review a trial court's grant of a temporary injunction under an abuse of discretion standard. Bay N Gulf, Inc. v. Anchor Seafood, Inc., 971 So. 2d 842, 843 (Fla. 3d DCA 2007). When the trial court's decision is based purely on a question of law, however, de novo review is appropriate. Rangel v. Torres, 77 So. 3d 708, 709 (Fla. 3d DCA 2011).

Urging us to employ a de novo review of the temporary injunction, Annex asserts that a temporary injunction is appropriate only to *preserve* the status quo, and, because the injunction in this case *alters*, rather than preserves, the status quo, this Court must reverse the trial court's temporary injunction as a matter of law. Corner Land argues that when, as here, maintaining the status quo results in a continuing trespass, a trial court may enjoin the alleged unauthorized use, so long as the trial court does not abuse its discretion.

We agree with Corner Land in this regard and review the instant injunction under the abuse of discretion standard.

III. Analysis

[1] The trial court's order required Corner Land to post a $217,000.00 bond to compensate Annex in the event the trial court ultimately determined that the temporary injunction had been improperly entered.

Annex's principal argument is that the exclusive purpose of a temporary injunction is to preserve the status quo until the trial court can conduct a final hearing to resolve the parties' dispute. Annex argues that, because Annex has used Corner Land's property for several years, the trial court's temporary injunction upends, rather than preserves, the status quo. Admittedly, on its face, Annex's argument is persuasive. See Tamiami Trail Tours, Inc. v. Greyhound Lines, Inc., 212 So. 2d 365, 367 (Fla. 4th DCA 1968) (reversing an injunction enjoining a bus company from operating between two Florida cities because the effect of the injunction was to disturb rather than preserve the status quo).

Under the unique facts and circumstances of this case, however, Annex's argument too narrowly defines the contours of Florida's temporary injunction applicability. Corner Land argues, and we agree, that a temporary injunction may also be entered to protect a party's private property rights when, as here, the temporary injunction prevents an alleged ongoing trespass. The trial court does not abuse its discretion by entering the injunction even if the injunction effectively disrupts, rather than preserves, the status quo.

A temporary injunction may be entered to protect a property owner's right to use its land, and exclude unauthorized persons from interfering with that right. See Fla. Action Films, Inc. v. Green E. No. 2, Ltd., 29 So. 3d 471 (Fla. 3d DCA 2010) (Mem) (affirming injunction against admittedly continuing trespass over appellee's

land); see also N. Dade Water Co. v. Adken Land Co., 114 So. 2d 347 (Fla. 3d DCA 1959) (affirming temporary injunction enjoining a continuous trespass that interfered with plaintiff's ownership rights); Pena v. Le Comte, 35 S.W. 2d 252 (Tex. Civ. App. 1931) (upholding temporary injunction in favor of appellee where appellant could not demonstrate any legal right to the use of appellee's land).

In this case, after conducting an exhaustive evidentiary hearing, the trial court determined that, after Corner Land had affirmatively withdrawn its consent, Annex's continued use of Corner Land's property was unauthorized. Once the trial court made that determination, it was incumbent upon the trial court to balance the preservation of the status quo (i.e., Annex's unauthorized use of Corner Land's property), against Corner Land's right to exclude others from using its property.

On this record, despite the injunction's disruption of the status quo, we certainly cannot say the trial court abused its discretion by protecting Corner Land's property rights, and enjoining what it determined was Annex's unauthorized use of Corner Land's property.

Affirmed.

Third District Court of Appeal

State of Florida

Opinion filed July 13, 2016.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-1403
Lower Tribunal No. 12-41663

Medley Plaza, Inc.,
Appellant,

vs.

The Rama Fund, LLC, etc., et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Samantha Ruiz-Cohen, Judge.

Thomas Neusom (Fort Lauderdale), for appellant.

Holland & Knight LLP, and Joaquin J. Alemany and Frances G. De La Guardia, for appellee The Rama Fund, LLC.

Before ROTHENBERG, LAGOA, and LOGUE, JJ.

LOGUE, J.

Medley Plaza, Inc., appeals a final summary judgment. We dismiss the case for lack of jurisdiction because the notice of appeal was filed outside the jurisdictional time limits established by Florida Rule of Appellate Procedure 9.110(b).

Unlike some rules that require a party to act within a specified time of service, Rule 9.110(b) requires a notice of appeal from a final order be filed within thirty days of the rendition of the order being appealed. "The time for taking an appeal is a jurisdictional requirement established by Florida Rule of Appellate Procedure 9.110(b). Where the notice of appeal is not filed within thirty days of rendition, the appellate court is precluded from exercising jurisdiction over the appeal." Am. Auto. Ass'n v. C.D.S. Towing & Recovery Inc., 805 So. 2d 1064, 1065 (Fla. 3d DCA 2002) (citation and quotation omitted).

Summary judgment was entered against Medley Plaza on March 10, 2016. Within fifteen days, Medley Plaza filed a timely motion for rehearing which tolled the rendition of the judgment and the time for filing an appeal. Fla. R. App. P. 9.020(i). On May 2, 2016, however, the trial court denied rehearing. Medley Plaza did not file its notice of appeal until thirty-five days later on June 6, 2016.

Medley Plaza argues that Florida Rule of Judicial Administration 2.514(b) provides an additional five days to file the notice of appeal. Rule 2.514(b) reads "[w]hen a party may or must act within a specified time after service and service is

made by mail or e-mail, 5 days are added after the period that would otherwise expire." Medley Plaza's reliance on rule 2.514(b) is misplaced. The additional five days provided by rule 2.514(b) does not operate to extend the time to file a notice of appeal. Instead, as this court has previously explained:

> The additional five-day time period applies when another rule requires a party to act within a specified time after service. Rule 2.514(b) affords no additional time when a rule … requires a party to act within a specified time after rendition of an order.

Miccosukee Tribe of Indians of Fla. v. Lewis, 122 So. 3d 504, 506 (Fla. 3d DCA 2013).

Because Medley Plaza filed its notice of appeal on June 6, 2016, thirty-five days after rendition of the order denying rehearing, the notice of appeal is untimely.

Dismissed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

WELLS FARGO BANK, N.A., as **TRUSTEE OF WAMU MORTGAGE PASS-THOUGH CERTIFICATES SERVICES 2005-PR4,**
Appellant,

v.

