Florida Real Property and Business Litigation Report

Volume XII, Issue 23
June 19, 2019
Manuel Farach

Taggart v. Lorenzen, Case No. 18–489 (2019).
"A [bankruptcy] court may hold a creditor in civil contempt for violating a discharge order if there is no fair ground of doubt as to whether the order barred the creditor's conduct." In other words, contempt is appropriate when a creditor violates a discharge order based on their objectively unreasonable view of the order.

Fountainbleau, LLC v. Hire Us, Inc., Case No. 2D18-4068 (Fla. 2d DCA 2019).
An order compelling parties to attend arbitration is not an order determining a party's "entitlement" to arbitration, and thus is not an appealable non-final order under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv).

Green Emerald Homes, LLC v. 21st Mortgage Corporation, Case No. 2D17-2192 (Fla. 2d DCA 2019).
A titleholder to real property, who purchased before litigation and before a lis pendens was filed, is entitled to defend a foreclosure suit including questioning the amounts due on the note and mortgage.

Rokosz v. Haccoun, Case No. 3D18-2459 (Fla. 3d DCA 2019).
A trial court cannot deny a party their right to have an evidentiary hearing on their Motion to Discharge Lis Pendens by reconsidering a prior order establishing a lis pendens.

Goodenow v. Nationstar Mortgage LLC, Case No. 3D18-1480 (Fla. 3d DCA 2019).
A loan servicer entitled to enforce a note can enforce the jury trial waiver contained in the mortgage.

MBlock Investors, LLC v. Bovis Lend Lease, Inc., Case No. 3D18-501 (Fla. 3d DCA 2019).
A lender that acquired property through foreclosure is a "successor and assign" of its borrower and bound by a pre-foreclosure release signed by its borrower that ran to successors and assigns.

Fassy v. The Bank Of New York Mellon, Case No. 4D18-1548 (Fla. 4th DCA 2019).
A plaintiff whose suit is dismissed for lack of standing is still liable for taxable costs, as costs are awarded pursuant to Florida Rule of Civil Procedure 1.420(d) and not the prevailing party provisions of the mortgage.

Deutsche Bank Trust Company Americas v. JB Investment Realty, LLC, Case No. 4D18-3240 (Fla. 4th DCA 2019).
A foreclosing lender need only prove the loan is in default and need not introduce a loan payment history "from the beginning" in order to prove default.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TAGGART *v.* LORENZEN, EXECUTOR OF THE ESTATE OF BROWN, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18–489. Argued April 24, 2019—Decided June 3, 2019

Petitioner Bradley Taggart formerly owned an interest in an Oregon company. That company and two of its other owners, who are among the respondents here, filed suit in Oregon state court, claiming that Taggart had breached the company's operating agreement. Before trial, Taggart filed for bankruptcy under Chapter 7 of the Bankruptcy Code. At the conclusion of that proceeding, the Federal Bankruptcy Court issued a discharge order that released Taggart from liability for most prebankruptcy debts. After the discharge order issued, the Oregon state court entered judgment against Taggart in the prebankruptcy suit and awarded attorney's fees to respondents. Taggart returned to the Federal Bankruptcy Court, seeking civil contempt sanctions against respondents for collecting attorney's fees in violation of the discharge order. The Bankruptcy Court ultimately held respondents in civil contempt. The Bankruptcy Appellate Panel vacated the sanctions, and the Ninth Circuit affirmed the panel's decision. Applying a subjective standard, the Ninth Circuit concluded that a "creditor's good faith belief" that the discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief if unreasonable." 888 F. 3d 438, 444.

Held: A court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct. Pp. 4–11.

(a) This conclusion rests on a longstanding interpretive principle: When a statutory term is "'obviously transplanted from another legal source,'" it "'brings the old soil with it.'" *Hall* v. *Hall*, 584 U. S. ___, ___. Here, the bankruptcy statutes specifying that a discharge order "operates as an injunction," 11 U. S. C. §524(a)(2), and that a court

Syllabus

may issue any "order" or "judgment" that is "necessary or appropriate" to "carry out" other bankruptcy provisions, §105(a), bring with them the "old soil" that has long governed how courts enforce injunctions. In cases outside the bankruptcy context, this Court has said that civil contempt "should not be resorted to where there is [a] fair ground of doubt as to the wrongfulness of the defendant's conduct." *California Artificial Stone Paving Co.* v. *Molitor*, 113 U. S. 609, 618. This standard is generally an objective one. A party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable. Subjective intent, however, is not always irrelevant. Civil contempt sanctions may be warranted when a party acts in bad faith, and a party's good faith may help to determine an appropriate sanction. These traditional civil contempt principles apply straightforwardly to the bankruptcy discharge context. Under the fair ground of doubt standard, civil contempt may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope**.** Pp. 5–7.

(b) The standard applied by the Ninth Circuit is inconsistent with traditional civil contempt principles, under which parties cannot be insulated from a finding of civil contempt based on their subjective good faith. Taggart, meanwhile, argues for a standard that would operate much like a strict-liability standard. But his proposal often may lead creditors to seek advance determinations as to whether debts have been discharged, creating the risk of additional federal litigation, additional costs, and additional delays. His proposal, which follows the standard some courts have used to remedy violations of automatic stays, also ignores key differences in text and purpose between the statutes governing automatic stays and discharge orders. Pp. 7–11.

888 F. 3d 438, vacated and remanded.

BREYER, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 18–489

BRADLEY WESTON TAGGART, PETITIONER *v.* SHELLEY A. LORENZEN, EXECUTOR OF THE ESTATE OF STUART BROWN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 3, 2019]

JUSTICE BREYER delivered the opinion of the Court.

At the conclusion of a bankruptcy proceeding, a bankruptcy court typically enters an order releasing the debtor from liability for most prebankruptcy debts. This order, known as a discharge order, bars creditors from attempting to collect any debt covered by the order. See 11 U. S. C. §524(a)(2). The question presented here concerns the criteria for determining when a court may hold a creditor in civil contempt for attempting to collect a debt that a discharge order has immunized from collection.

The Bankruptcy Court, in holding the creditors here in civil contempt, applied a standard that it described as akin to "strict liability" based on the standard's expansive scope. *In re Taggart*, 522 B. R. 627, 632 (Bkrtcy. Ct. Ore. 2014). It held that civil contempt sanctions are permissible, irrespective of the creditor's beliefs, so long as the creditor was "'aware of the discharge'" order and "'intended the actions which violate[d]'" it. *Ibid.* (quoting *In re Hardy*, 97 F. 3d 1384, 1390 (CA11 1996)). The Court of Appeals for the Ninth Circuit, however, disagreed with

that standard. Applying a subjective standard instead, it concluded that a court cannot hold a creditor in civil contempt if the creditor has a "good faith belief" that the discharge order "does not apply to the creditor's claim." *In re Taggart*, 888 F. 3d 438, 444 (2018). That is so, the Court of Appeals held, "even if the creditor's belief is unreasonable." *Ibid.*

We conclude that neither a standard akin to strict liability nor a purely subjective standard is appropriate. Rather, in our view, a court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct. In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful.

I

Bradley Taggart, the petitioner, formerly owned an interest in an Oregon company, Sherwood Park Business Center. That company, along with two of its other owners, brought a lawsuit in Oregon state court, claiming that Taggart had breached the Business Center's operating agreement. (We use the name "Sherwood" to refer to the company, its two owners, and—in some instances—their former attorney, who is now represented by the executor of his estate. The company, the two owners, and the executor are the respondents in this case.)

Before trial, Taggart filed for bankruptcy under Chapter 7 of the Bankruptcy Code, which permits insolvent debtors to discharge their debts by liquidating assets to pay creditors. See 11 U. S. C. §§704(a)(1), 726. Ultimately, the Federal Bankruptcy Court wound up the proceeding and issued an order granting him a discharge. Taggart's discharge order, like many such orders, goes no further than the statute: It simply says that the debtor "shall be granted a discharge under §727." App. 60; see United

States Courts, Order of Discharge: Official Form 318 (Dec. 2015), http://www.uscourts.gov/sites/default/files/form_b318_0.pdf (as last visited May 31, 2019). Section 727, the statute cited in the discharge order, states that a discharge relieves the debtor "from all debts that arose before the date of the order for relief," "[e]xcept as provided in section 523." §727(b). Section 523 then lists in detail the debts that are exempt from discharge. §§523(a)(1)–(19). The words of the discharge order, though simple, have an important effect: A discharge order "operates as an injunction" that bars creditors from collecting any debt that has been discharged. §524(a)(2).

After the issuance of Taggart's federal bankruptcy discharge order, the Oregon state court proceeded to enter judgment against Taggart in the prebankruptcy suit involving Sherwood. Sherwood then filed a petition in state court seeking attorney's fees that were incurred *after* Taggart filed his bankruptcy petition. All parties agreed that, under the Ninth Circuit's decision in *In re Ybarra*, 424 F. 3d 1018 (2005), a discharge order would normally cover and thereby discharge postpetition attorney's fees stemming from prepetition litigation (such as the Oregon litigation) *unless* the discharged debtor "'returned to the fray'" after filing for bankruptcy. *Id.*, at 1027. Sherwood argued that Taggart had "returned to the fray" postpetition and therefore was liable for the postpetition attorney's fees that Sherwood sought to collect. The state trial court agreed and held Taggart liable for roughly $45,000 of Sherwood's postpetition attorney's fees.