HILARY A. WILLIAMSON a/k/a **HILLARY A. WILLIAMSON** a/k/a **H. WILLIAMSON,** et al.,
Appellee.

No. 4D15-286

[July 13, 2016]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; George A. Shahood, Senior Judge; L.T. Case No. 432010CA001564.

Andrew B. Boese of Leon Cosgrove, LLC, Coral Gables, for appellant.

Justin S. Orosz of The Ticktin Law Group, PLLC, Deerfield Beach, for appellee.

MAY, J.

The bank appeals an order granting a motion to dismiss and entering final judgment for the borrower. The bank argues the trial court erred in three ways: (1) dismissing the complaint based on the doctrine of unclean hands; (2) finding the bank knew or should have known of the original lender's bad acts; and (3) precluding the bank's ability to pursue an action on the note. We agree and reverse.

The bank filed a one-count complaint to foreclose the mortgage after the borrower defaulted on the loan. The borrower answered and asserted affirmative defenses, including the original lender committed fraud and used unclean hands in securing the loan.

The borrower's fraud defense alleged the original lender's loan consultant falsified the loan application by overstating the borrower's liquid assets, her monthly income, and ownership of real estate. The unclean hands defense alleged "predicate acts" under chapter 772 (Civil

Remedies for Criminal Practices), and re-alleged fraud by the original lender for falsifying the loan application. The defense further alleged that if the bank "was not aware of the [original lender's] fraudulent behavior . . . then it did not exercise due diligence and should be made to assume the consequences."

The case proceeded to a non-jury trial.

Testimony revealed that a loan consultant for the original lender contacted the borrower to help secure the loan. The borrower completed a Master Loan Application telephonically with the loan consultant. While considering a more expensive property, the borrower ultimately settled on the property in dispute, and secured the loan for a smaller amount.

The borrower testified that the loan closing lasted approximately one hour. She was presented with a series of documents, including the loan application, which she signed in two separate places. The application contained the following language, which the borrower acknowledged preceded her first signature on the application:

> Each of the undersigned specifically represents to lender and to lender's actual or potential agents, brokers, processors, attorneys, insurers, servicers, successors and, assigns and agrees and acknowledges that **the information provided in this application is true and correct as of the date set forth opposite my signature**. . . .

(Emphasis added).

The loan application listed the borrower's assets, including $200,000 in liquid assets, monthly income of $8,300, and a schedule of real estate owned. The borrower testified that the income and asset information were false and the loan consultant inserted the information without her knowledge.

The borrower testified that she was not coerced into signing the loan application. She admitted she had not read what she signed even though she was given an opportunity to do so. She took the time to review the loan's interest provisions at closing, and admitted that she noticed the loan application offered her an adjustable-rate mortgage while she originally requested a fixed-rate mortgage. She knew exactly the amount she was borrowing. She "assumed" she was approved for the adjustable-rate loan based on her lower salary and far less liquid assets than reflected on the loan application. She left with a copy of the signed documents.

Just four months after securing the initial loan, the borrower applied for and received a home equity line of credit from the same lender. She subsequently signed a mortgage modification agreement to correct the legal description of the property. The signed agreement included a "reaffirmation" clause, stating that "[t]he Mortgagor hereby reaffirms all of its obligations set forth in the Note, Mortgage, and Loan Documents[.]"

The borrower and her husband made all monthly loan payments on both the adjustable rate mortgage and the home equity line of credit for almost four years until they were both laid off. They have not made any payments since 2009. The bank purchased the note and mortgage from the original lender.

The trial court found:

> (1) the borrower did not take part in the original lender's falsification of the loan application;
>
> (2) the original lender overstated the borrower's level of education, included a $200,000 gift and the ownership of real estate that did not exist, and inflated her income to $99,600 on the loan application;
>
> (3) the bank "either knew of this conduct and therefore acquiesced to it, or failed to conduct due diligence which is in and of itself similar conduct."

The trial court cited *Shahar v. Green Tree Servicing*, 125 So. 3d 251 (Fla. 4th DCA 2013), and concluded that the bank had unclean hands and was "precluded from foreclosing on the [m]ortgage and enforcement of the [p]romissory [n]ote at [i]ssue in equity."

The trial court granted the borrower's motion for dismissal and entered a final judgment for the borrower. From this judgment, the bank now appeals.

The bank argues the judgment should be reversed for three reasons: (1) the court misapplied the doctrine of unclean hands; (2) even if the original lender's conduct supports the defense of unclean hands, the court erred in applying it to the successor bank; and (3) the court's dismissal of the foreclosure complaint should not preclude the bank from proceeding on the note.

"[W]here a trial court's conclusions following a non-jury trial are based upon legal error, the standard of review is *de novo*." *Acoustic Innovations, Inc., v. Schafer*, 976 So. 2d 1139, 1143 (Fla. 4th DCA 2008) (citation omitted). "The sufficiency of the evidence is an issue of law reviewed *de novo*." *Norman v. Padgett*, 125 So. 3d 977, 978 (Fla. 4th DCA 2013).

This case is controlled by *Vidal v. Liquidation Properties, Inc.*, 104 So. 3d 1274 (Fla. 4th DCA 2013). There, the borrowers raised the affirmative defense of fraud based on the false inflation of their income on a loan application. *Id.* at 1278. The trial court rejected the borrowers' affirmative defense as legally insufficient as a matter of law, and we affirmed on that issue.

> Of course, the [borrowers] want damages caused by the lender's treachery. **The [borrowers] were obviously in a position to know their own income. Signing off on their own fraudulent loan application precludes them from raising this fraud as an affirmative defense**.

Id. (emphasis added).

Here, the borrower was in the best position to know her income and financial status. The loan was a "low-doc" loan; it was expected that she was verifying her own income without further investigation or verification by the original lender. The court erred in dismissing the bank's foreclosure action based on the doctrine of unclean hands. *Id.*

The trial court's reliance *on Shahar v. Green Tree Servicing LLC*, 125 So. 3d 251 (Fla. 4th DCA 2013), was misplaced. There, we reversed a summary judgment based in part on an unclean hands defense because of the "unique facts" of the case. *Id.* at 253–54. The unique facts were: (1) the lender altered the income information on the loan application; (2) the lender destroyed documentation of the borrowers' income and assets; (3) the lender did not allow the borrowers an opportunity to review the lengthy loan paperwork at closing; (4) the lender threatened the borrowers that if they did not sign the new loan application, all fees would still remain due and payable; and (5) **the borrowers were specifically harmed because the lender increased the monthly loan payments by fifty percent.** *Id.* at 252 (emphasis added).

The "unique facts" in *Shahar* are not present in this case. Here, the borrower had time to review the loan documents, had the opportunity to review the falsified information, specifically noticed the change from a fixed rate to an adjustable rate, was not coerced into signing the application,

and subsequently obtained a second loan in the form of a line of credit from the same lender. The borrower admitted she failed to read the documents and took the blame for that. These facts are insufficient to establish the defense of unclean hands in this case. *Allied Van Lines, Inc. v. Bratton*, 351 So. 2d 344, 347–48 (Fla. 1977) (citation omitted) ("Unless one can show facts and circumstances to demonstrate that he was prevented from reading the contract . . . [n]o party to a written contract in this state can defend against its enforcement on the sole ground that he signed it without reading it.").

To establish a defense of unclean hands, a defendant must have relied on the plaintiff's misconduct. As we explained in *McCollem v. Chidnese*, 832 So. 2d 194, 196 (Fla. 4th DCA 2002), "[t]he fact that a party's conduct is disreputable is entirely irrelevant where the party asserting unclean hands is not the target of, and has taken no action in reliance on that conduct, however disdainful of that conduct a court may be." In addition to acting in reliance on the misconduct, the defendant must also prove a harm that was caused by the misconduct. *Jelic v. CitiMortgage, Inc.*, 150 So. 3d 1223, 1225 (Fla. 4th DCA 2014).

None of the facts from *Shahar*, nor the required elements of a defense of unclean hands, are present here. The borrower's monthly loan payments were exactly what she chose to bind herself to when she took notice of the adjustable-rate mortgage at closing. She was not prejudiced by the loan consultant's falsification of information. The trial court erred in using the doctrine of unclean hands to dismiss the bank's foreclosure action.[1]

Reversed and remanded for reinstatement of the foreclosure complaint and further proceedings consistent with this opinion.

GROSS and KLINGENSMITH, JJ., concur.

* * *

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[1] We also agree the bank was entitled to pursue an action on the note even if we were to affirm the trial court's dismissal of the foreclosure complaint. Florida law is well-settled that a note and a mortgage are separate instruments and a party may exercise its rights under one document without barring an action under the other document. Thus, a "'plaintiff can sue on the note without foreclosing the mortgage, as they are distinct agreements.'" *Grier v. M.H.C. Realty Corp.*, 274 So. 2d 21, 22 (Fla. 4th DCA 1973) (citation omitted).

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

SHARON S. MILES,
Appellant,

v.

LORI PARRISH, as Property Appraiser of Broward County, Florida, **SUE BALDWIN,** as Tax Collector of Broward County, Florida, and **MARSHALL STRANBURG**, as successor to LISA VICKERS, as Executive Director of the Florida Department of Revenue,
Appellees.

No. 4D15-502

[July 13, 2016]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John J. Murphy, III, Judge; L.T. Case No. CACE 12-22373 (04).

Sherri L. Johnson of Johnson Legal of Florida, P.L., Sarasota, for appellant.

Gregory Durden of Gregory Durden, P.A., Fort Lauderdale, for appellee Lori Parrish.

Pamela Jo Bondi, Attorney General, and Carrol Y. Cherry Eaton, Assistant Attorney General, Tallahassee, for appellee Marshall Stranburg.

Gaylord A. Wood, Jr., of Wood & Stuart, P.A., Bunnell, as amicus curiae.

KLINGENSMITH, J.

Appellant, Sharon S. Miles, challenged a recapture tax lien imposed by the Broward County Property Appraiser (the "Property Appraiser") for retroactively-imposed taxes and penalties for the 2005 to 2010 tax years, as well as the removal of her homestead exemption for the 2011 tax year. The trial court dismissed her complaint for lack of jurisdiction, ruling that it had been filed beyond the sixty-day statute of nonclaim under section 194.171, Florida Statutes. We find this was error and reverse.

Prior to 1995, Miles applied for and received a homestead exemption on her Broward County property (the "Broward Property"), which she continued to receive through the 2011 tax year. The Property Appraiser later discovered that Miles and her late husband were simultaneously receiving the benefit of homestead exemptions on a property in Highlands County and the Broward Property while they were married, from 1986 until his passing in 2010. As a result, the Property Appraiser sent a notice to Miles informing her that her homestead exemption on the Broward Property was being removed because an individual or family unit can only have one homestead exemption according to article VII, section 6(b) of the Florida Constitution.[1]

On February 20, 2012, the Property Appraiser sent Miles a notice of intent to file its lien, and explained that the Broward Property's homestead exemption was retroactively revoked for the tax years 2005 through 2010. The notice also informed Miles that a tax lien would be filed with the Broward County Records Division if she failed to pay those taxes, associated penalties, interest, and costs within thirty days from the date of the notice. After the thirty days expired, the Property Appraiser recorded a "Notice of Tax Lien for Homestead Exemption and/ or Limitation Exclusion" in the public records.

On July 30, 2012, Miles filed her complaint challenging the Property Appraiser's retroactive revocation of the homestead tax exemption and the assessment for back taxes. More than two years later, the trial court dismissed the second and third counts of her complaint because they were filed more than 160 days after the Property Appraiser sent the notice on February 20 — well beyond the sixty-day statute of nonclaim under section 194.171. This appeal followed.

Miles claims on appeal that the Property Appraiser did not submit any evidence proving the date on which the taxes and penalties were "certified for collection under s. 193.122(2)," § 194.171(2), Fla. Stat. (2012), and thus did not show that she failed to timely file her complaint. The Property Appraiser counters that the February 20 notice was tantamount to such a certification, and because the sixty-day nonclaim period began to run from that date, Miles's complaint was untimely.

This court reviews questions of statutory interpretation de novo. *Adelman v. Elfenbein*, 174 So. 3d 516, 518 (Fla. 4th DCA 2015).

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[1] The Florida Constitution states, in pertinent part, "[n]ot more than one exemption shall be allowed any individual or family unit or with respect to any residential unit." Art. VII, § 6(b), Fla. Const.