At this point, Taggart returned to the Federal Bankruptcy Court. He argued that he had not returned to the state-court "fray" under *Ybarra*, and that the discharge order therefore barred Sherwood from collecting postpetition attorney's fees. Taggart added that the court should hold Sherwood in civil contempt because Sherwood had violated the discharge order. The Bankruptcy Court did

not agree. It concluded that Taggart had returned to the fray. Finding no violation of the discharge order, it refused to hold Sherwood in civil contempt.

Taggart appealed, and the Federal District Court held that Taggart had not returned to the fray. Hence, it concluded that Sherwood violated the discharge order by trying to collect attorney's fees. The District Court remanded the case to the Bankruptcy Court.

The Bankruptcy Court, noting the District Court's decision, then held Sherwood in civil contempt. In doing so, it applied a standard it likened to "strict liability." 522 B. R., at 632. The Bankruptcy Court held that civil contempt sanctions were appropriate because Sherwood had been "'aware of the discharge'" order and "'intended the actions which violate[d]'" it. *Ibid.* (quoting *In re Hardy*, 97 F. 3d, at 1390). The court awarded Taggart approximately $105,000 in attorney's fees and costs, $5,000 in damages for emotional distress, and $2,000 in punitive damages.

Sherwood appealed. The Bankruptcy Appellate Panel vacated these sanctions, and the Ninth Circuit affirmed the panel's decision. The Ninth Circuit applied a very different standard than the Bankruptcy Court. It concluded that a "creditor's good faith belief" that the discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." 888 F. 3d, at 444. Because Sherwood had a "good faith belief" that the discharge order "did not apply" to Sherwood's claims, the Court of Appeals held that civil contempt sanctions were improper. *Id.*, at 445.

Taggart filed a petition for certiorari, asking us to decide whether "a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt." Pet. for Cert. I. We granted certiorari.

II

The question before us concerns the legal standard for

holding a creditor in civil contempt when the creditor attempts to collect a debt in violation of a bankruptcy discharge order. Two Bankruptcy Code provisions aid our efforts to find an answer. The first, section 524, says that a discharge order "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset" a discharged debt. 11 U. S. C. §524(a)(2). The second, section 105, authorizes a court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." §105(a).

In what circumstances do these provisions permit a court to hold a creditor in civil contempt for violating a discharge order? In our view, these provisions authorize a court to impose civil contempt sanctions when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order.

A

Our conclusion rests on a longstanding interpretive principle: When a statutory term is "'obviously transplanted from another legal source,'" it "'brings the old soil with it.'" *Hall* v. *Hall*, 584 U. S. ___, ___ (2018) (slip op., at 13) (quoting Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947)); see *Field* v. *Mans*, 516 U. S. 59, 69–70 (1995) (applying that principle to the Bankruptcy Code). Here, the statutes specifying that a discharge order "operates as an injunction," §524(a)(2), and that a court may issue any "order" or "judgment" that is "necessary or appropriate" to "carry out" other bankruptcy provisions, §105(a), bring with them the "old soil" that has long governed how courts enforce injunctions.

That "old soil" includes the "potent weapon" of civil contempt. *Longshoremen* v. *Philadelphia Marine Trade Assn.*, 389 U. S. 64, 76 (1967). Under traditional princi-

ples of equity practice, courts have long imposed civil contempt sanctions to "coerce the defendant into compliance" with an injunction or "compensate the complainant for losses" stemming from the defendant's noncompliance with an injunction. *United States* v. *Mine Workers*, 330 U. S. 258, 303–304 (1947); see D. Dobbs & C. Roberts, Law of Remedies §2.8, p. 132 (3d ed. 2018); J. High, Law of Injunctions §1449, p. 940 (2d ed. 1880).

The bankruptcy statutes, however, do not grant courts unlimited authority to hold creditors in civil contempt. Instead, as part of the "old soil" they bring with them, the bankruptcy statutes incorporate the traditional standards in equity practice for determining when a party may be held in civil contempt for violating an injunction.

In cases outside the bankruptcy context, we have said that civil contempt "should not be resorted to where there is [a] *fair ground of doubt* as to the wrongfulness of the defendant's conduct." *California Artificial Stone Paving Co.* v. *Molitor*, 113 U. S. 609, 618 (1885) (emphasis added). This standard reflects the fact that civil contempt is a "severe remedy," *ibid.*, and that principles of "basic fairness requir[e] that those enjoined receive explicit notice" of "what conduct is outlawed" before being held in civil contempt, *Schmidt* v. *Lessard*, 414 U. S. 473, 476 (1974) (*per curiam*). See *Longshoremen*, *supra*, at 76 (noting that civil contempt usually is not appropriate unless "those who must obey" an order "will know what the court intends to require and what it means to forbid"); 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2960, pp. 430–431 (2013) (suggesting that civil contempt may be improper if a party's attempt at compliance was "reasonable").

This standard is generally an *objective* one. We have explained before that a party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively un-

reasonable. As we said in *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187 (1949), "[t]he absence of wilfulness does not relieve from civil contempt." *Id.*, at 191.

We have not held, however, that subjective intent is always irrelevant. Our cases suggest, for example, that civil contempt sanctions may be warranted when a party acts in bad faith. See *Chambers* v. *NASCO, Inc.*, 501 U. S. 32, 50 (1991). Thus, in *McComb*, we explained that a party's "record of continuing and persistent violations" and "persistent contumacy" justified placing "the burden of any uncertainty in the decree . . . on [the] shoulders" of the party who violated the court order. 336 U. S., at 192–193. On the flip side of the coin, a party's good faith, even where it does not bar civil contempt, may help to determine an appropriate sanction. Cf. *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 801 (1987) ("[O]nly the least possible power adequate to the end proposed should be used in contempt cases" (quotation altered)).

These traditional civil contempt principles apply straightforwardly to the bankruptcy discharge context. The typical discharge order entered by a bankruptcy court is not detailed. See *supra*, at 2–3. Congress, however, has carefully delineated which debts are exempt from discharge. See §§523(a)(1)–(19). Under the fair ground of doubt standard, civil contempt therefore may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope.

B

The Solicitor General, *amicus* here, agrees with the fair ground of doubt standard we adopt. Brief for United States as *Amicus Curiae* 13–15. And the respondents stated at oral argument that it would be appropriate for courts to apply that standard in this context. Tr. of Oral

Arg. 43. The Ninth Circuit and petitioner Taggart, however, each believe that a different standard should apply.

As for the Ninth Circuit, the parties and the Solicitor General agree that it adopted the wrong standard. So do we. The Ninth Circuit concluded that a "creditor's good faith belief" that the discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." 888 F. 3d, at 444. But this standard is inconsistent with traditional civil contempt principles, under which parties cannot be insulated from a finding of civil contempt based on their subjective good faith. It also relies too heavily on difficult-to-prove states of mind. And it may too often lead creditors who stand on shaky legal ground to collect discharged debts, forcing debtors back into litigation (with its accompanying costs) to protect the discharge that it was the very purpose of the bankruptcy proceeding to provide.

Taggart, meanwhile, argues for a standard like the one applied by the Bankruptcy Court. This standard would permit a finding of civil contempt if the creditor was aware of the discharge order and intended the actions that violated the order. Brief for Petitioner 19; cf. 522 B. R., at 632 (applying a similar standard). Because most creditors are aware of discharge orders and intend the actions they take to collect a debt, this standard would operate much like a strict-liability standard. It would authorize civil contempt sanctions for a violation of a discharge order regardless of the creditor's subjective beliefs about the scope of the discharge order, and regardless of whether there was a reasonable basis for concluding that the creditor's conduct did not violate the order. Taggart argues that such a standard would help the debtor obtain the "fresh start" that bankruptcy promises. He adds that a standard resembling strict liability would be fair to creditors because creditors who are unsure whether a debt has been discharged can head to federal bankruptcy court and

obtain an advance determination on that question before trying to collect the debt. See Fed. Rule Bkrtcy. Proc. 4007(a).

We doubt, however, that advance determinations would provide a workable solution to a creditor's potential dilemma. A standard resembling strict liability may lead risk-averse creditors to seek an advance determination in bankruptcy court even where there is only slight doubt as to whether a debt has been discharged. And because discharge orders are written in general terms and operate against a complex statutory backdrop, there will often be at least some doubt as to the scope of such orders. Taggart's proposal thus may lead to frequent use of the advance determination procedure. Congress, however, expected that this procedure would be needed in only a small class of cases. See 11 U. S. C. §523(c)(1) (noting only three categories of debts for which creditors must obtain advance determinations). The widespread use of this procedure also would alter who decides whether a debt has been discharged, moving litigation out of state courts, which have concurrent jurisdiction over such questions, and into federal courts. See 28 U. S. C. §1334(b); Advisory Committee's 2010 Note on subd. (c)(1) of Fed. Rule Civ. Proc. 8, 28 U. S. C. App., p. 776 (noting that "whether a claim was excepted from discharge" is "in most instances" not determined in bankruptcy court).

Taggart's proposal would thereby risk additional federal litigation, additional costs, and additional delays. That result would interfere with "a chief purpose of the bankruptcy laws": "'to secure a prompt and effectual'" resolution of bankruptcy cases "'within a limited period.'" *Katchen* v. *Landy*, 382 U. S. 323, 328 (1966) (quoting *Ex parte Christy*, 3 How. 292, 312 (1844)). These negative consequences, especially the costs associated with the added need to appear in federal proceedings, could work to the disadvantage of debtors as well as creditors.