"As with the interpretation of any statute, the starting point of analysis is the actual language of the statute." *Conservation All. of St. Lucie Cty., Inc. v. Fla. Dep't of Envtl. Prot.*, 144 So. 3d 622, 624 (Fla. 4th DCA 2014) (quoting *Brown v. City of Vero Beach*, 64 So. 3d 172, 174 (Fla. 4th DCA 2011)). "If the language is clear and unambiguous, there is no need to resort to the rules of statutory construction; 'the statute must be given its plain and obvious meaning.'" *Id.* (quoting *Samples v. Fla. Birth–Related Neurological*, 40 So. 3d 18, 21 (Fla. 5th DCA 2010)).

Because "[t]he words of a governing text are of paramount concern," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012), this court will not look beyond the express language unless it is clear that the plain meaning was not intended. After reviewing the plain text and meaning of the applicable statutes, we disagree with the Property Appraiser's interpretation of the legal effect of the February 20 notice.

Section 194.171(2) provides, in pertinent part, that "[n]o action shall be brought to contest a tax assessment *after 60 days from the date the assessment being contested is certified for collection under s. 193.122(2).*" § 194.171(2) (emphasis added). The version of section 193.122(2) applicable to this case stated:

> After the first certification of the tax rolls by the value adjustment board, the property appraiser shall make all required extensions on the rolls to show the tax attributable to all taxable property. *Upon completion of these extensions, and upon satisfying himself or herself that all property is properly taxed, the property appraiser shall certify the tax rolls and shall within 1 week thereafter publish notice of the date and fact of extension and certification in a periodical meeting the requirements of s. 50.011 and publicly display a notice of the date of certification in the office of the property appraiser*. The property appraiser shall also supply notice of the date of the certification to any taxpayer who requests one in writing. These certificates and notices shall be made in the form required by the department and shall be attached to each roll as required by the department by regulation.

§ 193.122(2), Fla. Stat. (2012) (emphasis added).

Section 194.171(2) specifically establishes an unambiguous trigger for the running of the sixty-day nonclaim period: the certification of the assessment pursuant to section 193.122(2). § 194.171(2). Under section

193.122(2), a property appraiser must, after first completing any necessary extensions, certify the tax rolls "upon satisfying himself or herself that all property is properly taxed." § 193.122(2). Then, within one week of that certification, a property appraiser must "publish notice of the date and fact of extension and certification in a periodical meeting the requirements of s. 50.011," along with publicly displaying "a notice of the date of certification in the office of the property appraiser." *Id.* Here, even if we were to find that the tax lien was subject to section 194.172(2), the sixty-day nonclaim period was not triggered because the Property Appraiser admitted that the requirements of section 193.122(2) were not fulfilled sixty days before Miles filed her lawsuit.

If we were to agree with the Property Appraiser's argument in this case, we would have to find that the instructions set forth in these two statutes are mere suggestions, and that those prescribed statutory mandates are either meaningless, permissive, or create an alternative method of certification, nonexclusive to other methods not contained within the scope of the statutory text. Because the plain wording of these statutes indicates that these procedures must be followed in order to achieve proper certification of the tax rolls, we disagree with the Property Appraiser's position.

Moreover, in an analogous case, the First District recently held that a tax lien filed for a retroactive removal of a religious exemption on a school's property was not subject to nonclaim under section 194.171(2). *Genesis Ministries, Inc. v. Brown*, 186 So. 3d 1074, 1077–79 (Fla. 1st DCA 2016). There, the court stated:

> Section 194.171(2), by its clear and unambiguous terms, applies only to actions contesting "a tax assessment" and it requires such actions to be filed within 60 days after the assessment is "certified for collection under s. 193.122(2)." *A tax lien is not a tax assessment*, and it is not certified for collection under section 193.122(2).

Id. at 1077 (emphasis added).

The Property Appraiser relies on *Ward v. Brown*, 894 So. 2d 811 (Fla. 2004), for the proposition that the nonclaim statute bars Miles' challenge. However, we agree with our sister court that although *Ward* held that the sixty-day period in section 194.171(2) applied "broadly to taxpayers' actions challenging the assessment of taxes against their property regardless of the legal basis of the challenge," 894 So. 2d at 812, there is "no support in *Ward* for the proposition that section

194.171(2) should be construed to apply to actions challenging tax liens." *Genesis Ministries*, 186 So. 3d at 1078. On that point, we find the following passage from *Genesis Ministries* particularly instructive as to why section 194.171(2) applies to tax assessments, but not to tax liens:

> Furthermore, basic notions of due process – i.e., notice and an opportunity to be heard – weigh against interpreting section 194.171(2) to apply to actions challenging tax liens. There is no requirement that the property appraiser give the property owner actual notice of the tax lien, and unlike valuation, classification, and exemption determinations which can be appealed to the value adjustment board before the tax rolls are certified and the 60-day period in section 194.171(2) is triggered, there is no procedure for the property owner to obtain administrative review of the property appraiser's determination under section 196.011 (9)(a) before the tax lien is recorded in the public records. Accordingly, if section 194.171(2) was construed to apply to tax liens, the *only* opportunity a property owner would have to challenge the property appraiser's "back-assessment" of taxes under section 196.011(9)(a) would be by filing suit within 60 days after the tax lien is recorded in the public records. We find it highly unlikely that the Legislature intended such a draconian result, which would effectively require property owners to routinely (at least every 60 days) check the public records to determine whether a tax lien has been recorded against their property.

Id. at 1079.

Therefore, we reverse the trial court's dismissal of the second and third counts of Miles' complaint, and remand this case for further proceedings consistent with this opinion.

Reversed and Remanded.

CIKLIN, C.J., and WARNER, J., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

LUCAS GAMES INC., a Florida Corporation, a/k/a **LUCAS GAMING, INC.,** d/b/a **VEGAS FUN;** and **LUC MARCOUX,** Individually,
Appellants,

v.

MORRIS AR ASSOCIATES, LLC; and **BARRICK ENTERPRISES, INC.,** a Florida Corporation,
Appellees.

No. 4D15-1516

[July 13, 2016]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; Lawrence M. Mirman, Judge; L.T. Case No. 13000952CAAXMX.

Carrie Ann Wozniak of Akerman LLP, Orlando, and Jonathan S. Robbins of Akerman LLP, Fort Lauderdale, for appellants.

Michael I. Feldman and Andrew I. Roth of Krinzman Huss & Lubetsky, Miami, for appellee Morris AR Associates, LLC.

CIKLIN, C.J.