Taggart also notes that lower courts often have used a standard akin to strict liability to remedy violations of automatic stays. See Brief for Petitioner 21. An automatic stay is entered at the outset of a bankruptcy proceeding. The statutory provision that addresses the remedies for violations of automatic stays says that "an individual injured by any willful violation" of an automatic stay "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U. S. C. §362(k)(1). This language, however, differs from the more general language in section 105(a). *Supra*, at 5. The purposes of automatic stays and discharge orders also differ: A stay aims to prevent damaging disruptions to the administration of a bankruptcy case in the short run, whereas a discharge is entered at the end of the case and seeks to bind creditors over a much longer period. These differences in language and purpose sufficiently undermine Taggart's proposal to warrant its rejection. (We note that the automatic stay provision uses the word "willful," a word the law typically does not associate with strict liability but "'whose construction is often dependent on the context in which it appears.'" *Safeco Ins. Co. of America* v. *Burr*, 551 U. S. 47, 57 (2007) (quoting *Bryan* v. *United States*, 524 U. S. 184, 191 (1998)). We need not, and do not, decide whether the word "willful" supports a standard akin to strict liability.)

III

We conclude that the Court of Appeals erred in applying a subjective standard for civil contempt. Based on the traditional principles that govern civil contempt, the proper standard is an objective one. A court may hold a creditor in civil contempt for violating a discharge order where there is not a "fair ground of doubt" as to whether the creditor's conduct might be lawful under the discharge order. In our view, that standard strikes the "careful

balance between the interests of creditors and debtors" that the Bankruptcy Code often seeks to achieve. *Clark* v. *Rameker*, 573 U. S. 122, 129 (2014).

Because the Court of Appeals did not apply the proper standard, we vacate the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

FOUNTAINBLEAU, LLC, a South Carolina limited liability company and NOAM PYADE, individually, Petitioners, v. HIRE US, INC., a Florida limited liability company and AERO DIVERSIFIED SERVICES, INC., a Florida profit corporation, Respondents.	)	Case No. 2D18-4068

Opinion filed June 7, 2019.

Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; Robert A. Foster, Jr., Judge.

Nicholas A. Brown, Jaret Fuente, and Jeffrey A. Cohen of Carlton Fields Jorden Burt, P.A., Tampa, for Petitioners.

Tyler S. Wolas of Wolas Law Group, PLLC, Largo, for Respondents.

BLACK, Judge.

Fountainbleau, LLC, and Noam Pyade, defendants in a lawsuit filed by Hire Us, Inc., and Aero Diversified Services, Inc., seek certiorari review of an order

declining to rule on pending motions, including a motion to dismiss for lack of jurisdiction, and instead sua sponte ordering the parties to arbitrate the motion to dismiss as well as the merits of the lawsuit. Fountainbleau and Mr. Pyade contend that the trial court departed from the essential requirements of law by exercising jurisdiction over the parties—ordering them to arbitration—without first determining whether it had personal jurisdiction over Fountainbleau, a South Carolina corporation, and Mr. Pyade, a South Carolina resident. We grant the petition for writ of certiorari and quash the order on review.

As relevant to the resolution of the petition before us, Hire Us and Aero Diversified (together, Hire Us) filed a second-amended complaint against Fountainbleau and Mr. Pyade (together, Fountainbleau) for breach of oral contract, fraudulent inducement, and unjust enrichment. Contemporaneously, Hire Us served interrogatories and a request for production on Fountainbleau. Fountainbleau immediately filed a motion to dismiss pursuant to Florida Rules of Civil Procedure 1.061 and 1.140, arguing forum non conveniens and lack of personal jurisdiction as required pursuant to Florida's long-arm statute, section 48.193, Florida Statutes (2018). Affidavits from Mr. Pyade individually and as the owner and registered agent of Fountainbleau were attached. Fountainbleau also filed a motion to stay merits discovery until the pending jurisdictional challenge was resolved. Fountainbleau's motion to dismiss was set for hearing, and Hire Us filed a motion to continue the hearing until the discovery-related motion to stay was heard. Ultimately, the motion to dismiss and motion to continue were heard together.

At the hearing, after listening to argument from the parties, the court stated, "I'm taking both motions under advisement and I'm setting [the case] for arbitration." In response to Fountainbleau's objection to the court's decision, the court stated: "I'm going to take everything under advisement and I'm going to send you to arbitration. . . . Both clients need to show up." The court then confirmed that the arbitration was to address the merits of the case, the jurisdictional issues, and attorneys' fees. On further objection by Fountainbleau, the court reiterated that the arbitrator would decide the jurisdictional challenge as well as the merits of the lawsuit. The September 14, 2018, order rendered by the court comports with the ruling orally pronounced, referring "the entire action to arbitration, including [the] pending motion to dismiss asserting a lack of personal jurisdiction," directing "that the parties themselves" appear in person "at all future hearings," and "otherwise tak[ing] under advisement" the pending motion to dismiss.

Fountainbleau timely filed this petition seeking certiorari review of the order or otherwise requesting appropriate relief. As an initial matter, we conclude that a petition for writ of certiorari is the appropriate mechanism for review. Although the trial court's order requires the parties to attend arbitration, it is not an order determining the "entitlement" of a party to arbitration such that it would be a nonfinal appealable order pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv). See Ebbit v. Terminix Int'l Co. Ltd. P'ship, 792 So. 2d 1275, 1276 (Fla. 4th DCA 2001); cf. Avatar Props., Inc. v. Greetham, 27 So. 3d 764, 765 n.1 (Fla. 2d DCA 2010) (distinguishing Ebbit where the order on appeal determined a contractual right, i.e., entitlement to

arbitration).[1] Similarly, the order is not an appealable nonfinal order determining the court's jurisdiction over Fountainbleau because the order specifically refers the issue of jurisdiction to the arbitrator and otherwise takes the issue "under advisement." See Fla. R. App. P. 9.130(a)(3)(C)(i); Frier v. Frier, 13 So. 3d 145, 146 (Fla. 1st DCA 2009) ("To fall within the scope of [rule 9.130(a)(3)(C)(i)], . . . an order must actually make a determination as to personal jurisdiction."); cf. Blogwire Hungary Szellemi Alkotást Hasznosító v. Bollea, 162 So. 3d 1116, 1117 n.2 (Fla. 2d DCA 2015) ("Although the circuit court apparently intended once again to defer a ruling on the jurisdictional aspect of [the] motion to dismiss, the order denying the motion to dismiss does not incorporate such a reservation. . . . Accordingly, we have jurisdiction to hear this matter under [rule] 9.130(a)(3)(C)(i)."); Sprint Corp. v. Telimagine, Inc., 923 So. 2d 525, 527-28 (Fla. 2d DCA 2005) ("By exercising jurisdiction over Sprint Corp. when issuing the temporary injunction, the trial court implicitly denied Spring Corp.'s motion to dismiss.").

"Before a court may grant certiorari relief . . . the petitioner must establish the following three elements: '(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal.' " Williams v. Oken, 62 So. 3d 1129, 1132 (Fla. 2011) (quoting Reeves v. Fleetwood Homes of Fla., Inc., 889 So. 2d 812, 822 (Fla. 2004)). The latter

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[1]Although Fountainbleau and Hire Us agree that the court ordered the parties to nonbinding arbitration pursuant to section 44.103, Florida Statutes (2018), the court did not reference the statute or use the phrase "nonbinding arbitration" at any point during the hearing or in the order on review. See § 44.103(2) ("A court, pursuant to rules adopted by the Supreme Court, may refer any contested civil action filed in a circuit or county court to nonbinding arbitration."). Nonetheless, that does appear to be the only possible basis upon which the court could have entered the order as there is no written agreement and the claims raised by Hire Us are not statutorily required to be arbitrated.

two elements are jurisdictional, id., and certiorari jurisdiction is established "where an 'order implicates a violation of the parties' constitutional rights which cannot be remedied on plenary review,' " Gundel v. AV Homes, Inc., 264 So. 3d 304, 310 (Fla. 2d DCA 2019) (quoting Rodriguez ex rel. Posso-Rodriguez v. Feinstein, 734 So. 2d 1162, 1163 (Fla. 3d DCA 1999)). That there exists a mechanism for correcting the error via postjudgment appeal is not determinative of this court's jurisdiction; "rather, the remedy must alleviate the harm that results from the error." Id. at 311 (quoting Gawker Media, LLC v. Bollea, 170 So. 3d 125, 132 (Fla. 2d DCA 2015)).

Here, the trial court has been asked to determine whether the complaint against a South Carolina corporation and a South Carolina resident alleges sufficient facts to comply with the due process and other constitutional considerations set forth in Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 502 (Fla. 1989). The material injury which cannot be corrected on plenary review is the trial court's exercise of jurisdiction over Fountainbleau by requiring Fountainbleau to appear and participate in arbitration where the court has not yet determined its jurisdiction over Fountainbleau. If orders deferring consideration of motions to dismiss based on a lack of personal jurisdiction in favor of ordering the entire action to arbitration—including jurisdictional determinations—are not subject to certiorari review, due process rights and rights afforded by section 48.193 are illusory and the policy inherent in subjecting nonresidents to Florida courts' jurisdiction becomes meaningless. See Gundel, 264 So. 3d at 311 (quoting Keck v. Eminisor, 104 So. 3d 359, 365-66 (Fla. 2012)); cf. Kauffman v. King, 89 So. 2d 24, 26 (Fla. 1956) (granting the petition for writ of certiorari and finding "that it is palpably unjust to require [petitioner] to incur the expense and be

subjected to the inconvenience of defending this suit in Da[d]e County and, in the event of an adverse verdict . . . to have to spend additional time and money to defend it again in Palm Beach County" such that petitioner's "remedy by appeal is . . . inadequate").

Having determined that we have certiorari jurisdiction, we next consider whether the trial court departed from the essential requirements of law when it ordered the parties to arbitrate the case without first determining whether personal jurisdiction over Fountainbleau has been established.