Lucas Games, Inc. and Luc Marcoux, defendants below ("tenants"), appeal an order granting partial final summary judgment in favor of Morris AR Associates, LLC ("the landlord") in a lease dispute. We find merit in one of the two issues raised by the tenants, namely that the trial court erred in granting summary judgment against the tenants because the landlord failed to rebut the tenants' affirmative defense of illegality of contract. Accordingly, we reverse.

In February 2013, Lucas Games entered into a lease with the landlord. The lease provided that "Tenant's Business" was to be "[o]nly for the operation of an entertainment arcade for persons over the age of 18 years old and for no other use or purpose," i.e., an adult arcade, and was to operate only under the name "Vegas Fun." It further provided, "Tenant . . . shall not allow any coin-operated amusement devices[.]"

According to the tenants, Vegas Fun employed a network of computers on which customers could play slot machine style games and win prizes such as gift cards. The computerized slot machines were legal until April 10, 2013, when section 849.16, Florida Statutes (2013), was amended to proscribe these types of games outside of designated casinos.[1] A safe harbor exception to this amendment existed for arcade amusement centers that utilized "coin-operated amusement games or machines . . . for the entertainment of the general public and tourists as a bona fide amusement facility." § 849.161, Fla. Stat. (2013).[2]

Following the amendment to section 849.16, Vegas Fun closed its doors and vacated the premises. The landlord sued the tenants for eviction, breach of lease, and breach of personal guaranty, and moved for summary judgment. The tenants responded that their performance under the lease should be excused, since the amendment to section 849.16 prevented them from operating legally. The trial court disagreed with the tenants' legal argument and granted summary judgment in favor of the landlord.

On appeal, the tenants argue that the trial court erred in entering summary judgment in favor of the landlord because the 2013 amendment to the law rendered the lease illegal. The landlord contends that summary judgment was properly granted because the lease could

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[1] In pertinent part, the statute defines the outlawed games as follows:

> (1) As used in this chapter, the term "slot machine or device" means any machine or device or system or network of devices that is adapted for use in such a way that, upon activation, which may be achieved by, but is not limited to, the insertion of any piece of money, coin, account number, code, or other object or information, such device or system is directly or indirectly caused to operate or may be operated and if the user, whether by application of skill or by reason of any element of chance or any other outcome unpredictable by the user, may:
>
> (a) Receive or become entitled to receive any . . . credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any . . . thing of value or which may be given in trade[.]

§ 849.16, Fla. Stat.

[2] Following the entry of summary judgment, section 849.161 was repealed and replaced by section 546.10, Florida Statutes (2015), the "Family Amusement Games Act," effective July 1, 2015. § 546.10, Fla. Stat. (2015).

still have been legally performed by substituting the tenants' casino-style games with legal ones such as skee-ball. We review orders granting summary judgment de novo. *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

"A contract which violates a provision of the constitution or a statute is void and illegal, and, will not be enforced in our courts." *Harris v. Gonzalez*, 789 So. 2d 405, 409 (Fla. 4th DCA 2001).

> [I]t seems to be well settled that where a lease restricts and limits the use of premises let to a particular specified purpose, and thereafter, because of the enactment of a valid statute, such use becomes unlawful, the subject-matter of the contract is destroyed, and the covenants of such lease will not be enforced against either party thereto.

Christopher v. Charles Blum Co., 82 So. 765, 767 (Fla. 1919) (citations omitted).

The parties do not dispute that the amendment to section 849.16 rendered the types of games operated by the tenants at Vegas Fun illegal. Although the tenants could have retrofitted or changed the games at Vegas Fun to comply with section 849.161 by converting the game machines to coin-operated machines, the subject lease directly prohibited the use of coin-operated games.

The restrictiveness of the lease—a determining factor in *Christopher*—prevented the defendants from both operating legally and complying with the lease. Consequently, the trial court erred in entering summary judgment and we reverse and remand for further proceedings.

Reversed and remanded.

WARNER and GERBER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

VICTORY CHRISTIAN WORLD MINISTRIES, INC.,
Appellant,

v.

MJP DISTRIBUTION LLC,
Appellee.

No. 4D15-2909

[July 13, 2016]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Marina Garcia-Wood, Judge; L.T. Case No. CACE-14-017083.

Michelle Austin Pamies of Austin Pamies Norris Weeks, LLC, Fort Lauderdale, for appellant.

Jonathan B. Lewis of Hyman & Lewis, PLLC, Margate, for appellee.

FORST, J.

The issue in this case is whether the Appellee, MJP Distribution LLC ("Seller"), is entitled to enforce a liquidated damages clause in a real estate contract with the Appellant, Victory Christian World Ministries, Inc. ("Buyer"). We affirm the trial court's grant of summary judgment enforcing this clause.

Background

Buyer and Seller entered into a real estate contract for the purchase of a specific piece of property. The final purchase price was $605,000 and Buyer made two deposits totaling $75,000. The contract contained liquidated damages provisions that stated:

> If Buyer fails to perform under this Contract, then, as Seller's sole and exclusive remedy under this Contract, the Settlement Agent is hereby irrevocably immediately directed and instructed that the Initial Escrow Deposit and if delivered by Buyer, the Additional Escrow Deposit shall be forfeited and

> paid over to Seller as agreed liquidated damages in order to compensate Seller for the damages caused by such breach and not as a penalty.
>
> In the event of Seller's default under this Contract, Buyer's sole remedies shall be to receive the return of Buyer's Escrow Deposit(s), at which time the Contract shall cease and terminate and Seller and Buyer shall have no further obligations, liabilities or responsibilities to one another. Buyer shall not have any claim against Seller (nor shall Seller be liable) for damages (actual, special, punitive or otherwise) and hereby waives any such claims.

After a disagreement between the parties, Buyer filed suit claiming a breach of contract. Seller filed a counterclaim alleging breach of contract and fraud in the inducement. Both parties moved for summary judgment. The trial court held a hearing on the motions and ordered that Buyer's motion be denied, Seller's motion be granted on the breach of contract claim, and Seller's motion be denied on the fraud in the inducement claim. The trial court found the liquidated damages provision to be valid and subsequently ordered that Seller recover $75,000 from Buyer (by retaining the deposits).

Analysis

The liquidated damages clauses at issue here provided that, if Buyer failed to perform, Seller was entitled to retain all deposits that had been made. On the other hand, if Seller failed to perform, Buyer was entitled only to the return of the deposits. Application of similar one-sided liquidated damages clauses have routinely been struck down based on one of the parties lacking any real obligation. *E.g.*, *Ocean Dunes of Hutchinson Island Dev. Corp. v. Colangelo*, 463 So. 2d 437, 439 (Fla. 4th DCA 1985); *Blue Lakes Apartments, Ltd. v. George Gowing, Inc.*, 464 So. 2d 705, 709 (Fla. 4th DCA 1985). Both *Ocean Dunes* and *Blue Lakes Apartments* involved a breach by the seller, the party without an obligation, and a successful effort (via litigation) by the buyer to recover damages, notwithstanding the one-sided terms of the damages clauses.

By contrast, the instant case involves the party with no real obligation under the agreement (Seller) seeking to enforce it against the party with an obligation (Buyer). This case is therefore comparable to *Developers of Solamar, LLC v. Weinhauer*, 18 So. 3d 13 (Fla. 2d DCA 2009). There, the Second District Court of Appeal reversed a grant of summary judgment in favor of the buyer in part because the seller was ready, willing, and able

to perform. *Id.* at 16; *see also Redington Grand, LLP v. Level 10 Props., LLC*, 22 So. 3d 604 (Fla. 2d DCA 2009) (similar). The Second District Court of Appeal concluded that the seller's continued attempts to perform "cured" any defect that existed in the original contract. *Weinhauer*, 18 So. 3d at 16.

> Although a contract is lacking in mutuality at its inception, such defect may be cured by the subsequent conduct of the parties. Want of mutuality is no defense in the case of an executed contract, and a promise lacking in mutuality at its inception becomes binding on the promisor after performance by the promisee.

Wright & Seaton, Inc. v. Prescott, 420 So. 2d 623, 627 (Fla. 4th DCA 1982) (quoting 17 C.J.S. *Contracts* § 100(3), at 799-800 (1963)).

Here too, the record indicates that Seller was ready, willing, and able to perform. As such, any lack of mutuality of obligation was cured. Therefore, although Seller would not have been able to enforce the provision of the liquidated damages clause requiring only the return of the deposits had it been the breaching party, it may enforce the contractual stipulation allowing it to keep the deposits when it is not at fault.

Conclusion

Accordingly, we affirm the trial court's judgment enforcing the liquidated damages clause of the contract.

Affirmed.

GROSS and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ANTONIO DELA CRUZ,
Appellant,

v.

CITIMORTGAGE, INC.,
Appellee.

Nos. 4D15-3875 and 4D16-835

[July 13, 2016]

Consolidated appeals from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Lisa S. Small, Judge; L.T. Case No. 2013CA018198XXXXMB.

Margery E. Golant, Stuart M. Golant and Richard R. Widell of Golant & Golant, P.A., Boca Raton, for appellant.

Nancy M. Wallace of Akerman LLP, Tallahassee, William P. Heller of Akerman LLP, Fort Lauderdale, and Eric M. Levine of Akerman LLP, West Palm Beach, for appellee.

MAY, J.

A borrower petitions for a writ of prohibition seeking to prevent the trial court from proceeding with the foreclosure action in which he is the named defendant.[1] He argues that the trial court lacked jurisdiction to authorize issuance of a pluries (third) summons where his motion to quash the prior service remained pending. In another pending non-final appeal from the same case, the petitioner has raised essentially the same argument. We *sua sponte* consolidate the two cases. We deny the petition and affirm the non-final appeal.

[1] The circuit court case number listed on the petition and appendix (502010CA029097) is incorrect. All the documents in the appendix reflect case number 2013CA018198XXXMB. The circuit court's docket shows that the 2010 case number listed on the petition belongs to another defendant.

The lender served the initial summons in January 2014. In August 2014, the trial court granted the petitioner's motion to quash service. An alias (second) summons issued, but was returned unserved. The lender then constructively served the petitioner by publication in November 2014.

In February 2015, the petitioner moved to quash the constructive service of process. In June 2015, the lender moved to authorize a pluries summons and direct the clerk to issue the summons. The lender sought to re-serve the complaint to moot the petitioner's challenge to constructive service of process.

The trial court allowed another summons to issue, which was served on the petitioner. In August 2015, the petitioner moved to quash this re-service and the pluries summons. The trial court heard the two motions in September 2015.

The trial court ruled that the February 2015 motion to quash the constructive service was rendered moot by service of the pluries summons. The court held an evidentiary hearing and denied on the merits the August 2015 motion to quash service of the pluries summons. From these orders, the petitioner appealed on October 15, 2015.

The petitioner then moved the trial court to abate the foreclosure proceedings, arguing the trial court lacked subject matter and personal jurisdiction due to the pending appeal. In November 2015, the trial court denied the motion to abate and ordered the petitioner to respond to the complaint within ten days. The petitioner then moved to dismiss the amended complaint, which the trial court denied in February 2016. The trial court again ordered the petitioner to respond to the complaint within ten days.

The petitioner moved for enlargement of time and for reconsideration. In March 2016, the trial court denied the motion for reconsideration and again ordered the petitioner to file an answer no later than March 9, 2016. This petition followed on March 13, 2016.

A discretionary writ of prohibition may issue only where a petitioner demonstrates that the circuit court clearly lacks subject matter jurisdiction. *English v. McCrary*, 348 So. 2d 293, 296 (Fla. 1977). Here, the petitioner has failed to make the necessary showing.

The petitioner relies on language from our decision in *Vidal v. SunTrust Bank*, 41 So. 3d 401, 404 (Fla. 4th DCA 2010), where we reversed an order denying a motion to quash service because the process server failed to note

the time of service on the copy of the complaint served. His reliance is misplaced. In *Vidal*, we simply held "that failure to note the time of service render[ed] the service defective." *Id.* at 402. *Vidal* does not support the petitioner's position that service of an alias or pluries summons is unauthorized where a challenge to prior service remains pending.

The petitioner also refers to our recent opinion in *Miceli v. Bank of New York Mellon Trust Co., N.A.*, 41 Fla. L. Weekly D476, D476 (Fla. 4th DCA Feb. 24, 2016), in which we affirmed an order determining that a motion to quash service of process was moot based on "re-service" of a subsequent summons. There, the alleged error was not preserved for appeal. *Id.* To the extent *Vidal* and *Miceli* can be used to suggest a trial court is required to rule on the validity of prior service before considering a challenge to "re-service," we make clear there is no such requirement.