"Personal jurisdiction refers to whether the actions of an individual or business entity as set forth in the applicable statutes permit the court to exercise jurisdiction in a lawsuit brought against the individual or business entity in this state." Borden v. E.-European Ins. Co., 921 So. 2d 587, 591 (Fla. 2006). And personal jurisdiction is "necessary before a defendant, either an individual or business entity, may be compelled to answer a claim brought in a court of law." Id. Section 48.193, Florida's long-arm jurisdiction statute, "defines the parameters by which a trial court may exercise personal jurisdiction over a party who is not a Florida resident." Youssef v. Zaitouni, 241 So. 3d 901, 903 (Fla. 2d DCA 2018). A court's exercise of long-arm jurisdiction outside of the limited circumstances set forth in section 48.193 is a departure from the essential requirements of law. See Kauffman, 89 So. 2d at 26 ("The trial judge departed from the essential requirements of the law in denying to the resident defendants a privilege granted to them by statute[.]"); Citizens Prop. Ins. Corp. v. Trapeo, 136 So. 3d 670, 676 (Fla. 2d DCA 2014) (" 'It is only in exceptional cases, such as those where the lower court acts without or in excess of jurisdiction, or where the interlocutory order

does not conform to the essential requirements of law' that certiorari relief is appropriate." (quoting Kauffman, 89 So. 2d at 26)).

Courts of this state "simply cannot subvert the statutory requirements or the due process interests that they implicate." Youssef, 241 So. 3d at 903. Those due process interests limit "the State's adjudication authority[,] principally protect[ing] the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." Estes v. Rodin, 259 So. 3d 183, 192 (Fla. 3d DCA 2018) (quoting Walden v. Fiore, 571 U.S. 277, 284 (2014)); see also World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) ("Due process requires that the defendant . . . be subject to the personal jurisdiction of the court." (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945))); Logitech Cargo, U.S.A., Corp. v. JW Perry, Inc., 817 So. 2d 1033, 1035 (Fla. 3d DCA 2002) ("The whole point of our jurisdiction and venue laws is not to hale defendants into foreign jurisdictions where they are not seeking affirmative relief."). In that respect, it seems evident that in order to apply and enforce a statute of this state the court must first determine that it has jurisdiction, both subject matter and personal.[2] See Humphrey v. Deutsche Bank Nat'l Tr. Co., 113 So. 3d 1019, 1019 (Fla. 2d DCA 2013) ("[T]he court never secured personal jurisdiction over Humphrey and, thus, had no power over him. That being so, the court had no authority to direct Humphrey to do anything."); cf. Johns v. Taramita, 132 F. Supp. 2d 1021, 1027 (S.D. Fla. 2001) ("[T]he

[2]The fact that orders determining personal jurisdiction are reviewable under rule 9.130 as nonfinal appealable orders also supports that determinations of personal jurisdiction must be made prior to any other action or order of the court. See Fla. R. App. P. 9.130(a)(3)(C)(i).

court lacks the power to enforce the agreement because it does not have personal jurisdiction over the respondent.").

"The determination of jurisdictional disputes . . . must be made by a court of law." Curtis v. Olson, 837 So. 2d 1155, 1157 (Fla. 1st DCA 2003). "Without jurisdiction, the court cannot proceed at all in any cause. Jurisdiction is [the] power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Trerice v. Trerice, 250 So. 3d 695, 697 (Fla. 4th DCA 2018) (quoting Griffith v. Fla. Parole & Prob. Comm'n, 485 So. 2d 818, 821 (Fla. 1986)); see also Springbrook Commons, Ltd. v. Brown, 761 So. 2d 1192, 1194 (Fla. 4th DCA 2000) ("If the court is to exercise its power over a person it must have jurisdiction over that individual."); cf. § 682.181(1), Fla. Stat. (2018) ("A court of this state having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate." (emphasis added)); Kintzele v. J.B. & Sons, Inc., 658 So. 2d 130, 132 (Fla. 1st DCA 1995) ("On questions of arbitrators' 'in personam' jurisdiction, the parties are entitled to judicial interpretation of the pertinent contractual language." (emphasis added)). Thus, before the court could invoke the nonbinding arbitration statute, section 44.103, Florida Statutes (2018), and refer the action to arbitration, it was required to determine that it had personal jurisdiction over Fountainbleau. See Camp Illahee Inv'rs, Inc. v. Blackman, 870 So. 2d 80, 84 (Fla. 2d DCA 2003) ("[B]efore reaching the issue of forum non conveniens under Florida Rule of Civil Procedure 1.061, the trial court was required to first determine whether it had in personam jurisdiction in accordance with the two-prong test." (emphasis added)); La Reunion Francaise, S.A. v. La Costena, 818 So. 2d 657, 659 (Fla. 3d DCA 2002)

(concluding that there was no personal jurisdiction over the foreign defendant and therefore no need to reach other issues raised in the motion to dismiss, including the issue of forum non conveniens); cf. CT Miami, LLC v. Samsung Elecs. Latinoamerica Miami, Inc., 201 So. 3d 85, 92 (Fla. 3d DCA 2015) ("Arbitrators have no inherent authority over a dispute or the parties to that dispute . . . .").

Here, the court's failure to determine its jurisdiction in the first instance is a departure from the requirements of law and is an act in excess of its jurisdiction. Without ruling on the contested jurisdictional issue, the court entered an order which required the exercise of jurisdiction. Accordingly, the petition for writ of certiorari is granted, and the September 14, 2018, order referring the lawsuit to arbitration is quashed.

Petition granted; order quashed.

LaROSE, C.J., and ROTHSTEIN-YOUAKIM, J., Concur.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

GREEN EMERALD HOMES, LLC, Appellant, v. 21ST MORTGAGE CORPORATION, a Delaware corporation authorized to transact business in Florida, Appellee.	)	Case No. 2D17-2192

Opinion filed June 7, 2019.

Appeal from the Circuit Court for Hillsborough County; William P. Levens, Senior Judge.

Mark P. Stopa of Stopa Law Firm, Tampa (withdrew after briefing); Latasha Scott of Lord Scott, PLLC, Tampa; Richard J. Mockler of Stay In My Home, P.A., St. Petersburg (substituted as counsel of record); and Angela L. Leiner of The Law Office of Angela L. Leiner, P.A., St. Petersburg, for Appellant.

Leslie S. White and Tim W. Sobczak of Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., Orlando, and Dariel Abrahamy of Greenspoon Marder, P.A., Boca Raton, for Appellee.

SALARIO, Judge.

Green Emerald Homes, LLC appeals from a final judgment of foreclosure in favor of 21st Mortgage Corporation. Although Green Emerald was not a party to the mortgage the judgment foreclosed, it was the owner of the property subject to the mortgage at the time the complaint and lis pendens were filed and was a named defendant in the case. 21st Mortgage argues that we must affirm because, as a nonparty to the mortgage who purchased the property after the mortgage was recorded, Green Emerald lacks standing to dispute the legal sufficiency of its proof of the amount due, an element of the foreclosure cause of action. We reject that argument, find 21st Mortgage's proof of the amount due legally insufficient, and reverse and remand for entry of a judgment of involuntary dismissal.

I.

In 2007, Rosalie Reid executed a note in favor of American Residential Lending, Inc. evidencing a debt of $186,000 and secured by a mortgage on real property. In 2014, 21st Mortgage filed a civil action to foreclose the mortgage based on Ms. Reid's default of her payment obligations on the note. A lis pendens was filed on the same day. In addition to Ms. Reid, the foreclosure complaint and lis pendens named Green Emerald as a defendant and alleged that Green Emerald was the owner and was in possession of the property subject to its mortgage. The complaint requested a judgment "foreclosing the Defendants' interest in the Property made the subject of the Mortgage." In sum, then, the complaint named Green Emerald as a defendant and sought a judgment foreclosing its ownership interest in the mortgaged property.

Ms. Reid failed to answer the complaint, and she was ultimately the subject of a clerk's default. Green Emerald did file an answer in which it denied the bulk of 21st Mortgage's allegations and asserted several affirmative defenses. It admitted, however, 21st Mortgage's allegation that Green Emerald was the owner of the property and was then in possession of it. From there, the case proceeded in the more-or-less normal course to a nonjury trial on 21st Mortgage's claim for foreclosure.

At the beginning of trial, 21st Mortgage challenged Green Emerald's "standing" to defend the lawsuit on the basis that it was not a party to the note and mortgage. It argued that because Green Emerald was not a party to the note and mortgage, it "should not be able to contest practically anything here" and that although Green Emerald had pleaded defenses, "there's no standing for this particular defendant." It asked the court to strike Green Emerald's defenses, to hold that it was estopped from defending the case, or "otherwise provide extreme light, little weight to any arguments or objections here today."

The trial court asked how Green Emerald came into possession of the property, and Green Emerald replied that it had "obtained title to the property and is the record owner." Green Emerald reminded the court that its status as the owner of the property was established by the pleadings for purposes of the action. See, e.g., Gen. Accident Fire & Life Assurance Corp. v. Means, 362 So. 2d 135, 136 (Fla. 2d DCA 1978) (holding that there was "no issue" as to coverage under an insurance policy where coverage was alleged in the complaint and admitted in the answer). Throughout the case, no one ever disputed that Green Emerald owned the mortgaged property at the time of the filing of the foreclosure complaint and lis pendens.

21st Mortgage's lone witness at trial was Whit Reed, a "legal team leader" for 21st Mortgage who worked with loans in default. Through this witness, 21st Mortgage admitted the original note and mortgage, default letter, and payment history. Mr. Reed also testified about a proposed final judgment 21st Mortgage had tendered to the trial court. That testimony revealed that 21st Mortgage had included in the amount-due finding of the proposed final judgment $77,270 more in principal indebtedness than was reflected by the trial evidence. Mr. Reed testified that the principal increase was most likely the result of a modification agreed to by Ms. Reid and a prior loan servicer. He further testified that a change in principal like the one reflected in the proposed final judgment could not be accomplished without a separate written agreement and, therefore, that there had to be a written agreement on that point somewhere, but that he did not have it with him. 21st Mortgage never disputed or clarified Mr. Reed's testimony. Nor did it produce the likely loan modification (or any other document) or offer any other admissible evidence of its terms.

Green Emerald moved for an involuntary dismissal at the close of evidence. It argued, among other things, that 21st Mortgage failed to provide sufficient evidence of the amount due under the note—specifically, that without any evidence of the loan modification Mr. Reed testified to, 21st Mortgage could not prove the amount due. 21st Mortgage responded that Green Emerald lacked standing to challenge the amount due because it was not a party to the note or mortgage. The trial court denied Green Emerald's motion but—recognizing the lack of evidence of the principal amount contained in the proposed final judgment—removed the additional $77,270, and it entered a judgment in favor of 21st Mortgage that foreclosed Green Emerald's interests

in the property and directed that the property be sold at a public sale. Green Emerald timely filed a notice of appeal.

II.

Green Emerald argues that we should reverse because 21st Mortgage failed to adduce legally sufficient proof of the amount due under the note and mortgage. We review the trial court's legal conclusions de novo and its factual findings for competent substantial evidence. See Corya v. Sanders, 155 So. 3d 1279, 1283 (Fla. 4th DCA 2015) ("After a nonjury trial, review of trial court decisions based on legal questions are reviewed de novo and those based on findings of fact from disputed evidence are reviewed for competent, substantial evidence.").

A.

As it did in the trial court, 21st Mortgage maintains on appeal that Green Emerald lacks standing to challenge the sufficiency of the evidence of the amount due under the note because it was not a party to the note and mortgage. The amount due under the note is an element of the foreclosure cause of action. See Ernest v. Carter, 368 So. 2d 428, 429 (Fla. 2d DCA 1979); Liberty Home Equity Sols., Inc. v. Raulston, 206 So. 3d 58, 60 (Fla. 4th DCA 2016); Bank of Am., N.A. v. Delgado, 166 So. 3d 857, 859 (Fla. 3d DCA 2015). The notion that a party named as a defendant in a civil action has no standing to require that the plaintiff prove the elements of its cause of action is a novel one, and we have been unable to find any other area where the law says that a named defendant must have standing to require that the plaintiff prove its case.

Requiring a named defendant to have standing to hold the plaintiff to its proof is quite out of line with the conventional understanding of standing that prevails in civil litigation. Standing is usually regarded as an attribute the claimant—not the

defendant—must possess before it can open the courthouse doors and have its suit decided. See, e.g., Rogers & Ford Constr. Corp. v. Carlandia Corp., 626 So. 2d 1350, 1352 (Fla. 1993) ("The determination of standing to sue concerns a court's exercise of jurisdiction to hear and decide the cause pled by a particular party."); Progressive Express Ins. Co. v. McGrath Cmty. Chiropractic, 913 So. 2d 1281, 1284-85 (Fla. 2d DCA 2005) (explaining that standing is an obligation of the claimant in a civil case and stating that "the plaintiff's lack of standing at the inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed"). The requirement of standing ensures that a claimant seeking a judgment from a court has a "sufficient interest in the outcome of litigation which will warrant the court's entertaining it." Gen. Dev. Corp. v. Kirk, 251 So. 2d 284, 286 (Fla. 2d DCA 1971). As applied to foreclosure cases, standing has been deemed to require (loosely stated) that the claimant seeking a foreclosure judgment have the right to enforce the note secured by the mortgage it seeks to foreclose. See § 673.3011, Fla. Stat. (2014); Verizzo v. Bank of N.Y. Mellon, 220 So. 3d 1262, 1264 (Fla. 2d DCA 2017).

Our court has not previously—in foreclosure cases or otherwise—restricted a named defendant's right to demand that the plaintiff prove its cause of action based on a case-by-case or issue-by-issue analysis of the defendant's standing to defend.[1] That would raise serious concerns of procedural due process. Consider the

[1]We recognize that a foreclosure action is an action in rem or quasi in rem. See Aluia v. Dyck-O'Neal, Inc., 205 So. 3d 768, 773 (Fla. 2d DCA 2016). We also recognize that in some other proceedings against property, we have required a party who asserts an interest in the property to establish "standing." See, e.g., In re Forfeiture of: $7464 + 2002 Cadillac Escalade, Identification No. 3GYEK63N02G222802, 872 So. 2d 1017, 1018 (Fla. 2d DCA 2004) (holding that only persons who have standing can participate in a forfeiture proceeding and that standing must be based on a claim to ownership of the property). Without undertaking to detail

circumstances here. It is undisputed in this case that Green Emerald owns the property secured by the mortgage 21st Mortgage seeks to enforce. A titleholder is regarded by the law as an indispensable party to a foreclosure action, and 21st Mortgage doubtless named Green Emerald in the foreclosure complaint in this case for that reason. See Oakland Props. Corp. v. Hogan, 117 So. 846, 848 (Fla. 1928) ("One who holds the legal title to mortgaged property is not only necessary, but is an indispensable, party defendant in a suit to foreclose a mortgage."); U.S. Bank Nat'l Ass'n v. Bevans, 138 So. 3d 1185, 1188 (Fla. 3d DCA 2014) (holding that the legal titleholder is an indispensable party to a foreclosure complaint without whom the litigation cannot proceed). Before Green Emerald could be stripped of its ownership of the subject property—the all-but-certain effect of the foreclosure judgment 21st Mortgage sought and obtained—it was unquestionably entitled to procedural due process. See Dep't of Law Enf't v. Real Prop., 588 So. 2d 957, 964 (Fla. 1991) ("Property rights are among the basic substantive rights expressly protected by the Florida Constitution."); Adhin v. First Horizon Home Loans, 44 So. 3d 1245, 1254 n.6 (Fla. 5th DCA 2010) (explaining that due process protects the property interests of a subsequent purchaser of mortgaged property); Metro. Dade Cty. v. Sokolowski, 439 So. 2d 932, 934 (Fla. 3d DCA 1983) ("[A] property interest falls within the protections of procedural due process.").

In the context of civil litigation, "[d]ue process mandates that in any judicial proceeding, the litigants must be afforded the basic elements of notice and [an] opportunity to be heard." Shlishey the Best, Inc. v. CitiFinancial Equity Servs., Inc., 14

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all of the ways in which a foreclosure proceeding may be different, we stress here that Green Emerald was a named defendant in the foreclosure suit and a judgment was sought against it, which gives it, as shown in the text, a due process right to defend the action.

So. 3d 1271, 1273 (Fla. 2d DCA 2009) (quoting E.I. DuPont De Nemours & Co. v. Lambert, 654 So. 2d 226, 228 (Fla. 2d DCA 1995)). The right to be heard "includes more than simply being allowed to be present and to speak"; it includes the right to meaningfully introduce evidence, cross-examine witnesses, and be heard on questions of law. Vollmer v. Key Dev. Props., Inc., 966 So. 2d 1022, 1027 (Fla. 2d DCA 2007); see also Baron v. Baron, 941 So. 2d 1233, 1236 (Fla. 2d DCA 2006) (holding that a father had a due process right to introduce evidence, cross-examine witnesses, and be heard on questions of law with respect to a mother's emergency motion to place their child in a therapeutic boarding school); Glary v. Israel, 53 So. 3d 1095, 1098-99 (Fla. 1st DCA 2011) (holding that a nonparty who was subject to an order compelling it to turn over funds to a receiver had a due process right to present evidence, cross-examine witnesses, and be heard on questions of law); Brinkley v. County of Flagler, 769 So. 2d 468, 472 (Fla. 5th DCA 2000) (holding that the owner of animals subject to a forfeiture order had a due process right to present evidence, cross-examine witnesses, and be heard on questions of law). Under the conception of standing asserted by 21st Mortgage, Green Emerald—or anyone else who purchases real property subsequent to the recording of a mortgage encumbering that property, for that matter—would not receive any of these long-recognized elements of procedural due process. It would be forced largely if not entirely to sit silent, regardless of the insufficiency of the plaintiff's proof, while the property to which it holds title is foreclosed and sold at auction.

That would be a tough pill to swallow with any named defendant in a civil suit, and it is even more so here in light of a titleholder's status as an indispensable party to a foreclosure suit. See Bank of N.Y. Mellon v. Burgiel, 248 So. 3d 237, 238 n.1 (Fla. 5th DCA 2018); Citibank, N.A. v. Villanueva, 174 So. 3d 612, 613 (Fla. 4th DCA

2015). An indispensable party is one who is "so essential to a suit that no final decision can be rendered without their joinder." Hertz Corp. v. Piccolo, 453 So. 2d 12, 14 n.3 (Fla. 1984). As we explained in Department of Revenue ex rel. Preston v. Cummings, 871 So. 2d 1055, 1058 (Fla. 2d DCA 2004), an indispensable party is one "whose interest will be substantially and directly affected by the outcome of the case" or "whose interest in the subject matter is such that if he is not joined[,] a complete and efficient determination of the equities and rights between the other parties is not possible." (first quoting Amerada Hess Corp. v. Morgan, 426 So. 2d 1122, 1125 (Fla. 1st DCA 1983); then quoting Allman v. Wolfe, 592 So. 2d 1261, 1263 (Fla. 2d DCA 1992)).