Many of the petitioner's arguments were rejected fifty years ago in *Sunrise Beach, Inc. v. Phillips*, 181 So. 2d 169 (Fla. 2d DCA 1965). There, a corporate defendant moved to dismiss an action based on insufficiency of service of process. *Id.* at 170. The defendant produced an affidavit from the person served, attesting that he had resigned from the company prior to service of process and that plaintiff knew that before suit was filed. *Id.* The trial judge denied the motion to dismiss, and the corporate defendant appealed. *Id.*

The plaintiff then obtained and served an alias summons on the corporate defendant's president. *Id.* The corporate defendant moved to quash service of the alias summons, arguing the clerk lacked authority to issue the summons due to the defendant's appeal of the non-final order and the posting of a supersedeas bond. *Id.* at 170–71. The trial court denied the motion, and the defendant again appealed. *Id.* at 171.

In a consolidated appeal, the *Sunrise* court reversed the denial of the first motion to quash because service on the former vice-president did not confer personal jurisdiction over the corporate defendant. *Id.* at 171, 174. However, the court affirmed the order denying the motion to quash service of the alias summons. *Id.* The court rejected the argument that the clerk was precluded from issuing the alias summons.

> It does not appear logical to state that merely because Sunrise Beach, Inc., had purportedly been served with process, a second service of process was precluded when there was some doubt as to the validity of the first service. Moreover, issuance of an 'insurance summons' has received tacit approval by our Supreme Court in two recent decisions, *Punta Gorda Ready*

> *Mixed Concrete, Inc. v. Green Manor Const. Co. Inc.*, Fla. 1964, 166 So. 2d 889, and *Klosenski v. Flaherty*, Fla. 1959, 166 So. 2d 767, 82 A.L.R.2d 664.

Sunrise Beach, Inc., 181 So. 2d at 171.

Sunrise stands for four important principles: (1) the procedure formerly employed under section 50.03, Florida Statutes, no longer controls; (2) the rules of procedure do not preclude issuance of an alias summons until a prior summons was returned unexecuted or returned improperly; (3) an appeal from the order denying the first motion to quash does not deprive the circuit court of jurisdiction; and (4) posting a supersedeas bond does not invalidate the alias summons. *Id.* at 172–74.

In *Hotel & Restaurant Employees & Bartenders International Union v. Lake Buena Vista Communities, Inc.*, 349 So. 2d 1217, 1218 (Fla. 4th DCA 1977), *disapproved on other grounds by Public Gas Co. v. Weatherhead Co.*, 409 So. 2d 1026, 1026 n.1 (Fla. 1982), we rejected the contention that, under rule 1.070(b), an alias summons may not issue until the original summons is returned unexecuted or improperly served. "[W]hen the original summons is not returned, an alias summons can be authorized by the court. The proper procedure is to file a motion to obtain such authorization, alleging the need for alias summons and the reason the original summons has not been returned." *Id.*

Here, the validity of the "re-service" has already been determined to be valid after an evidentiary hearing. The motion to quash the original service is therefore moot. The petitioner's suggestion that the trial court lost jurisdiction when he appealed from the denial of the motions to quash service is simply unsupported by law. It is also contrary to the plain language of Florida Rule of Appellate Procedure 9.130(f):

> In the absence of a stay, during the pendency of a review of a non-final order, the lower tribunal may proceed with all matters, including trial or final hearing, except that the lower tribunal may not render a final order disposing of the cause pending such review absent leave of the court.

Id.

An appeal of an order determining jurisdiction of the person does not deprive the trial court of subject matter jurisdiction over the dispute. There is no error in the trial court's rulings, and no basis for exercising extraordinary writ jurisdiction, in this case. "[P]rohibition will not lie to

review the correctness of an order of a trial court overruling a challenge to its jurisdiction over the person of a defendant where that court has jurisdiction over the subject matter of the suit." *State ex rel. Eli Lilly & Co. v. Shields*, 83 So. 2d 271, 272 (Fla. 1955) (citing *State ex rel. Atlanta Paper Co. v. Herin*, 80 So. 2d 331, 331 (Fla. 1955)).[2]

A plaintiff should be able to correct purported problems with service of process by re-serving a summons. If subsequent service of process is valid, then any challenge to the sufficiency of a prior service is moot. The language in the rule upon which the petitioner relies provides:

> When any process is returned not executed or returned improperly executed for any defendant, the party causing its issuance shall be entitled to such additional process against the unserved party as is required to effect service.

Fla. R. Civ. P. 1.070(b). Nothing in rule 1.070(b) suggests that a trial court lacks authority to issue an alias or pluries summons merely because the original summons has not been quashed or returned unserved. Issuance of an additional summons is not precluded by the rule. The petitioner cites no authority supporting his position.

It is well-settled that the fundamental purpose of the service of process statute "is to give the person affected notice of the proceedings and an opportunity to defend his rights." *Shurman v. Atl. Mortg. & Inv. Corp.*, 795 So. 2d 952, 954 (Fla. 2001). This purpose has been served here as the petitioner is well aware of the proceedings and, although given the opportunity to defend, has chosen to avoid doing so.

The delay caused by the motions to quash service has come to an end. We deny the petition in Case No. 4D16-835 and affirm the appeal in Case No. 4D15-3875.

Petition denied in Case No. 16-835; Affirmed in Case No. 15-3875.

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[2] Similarly, the petitioner's argument that he may unintentionally waive his challenge to personal jurisdiction by defending against the action is baseless as the Florida Supreme Court resolved this issue in *Shields* more than sixty years ago. 83 So. 2d at 272 (holding that a defendant who has properly challenged personal jurisdiction is "not prejudiced by participation in the trial and defending the matter on the merits and may have the correctness of such ruling reviewed upon appeal after adverse final judgment in the cause should one so be rendered").

WARNER and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

DYCK-O'NEAL, INC.,

Appellant,

v. Case No. 5D15-3266

LARRY ROJAS,

Appellee.

_____/

Opinion filed July 15, 2016

Appeal from the Circuit Court
for Orange County,
John E. Jordan, Judge.

Susan B. Morrison, of Law Offices of Susan B. Morrison, Tampa, for Appellant.

N. James Turner, of NJT Law, LLC, Orlando, for Appellee.

LAMBERT, J.

Dyck-O'Neal, Inc. ("Appellant") appeals the order dismissing its amended complaint for a deficiency judgment based on the trial court's finding that it lacked personal jurisdiction over Appellee. Concluding that the facts before the trial court established the necessary minimum contacts for the court to exercise personal jurisdiction over Appellee, we reverse.