If the owner of property subject to a mortgage foreclosure action is so important as to be indispensable to a just adjudication, due process surely requires that the owner be permitted to defend the suit. See Ezem v. Fed. Nat'l Mortg. Ass'n, 153 So. 3d 341, 345 (Fla. 1st DCA 2014) (holding that a nonparty to a foreclosure action claiming to be a co-owner of the property subject to that action, although not a party to the mortgage securing it, was entitled to intervene because "[a]t the minimum, he is entitled to a hearing on his claimed interest"); cf. Villanueva, 174 So. 3d at 614 (holding that a foreclosure judgment was void where the subsequent purchasers of the subject property were not joined to the foreclosure litigation). If only the party to the note and mortgage is relevant, and the titleholder is nothing more than a set piece with no right to defend of any substance, there is no point in making the final resolution of a mortgage foreclosure action contingent on the titleholder being joined to the litigation.

In sum, then, a titleholder named as an indispensable party in a foreclosure suit has a due process right to defend the suit in the same way any other named party to civil litigation has a due process right to defend. It is not as a general

proposition required to demonstrate that it has "standing" to assert a particular issue in the way of defense to the plaintiff's claim for foreclosure.

B.

There are, however, two aspects of substantive foreclosure law that are commonly asserted to limit the types of issues and defenses a subsequent purchaser may raise. The first is that that an owner who acquired title to the property after a facially valid mortgage on that property has been recorded is estopped from disputing the validity of that mortgage. See CCM Pathfinder Palm Harbor Mgmt., LLC v. Unknown Heirs, 198 So. 3d 3, 7 (Fla. 2d DCA 2015) (holding that a subsequent purchaser "is 'estopped from contesting the validity of the mortgage' " (quoting Eurovest, Ltd. v. Segall, 528 So. 2d 482, 483 (Fla. 3d DCA 1988))). The reason the law imposes this estoppel is that a purchaser subsequent to the recorded mortgage has constructive notice of the mortgage and could elect to assume the mortgage as a part of the purchase. Eurovest, 528 So. 2d at 483. When it declines that election, the purchaser "may not defend . . . on grounds which would be unavailable to him had he assumed payment of the mortgage." Id. (holding that a subsequent purchaser was estopped from asserting the affirmative defense of want of consideration); see also Irwin v. Grogan-Cole, 590 So. 2d 1102, 1104 (Fla. 5th DCA 1991).

The second frequently cited rule that limits the kinds of defenses a subsequent purchaser can assert is that a subsequent purchaser who is not a party to the mortgage contract generally cannot assert rights under the contract that belong to the parties. See LaFaille v. Nationstar Mortg., LLC, 197 So. 3d 1246, 1247 (Fla. 3d DCA 2016); Clay Cty. Land Trust No. 08-04-25-0078-014-27, Orange Park Tr. Servs.,

LLC v. JPMorgan Chase Bank, Nat'l Ass'n, 152 So. 3d 83, 84 (Fla. 1st DCA 2014).[2] This is an extension to the mortgage foreclosure context of the hornbook contract law rule that a person who is neither a party to nor an intended third-party beneficiary of a contract has no rights under the contract to enforce. See Greenacre Props., Inc. v. Rao, 933 So. 2d 19, 23 (Fla. 2d DCA 2006) ("As a general rule, a person who is not a party to a contract cannot sue for a breach . . . even if the person receives some incidental benefit from the contract. A third party must establish that the contract either expressly creates rights for them . . . or that the provisions of the contract primarily and directly benefit the third party or a class of persons of which the third party is a member."). The application of this general contract principle in the mortgage foreclosure context makes perfect sense because "we are to interpret and apply the provisions of mortgages the same way we interpret and apply the provisions of any other contract." Green Tree Servicing, LLC v. Milam, 177 So. 3d 7, 12-13 (Fla. 2d DCA 2015).

The cases have sometimes loosely characterized the substantive rules that subsequent purchasers are estopped from contesting the validity of facially valid mortgages and cannot assert contract rights they do not own as related to a foreclosure defendant's "standing" to defend. See, e.g., Rouffe v. CitiMortgage, Inc., 241 So. 3d 870, 872 (Fla. 4th DCA 2018); Clay Cty. Land Tr., 152 So. 3d at 84. But we should

[2]These cases involve allegations that a foreclosure plaintiff failed to comply with the default notice requirement of paragraph twenty-two of the standard residential mortgage contract. Because compliance with paragraph twenty-two is a condition precedent to a foreclosure suit, Konsulian v. Busey Bank, N.A., 61 So. 3d 1283, 1284-85 (Fla. 2d DCA 2011), there might be an argument that the failure to comply with paragraph twenty-two may be asserted by a named defendant to the suit that is not a party to the mortgage. By citing these cases, we do not express an opinion on that question.

recognize these rules for what they are: limitations on the rights of particular parties in the foreclosure process imposed by substantive law. Their scope is confined to the limited subject areas they cover—disputes as to the validity of mortgages and the rights of nonparties to enforce contract provisions. On their face, they do not represent a determination that a subsequent purchaser lacks standing to contest practically anything a plaintiff might assert in a foreclosure case or that a subsequent purchaser must tie each and every matter it asserts by way of defense to some interest that gives it standing to assert that specific matter.[3] See Wilmington Tr., N.A. v. Alvarez, 239 So. 3d 1265, 1266 n.1 (Fla. 3d DCA 2018) (rejecting the argument that a subsequent purchaser "lack[ed] standing" to assert the statute of limitations as a defense to a foreclosure case); 3709 N. Flagler Drive Prodigy Land Tr. v. Bank of Am., N.A., 226 So. 3d 1040, 1042 (Fla. 4th DCA 2017) (holding that a subsequent purchaser may challenge a foreclosure plaintiff's standing to foreclose because otherwise "a subsequent purchaser would never have the ability to defend against the taking of a bona fide interest in the property through a foreclosure sale").

Green Emerald's insistence that 21st Mortgage prove the required element of the amount due does not implicate either the validity of the mortgage or an

[3]We do not mean to imply that these are the only two respects in which the law might treat any specific purchaser subsequent to the recording of a mortgage differently from the borrower under the note and mortgage or from another type of subsequent purchaser, such as one who acquires title after the filing of a foreclosure action. It is possible, for example, that the law might recognize legally consequential distinctions in the facts and circumstances under which a subsequent purchaser took title that the generic use of the term "subsequent purchaser" might mask. We discuss the two rules identified in the text because they are the rules upon which 21st Mortgage relies and because they are the ones discussed in the Florida cases addressing the standing of subsequent purchasers. We express no opinion on any other possibility.

effort to enforce provisions in a mortgage contract to which Green Emerald is not a party. Green Emerald is not saying that 21st Mortgage's mortgage is invalid; it is saying that where the plaintiff's own witness has testified as to the existence of a loan modification as the basis for its computation of the amount due, proof of that agreement's terms is indispensable to proof of the amount due.[4] Nor is Green Emerald trying to assert any right that inured only to Ms. Reid's benefit under the mortgage contract; it is asking the court to determine whether 21st Mortgage's proof of the amount due under the note is legally sufficient to get a judgment that forecloses its interest in the mortgaged property. This is litigation defense 101—requiring the claimant to prove the elements of its case—not the assertion of some right that Green Emerald either does not have or is estopped by law from asserting.

We recognize that we have decided cases addressing a subsequent purchaser's ability to intervene in a pending foreclosure action that hold that there is no right to intervene and that those cases sometimes speak in terms of the purchaser's standing. Those cases have no bearing with regard to a subsequent purchaser who took title prior to the foreclosure litigation and has been named as a defendant in that litigation. First and foremost, those cases involve subsequent purchasers who acquired

[4]This distinguishes the cases on which 21st Mortgage relies, all of which involved the assertion of some defense that went to the validity of the mortgage or its express terms. See Wells Fargo Bank, N.A. v. Rutledge, 230 So. 3d 550, 552 (Fla. 2d DCA 2017) (holding that a third-party purchaser lacked standing to argue that the borrower's signature had been forged on the note and mortgage); CCM Pathfinder, 198 So. 3d at 7 (holding that a subsequent purchaser was bound by a provision in the mortgage contract waiving the statute of limitations for a foreclosure action); LaFaille, 197 So. 3d at 1247 (stating that subsequent titleholders could not assert a contract right that belonged only to the parties to the mortgage); Eurovest, 528 So. 2d at 483 (holding that a third-party purchaser was estopped from arguing that the mortgage was procured by fraud and without consideration).

the mortgaged property after the foreclosure complaint and lis pendens were filed, not before. See, e.g., Bank of N.Y. Mellon for Certificateholders CWALT, Inc. v. HOA Rescue Fund, LLC, 249 So. 3d 731, 733-34 (Fla. 2d DCA 2018); Ventures Tr. 2013-I-H-R v. Asset Acquisitions & Holdings Tr., 202 So. 3d 939, 942-43 (Fla. 2d DCA 2016); Bonafide Props. v. Wells Fargo Bank, N.A., 198 So. 3d 694, 695 (Fla. 2d DCA 2016); Market Tampa Invs., LLC v. Stobaugh, 177 So. 3d 31, 32 (Fla. 2d DCA 2015). Because they purchase property with constructive if not actual notice of the fact that the property is subject to a foreclosure suit, the law treats purchasers pendente lite—pending litigation—accordingly and holds that they have no right to insert themselves into the pending litigation to which they were not previously a party. See Rutledge, 230 So. 3d at 552 ("Rutledge is a subsequent purchaser who was at least constructively aware of Wells Fargo's recorded lis pendens when he purchased the property."); Bonafide Props., 198 So. 3d at 695 (affirming an order denying a subsequent purchaser's motion to intervene because "it is undisputed that [it] acquired its rights to the property four years after Wells Fargo initiated the foreclosure action and filed its notice of lis pendens"); see also Whitburn, LLC v. Wells Fargo Bank, N.A., 190 So. 3d 1087, 1091 (Fla. 2d DCA 2015) (holding that purchaser subsequent to lis pendens "took the property subject to the outcome of the litigation . . ., including the foreclosure sale"). In contrast to a purchaser pendente lite, a party who owns the mortgaged property at the time the foreclosure action and lis pendens are filed is an indispensable party to the litigation. Bevans, 138 So. 3d at 1188. Our court has (rightly) never held that a subsequent purchaser in that situation lacks the right to insist that the plaintiff that has haled the purchaser into court prove the elements of its case.

Furthermore, the questions on a motion to intervene are whether a nonparty has an interest in litigation that entitles it to intervene and whether as a matter of judicial discretion it should be permitted to intervene. See generally Union Cent. Life Ins. Co. v. Carlisle, 593 So. 2d 505, 507-08 (Fla. 1992). One major consideration applicable to the intervention by purchasers pendente lite is that allowing intervention invites the unnecessary protraction of litigation by a nonparty who knew full well at the time it took title that the property was in foreclosure. See Bymel v. Bank of Am., N.A., 159 So. 3d 345, 347 (Fla. 3d DCA 2015) ("Allowing [a purchaser pendente lite] to intervene would unnecessarily prolong the foreclosure action."). To say that a nonparty to litigation does not have an interest sufficient to justify intervention because of when they acquired their interest or that intervention is not advisable under the facts out of concern for delay says nothing about whether a party named as a defendant by the plaintiff and actually joined in the litigation should be permitted to defend itself fully.

We also recognize that other courts have held that a subsequent purchaser has "standing" to contest the amount due because the computation of the amount due bears directly on its right of redemption—i.e., its right to cure the mortgagor's indebtedness by paying everything that is due. See Clay Cty. Land Tr., 152 So. 3d at 85; see also § 45.0315, Fla. Stat. (2014); Beauchamp v. Bank of N.Y., 150 So. 3d 827, 828 (Fla. 4th DCA 2014). But that analysis proceeds from the assumption, which we think unwarranted, that a subsequent purchaser lacks standing to do anything in defense of a foreclosure case unless it can relate it to a right or interest specific to subsequent purchasers. As we have explained in this opinion, a subsequent purchaser has an ownership interest in property and as a matter of due process is entitled to defend in accord with its rights and obligations under applicable substantive law.

Accordingly, we hold that as the owner of the mortgaged property who took title before the filing of the lis pendens, Green Emerald was entitled to insist that 21st Mortgage present competent substantial evidence of the amount due under the note.[5] We now turn to whether it did so.

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[5]The dissent says that a subsequent purchaser receives all the process it is due when its participation is limited to protecting its statutory right of redemption because (1) a subsequent purchaser takes title subject to the mortgage and (2) some subsequent purchasers take advantage of borrowers in distressed situations. As to the first point, the law already limits the subsequent purchaser's rights on the grounds that it takes title subject to the mortgage; it holds that a subsequent purchaser is estopped from disputing the validity of a facially valid mortgage. As we have shown, that principle does not translate into the rule the dissent wants—namely, that a subsequent purchaser, even though it owns the property and is named as a defendant, can be precluded from saying or doing anything in defense of a foreclosure action unless it can convince a judge that its action is tied to the right of redemption. As to the second point, if bad behavior by some subsequent purchasers is a problem, the extent to which it demands action and what action it demands are policy questions properly addressed to the legislature and not questions that we as law-trained judges have either the technical competence or the information-gathering tools to answer. See Bonafide Props., 198 So. 3d at 698 (Altenbernd, J., concurring) (noting that the practice of some subsequent purchasers buying distressed properties and putting rent-paying tenants in them likely has "a measure of good . . . that should be preserved" and "a measure of bad that ought to be regulated or prohibited" and explaining that "[t]his court is not a proper forum to make these determinations or to establish any needed rule of law"). The dissent concludes by saying that our decision "strips 21st Mortgage of its security under the guise of due process." That is not a reasonable characterization; at most, we have required that 21st Mortgage do what virtually any other plaintiff who seeks a judgment against virtually any other defendant must do—prove the elements of its case. And although we cannot preemptively decide the issue, we note that because the law treats each payment default under a note and mortgage as a separate event for res judicata purposes, the smart money says that 21st Mortgage can and will file a new foreclosure action (as soon as tomorrow, if it wants) based on payment defaults subsequent to those involved here. See Provident Funding Assocs., L.P. v. MDTR, 257 So. 3d 1114, 1118 (Fla. 2d DCA 2018) (holding that a judgment in an initial foreclosure action did not bar a subsequent action based on different payment defaults under the same note and mortgage where "[t]he final judgment in the first foreclosure action did not make any determination that would invalidate the note and mortgage or preclude [the plaintiff] from ever suing upon the note and mortgage" and relying on Singleton v. Greymar Associates, Inc., 882 So. 2d 1004 (Fla. 2004), in support of that proposition).

III.

In a foreclosure case, the amount due under the note must be proved by competent substantial evidence. Wolkoff v. Am. Home Mortg. Servicing, Inc., 153 So. 3d 280, 281 (Fla. 2d DCA 2014); E & Y Assets, LLC v. Sahadeo, 180 So. 3d 1162, 1163 (Fla. 4th DCA 2015). 21st Mortgage's failure to produce a loan modification its own witness testified must have existed left it unable to meet that burden.

As we explained in Wolkoff, a foreclosure plaintiff typically proves the amount due "through the testimony of a competent witness who can authenticate the mortgagee's business records and confirm that they accurately reflect the amount owed on the mortgage." 153 So. 3d at 281 (emphasis added). Here, Mr. Reed's testimony established without contradiction that at some point a document, most likely a loan modification agreement, was executed that changed the terms of the original note. Without the loan modification or other admissible evidence of its contents, it is not possible to determine the basis for 21st Mortgage's computation of the principal, interest, or other charges folded into the total amount due in the final judgment because the record is simply silent on what (after modification) the borrower's obligations in this regard were. Cf. Werb v. Green Tree Servicing, LLC, 231 So. 3d 483, 484 (Fla. 4th DCA 2017) (holding that the bank failed to prove the amount due where its only evidence was a witness's testimony that the figure in a proposed final judgment, which had not been admitted into evidence, comported with the bank's records; but it did not show how interest and additional fees were calculated). The trial court's reduction of the claimed principal amount due did not cure this problem; the fact remains that there was no evidentiary basis to determine what the borrower in fact owed. We note that on

appeal, not even 21st Mortgage has argued that its evidence of the amount due was legally sufficient.

IV.

21st Mortgage failed to present legally sufficient evidence of the amount due. We reverse and remand for the trial court to enter an order of involuntary dismissal, which was the remedy Green Emerald properly sought in the trial court.[6] See Tracey v. Wells Fargo Bank, N.A., 264 So. 3d 1152, 1161-65 (Fla. 2d DCA 2019) (holding that a new trial is generally improper upon a reversal based on the insufficiency of the evidence absent exceptional circumstances and harmonizing this court's prior opinions on the scope of remand under this rubric).

Reversed and remanded with instructions.

ROTHSTEIN-YOUAKIM, J., Concurs.
VILLANTI, J., Concurring in part and dissenting in part.

VILLANTI, Judge, Concurring in part and dissenting in part.

I concur with that portion of the majority's opinion that reverses the damages awarded in the final judgment because it is clear that 21st Mortgage failed to carry its burden of proof as to the amount of the judgment to which it was entitled.

[6]We note that 21st Mortgage has not argued that there are components of the amount due that were sufficiently proved notwithstanding the absence of evidence with regard to the loan modification to which its witness testified. See, e.g., Boyette v. BAC Home Loans Servicing, LP, 164 So. 3d 9, 10 (Fla. 2d DCA 2015).

However, I cannot concur in the remainder of the opinion because, in my view, Green Emerald received all the process it was due.

It is true, as the majority points out, that Green Emerald held legal title to the property on the date that 21st Mortgage filed its foreclosure complaint. However, it is also clear from the record that Green Emerald took its title subject to 21st Mortgage's prior recorded mortgage. Green Emerald had constructive, if not actual, notice of the recorded mortgage when it took title; yet it elected not to assume the mortgage, and it undertook no efforts to satisfy the mortgage debt so as to obtain clear title. Under Florida law, it is presumed that a buyer with notice of the mortgage took the mortgage debt into consideration in its purchase price of the property. See Spinney v. Winter Park Bldg. & Loan Ass'n, 162 So. 899, 903 (Fla. 1935) (quoting Ala.-Fla. Co. v. Mays, 149 So. 61, 64 (Fla. 1933)). And the titleholder has the right to either pay the mortgage debt or redeem the property rather than lose it to foreclosure. See § 45.0315, Fla. Stat. (2017) ("At any time before the later of the filing of a certificate of sale by the clerk of the court or the time specified in the judgment, order, or decree of foreclosure, the mortgagor or the holder of any subordinate interest may cure the mortgagor's indebtedness and prevent a foreclosure sale by paying the amount of moneys specified in the judgment, order, or decree of foreclosure, or if no judgment, order, or decree of foreclosure has been rendered, by tendering the performance due under the security agreement, including any amounts due because of the exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor."). If Green Emerald wanted to obtain clear title to the property, it simply needed to exercise its right to pay the mortgage debt that it knew existed when it took title to the property. Hence, contrary to

what the majority asserts, it was not "all but certain" that Green Emerald would be stripped of its ownership of the property by any foreclosure judgment 21st Mortgage sought and obtained. That was all but certain only if Green Emerald had no intention of ever paying the mortgage debt that it knew encumbered the property when it took title.