The material facts in this case are not in dispute. Appellee, a resident of California, purchased a condominium in Florida to serve as a residence for his daughter while she attended college. To facilitate the purchase of this real property, Appellee obtained a loan and executed and delivered a promissory note, which was secured by a mortgage on the condominium. Appellee later defaulted on the note, and a foreclosure suit was filed against him in Orange County, Florida. The plaintiff in that case obtained a final judgment of foreclosure in which the court, among other things, reserved jurisdiction over the parties to render a deficiency judgment, if permissible.

The mortgaged property sold at a foreclosure sale. The interest in the promissory note and the judgment, including the right to seek a deficiency, was ultimately assigned to Appellant. Thereafter, Appellant filed a separate action at law pursuant to section 702.06, Florida Statutes (2013), to obtain a deficiency judgment. *See Garcia v. Dyck-O'Neal, Inc.*, 178 So. 3d 433, 436 (Fla. 3d DCA 2015) (holding that the unambiguous language of section 702.06 permits the filing of a separate action at law for a deficiency judgment, notwithstanding the foreclosure court's reservation of jurisdiction in its final judgment to consider a deficiency).

In the order on appeal, the trial court reasoned that, because the promissory note and mortgage merged into the earlier foreclosure judgment, the Appellant, by electing to bring the separate action at law instead of pursuing the deficiency in the original foreclosure proceeding, had essentially negated its only basis to acquire personal jurisdiction over the nonresident Appellee. The court also noted that Appellee had no connections with Florida and Appellant's amended complaint did not allege any other separate connections that Appellee had with this state other than the transaction and foreclosure litigation previously described. Our review of a trial court's ruling on a motion

to dismiss for lack of personal jurisdiction is de novo. *Wendt v. Horowitz*, 822 So. 2d 1252, 1256–57 (Fla. 2002) (citing *Execu-Tech Bus. Sys., Inc.*, *v. New Oji Paper Co.*, 752 So. 2d 582, 584 (Fla. 2000)).

In *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499 (Fla. 1989), the Florida Supreme Court articulated a two-pronged inquiry for determining whether a Florida state court has long-arm jurisdiction over a nonresident defendant in a particular case. *See Wendt*, 822 So. 2d at 1257 (citing *Execu-Tech. Bus. Sys.,* 752 So. 2d at 584). First, in the "statutory prong," the court must determine whether "the complaint alleges sufficient jurisdictional facts to bring the action within the ambit" of Florida's long-arm statute. *Id*. (quoting *Execu-Tech Bus. Sys.*, 752 So. 2d at 584). Second, in the "constitutional prong," the court must determine whether the non-resident defendant maintains "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice[,]'" as provided in the United States Supreme Court precedent interpreting the due process clause of the Constitution of the United States. *Id.* (first alteration in original) (quoting *Execu-Tech Bus. Sys.*, 752 So. 2d at 584). This federal due process clause "minimum contacts" inquiry "asks whether the non-resident's 'conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *See Balboa v. Assante*, 958 So. 2d 573, 574 (Fla. 4th DCA 2007) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980)).

The provision of the Florida long-arm statute applicable in the present case is section 48.193(1)(a)3., Florida Statutes (2013), which provides:

> (1)(a) A person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or

> herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from any of the following acts:
>
> . . . .
>
> 3. Owning, using, possessing, or holding a mortgage or other lien on any real property within this state.

Appellee argued below and argues here that this provision of the long-arm statute requires continuing ownership, use, or possession of real property by a nonresident before Florida can acquire personal jurisdiction. We disagree. The language of the statute merely requires that Appellant's cause of action arose from a nonresident's ownership of real property in Florida. *See Nicholas v. Paulucci*, 652 So. 2d 389, 392 n.5 (Fla. 5th DCA 1995) ("By itself, ownership of property is insufficient to subject a nonresident defendant to the jurisdiction of the courts of this state, unless the cause of action arose out of such ownership." (citation omitted)); *see also Holt v. Wells Fargo Bank, N.A.*, 32 So. 3d 194, 195 (Fla. 4th DCA 2010) (explaining that 1993 amendment to section 48.193(1)(a)3., adding the words "holding a mortgage or other lien on," is more reasonably read to extend personal long-arm jurisdiction to those holding a mortgage or lien on real property in Florida, not eliminating the long-standing jurisdictional basis for those owning real property within Florida).

In *Dyck-O'Neal, Inc. v. Huthsing,* 181 So. 3d 555 (Fla. 1st DCA 2015), our sister court essentially addressed the same scenario presently before us. There, as in the present case, the trial court dismissed the appellant's amended complaint for deficiency judgment, concluding that it lacked personal jurisdiction over the appellee, a non-resident. 181 So. 3d at 555. In reversing, the First District concisely explained:

> Applying the principles discussed by the Florida Supreme Court in *Venetian Salami Co. v. Parthenais,* 554 So.

> 2d 499 (Fla. 1989), the well-pleaded allegations of the amended complaint (which went undisputed by appellee's affidavit attached to her motion to dismiss) were sufficient to bring the action within the ambit of Florida's long-arm statute—section 48.193, Florida Statutes. Federal due process concerns were satisfied by appellee's prior conduct, the final judgment of foreclosure, and the foreseeable future consequence of a deficiency judgment; appellee reasonably could have anticipated " 'being haled into court' " in this state. *Id.* at 500 (quoting *World–Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)). We hold requisite minimum contacts existed for the trial court to acquire personal jurisdiction over appellee.

Id.[1]

We agree with this reasoning. Appellant's amended complaint sufficiently pleaded that its cause of action arose from Appellee's ownership of real property in Florida. Moreover, Appellee should have reasonably anticipated being "haled" back to Florida to address a claim for deficiency, as the foreclosure final judgment expressly reserved jurisdiction over the parties to enter a deficiency judgment. Finally, we attribute no significance to Appellant pursuing the deficiency judgment in a separate action, as opposed to reopening the original foreclosure proceeding because, under the facts of the case, the plain language of section 702.06 permitted it to do so.

Accordingly, we reverse the order dismissing the amended complaint and remand this case for further proceedings.

REVERSED and REMANDED.

TORPY and COHEN, JJ., concur.

[1] In defense of the trial judge below, he did not have the benefit of the First District's opinion when he issued the order on appeal.