Of course, we know that many companies were formed in the wake of Florida's foreclosure crisis to do just that—take title from distressed homeowners at little to no expense, put rent-paying tenants in those properties, and then collect rents while not paying the mortgages until such time as the bank could foreclose. See, e.g., Mortgages: Most Common Forms of Fraud, Mortgage & Real Estate Executives Rpt. (Feb. 15, 2019). Many of these companies spent portions of their rent collections actively fighting foreclosure proceedings brought by banks that held purchase-money mortgages from the now-absent former homeowners with no intention of ever paying a dime toward the mortgage debt that they knew encumbered the properties. In my view, the broad sweep of the majority's opinion will simply encourage such companies to continue to take advantage of desperate homeowners.

We have previously held that "[t]he extent of procedural due process protection varies with the character of the interest and nature of the proceeding involved." Carmona v. Wal-Mart Stores, E., LP, 81 So. 3d 461, 464 (Fla. 2d DCA 2011) (quoting Carillon Cmty. Residential v. Seminole County, 45 So. 3d 7, 9 (Fla. 5th DCA 2010)). We also noted that due process does not lend itself to a single, unchanging test. Instead, courts must "consider the facts of the particular case to determine whether the parties have been accorded that which the state and federal constitutions demand." Id. The majority recognizes that a third party who takes title after the foreclosure complaint and lis pendens have been filed does not have the right to

challenge any aspect of the foreclosure proceeding. I would hold that the same is true for a third party who takes title before a foreclosure complaint is filed, who has notice of the prior-recorded mortgage, and who fails or refuses to assume that mortgage or ensure that it has been satisfied. The title-taker is charged with notice of the mortgage in either situation, and we should not "reward" those who rush in and secure title from distressed homeowners before a foreclosure complaint is filed by providing them with more extensive due process protections. Regardless of the filing of a complaint, the legal interest held is the same—legal title subject to the prior-recorded mortgage and the bank's concomitant right to foreclose if the mortgage is not paid. Therefore, since the scope of the interest is the same, the scope of the due process protections should be the same.

Further, as I suggested two years ago, I continue to believe that it would behoove the legislature to amend the foreclosure statutes to require that any foreclosure defendant wishing to raise any defense other than payment make the payments due under the existing note and mortgage into the registry of the court. See Shaffer v. Deutsche Bank Nat'l Tr., 235 So. 3d 943, 947 (Fla. 2d DCA 2017) (Villanti, J., concurring specially). Such a procedure would go a long way toward ensuring that the due process rights of both the bank and the holder of legal title to the property are protected during foreclosure litigation.

In sum, I agree with the majority that Green Emerald had the due process right to challenge the amount of the foreclosure judgment because the amount of that judgment directly affected Green Emerald's statutory right of redemption. However, I disagree with the remainder of the decision, which essentially strips 21st Mortgage of its

security under the guise of due process. Therefore, I would reverse only the damages awarded in the final judgment and remand for further proceedings on that issue alone.

Third District Court of Appeal

State of Florida

Opinion filed June 5, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-2459
Lower Tribunal No. 16-18699

Aaron Rokosz,
Appellant,

vs.

Sarah Haccoun,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Marcia del Rey, Judge.

The Lora Law Firm, LLC, and Hector E. Lora; Deborah Marks, PLLC, and Deborah B. Marks, for appellant.

Dorothy G. Negrin, P.A., and Dorothy G. Negrin, for appellee.

Before LOGUE, SCALES, and HENDON, JJ.

HENDON, J.

The former husband, Aaron Rokosz, seeks review by interlocutory appeal of the "Order Denying Former Husband's Verified Motion to Discharge Lis Pendens Against Homestead Property."[1] For the reasons that follow, we reverse and remand for an evidentiary hearing.

In 2016, the former wife, Sarah Haccoun, filed a petition for dissolution of marriage. Thereafter, the parties entered into a partial mediated settlement agreement ("partial MSA") that equitably distributed the parties' assets and liabilities, provided that the former wife was waiving alimony, and resolved issues relating to child support through the end of May 2018. The parties, however, did not resolve issues relating to post-May 2018 child support, the parenting plan, and the former wife's claim for attorney's fees. In May 2018, the trial court entered a partial final judgment of dissolution of marriage dissolving the parties' marriage, approving the partial MSA, and retaining jurisdiction to enforce the partial MSA and to try the remaining issues.

Pursuant to the partial MSA, the former husband received condominiums located in New York City and Hialeah. The partial MSA provides that a lis pendens on the Hialeah condominium would remain in place to secure the payment of the former wife's attorney's fees, if awarded. Following the equitable distribution of

[1] This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(B). See Rodriguez v. Guerra, 254 So. 3d 521, 521 n.1 (Fla. 3d DCA 2018).

the New York City condominium to the former husband, the former husband and his father entered into a 1031 Exchange Agreement, whereby they agreed to exchange the New York City condominium owned by the former husband for properties then owned by the father—a condominium located in Pompano Beach and 159 parcels of land located in Duval County.

On August 10, 2018, the former wife filed an "Urgent Motion for Leave to File Lis Pendens on Properties Located In Duval County and Pompano, Florida" ("motion for lis pendens"). The former wife argued that the former husband violated the status quo order[2] by entering into the 1031 Exchange Agreement with his father, and requested that the trial court grant her leave of court to place lis pendens on the Pompano Beach condominium and the parcels in Duval County to prevent the former husband from disposing of or encumbering his assets prior to the trial court's entry of a judgment awarding attorney's fees and costs to the wife, if applicable. Following an evidentiary hearing, the trial court entered an order granting the former wife's motion for lis pendens finding that the former husband's transfer of the New York condominium and the Duval County parcels to his father violated the status quo order.

[2] At the commencement of the dissolution action, the former wife filed a Notice of Filing and Serving Administrative Order No. 14-13, which attached an order titled, "Status Quo Temporary Domestic Relations Order, With or Without Minor Children."

On September 24, 2018, the former husband filed a "Verified Motion to Discharge Lis Pendens Against Homestead Property" ("motion to discharge"), arguing that the Pompano Beach property was his homestead, and therefore, pursuant to Article X, section 4(a) of the Florida Constitution, the property was exempt from levy or forced sale to enforce the former wife's claim for attorney's fees and costs.[3] At the evidentiary hearing on the former husband's motion to discharge lis pendens, the former wife objected to the former husband introducing several exhibits for the purpose of demonstrating whether the Pompano Beach condominium was in fact the former husband's homestead. Following the trial court's review of the transcript of the hearing on the former wife's motion for lis pendens, the trial court ruled that it was treating the motion to discharge the lis pendens as a motion for reconsideration of the order granting the former wife's motion for lis pendens and was denying the motion. Based on the trial court's ruling, the former husband did not testify and the exhibits the former husband intended to introduce were marked for identification but not introduced into evidence. Thereafter, the trial court entered an order denying the former husband's motion to discharge the lis pendens, noting that the trial court considers the motion for

[3] While the former husband's motion to discharge lis pendens was pending, the former husband appealed the non-final order granting the former wife's motion for lis pendens. During the pendency of that appeal, on the former husband's motion, this Court remanded on an interim basis to allow the trial court to address the former husband's motion to discharge lis pendens.

discharge as a motion for reconsideration of the issues raised in the former wife's motion for lis pendens. This non-final appeal followed.

The former husband contends that he was denied his right to procedural due process because he was not provided with a meaningful opportunity to be heard on his motion to discharge lis pendens based on the trial court erroneously treating his motion to discharge the lis pendens as motion for reconsideration of the order granting the former wife's motion for lis pendens. We agree. See Julia v. Julia, 146 So. 3d 516, 520 (Fla. 4th DCA 2014) (holding that an appellate court reviews "a possible violation of due process *de novo*").

Motions for reconsideration apply to "nonfinal, interlocutory orders, and are based on a trial court's 'inherent authority to reconsider and, if deemed appropriate, alter or retract any of its nonfinal rulings prior to entry of the final judgment or order terminating an action . . . .'" Seigler v. Bell, 148 So. 3d 473, 478-79 (Fla. 5th DCA 2014) (quoting Silvestrone v. Edell, 721 So. 2d 1173, 1175 (Fla. 1998) (citations omitted)); see also Bettez v. City of Miami, 510 So. 2d 1242, 1243 (Fla. 3d DCA 1987) ("It is well settled in this state that a trial court has inherent authority to reconsider . . . any of its interlocutory rulings prior to entry of a final judgment or final order in the cause."). In the instant case, in granting the former wife's motion for lis pendens, the trial court ruled that the former husband's transfer of the New York condominium and the Duval County parcels to his father violated the status

quo order. In moving to discharge the lis pendens, the former husband did not ask the trial court to reconsider this ruling. Rather, the former husband moved to discharge the lis pendens on the Pompano Beach condominium arguing that the Pompano Beach condominium was his homestead, and therefore, pursuant to Article X, section 4(a) of the Florida Constitution, the property was exempt from levy or forced sale to enforce the former wife's claim for attorney's fees and costs.[4] Thus, the trial court erred by treating the motion to discharge lis pendens as a motion for reconsideration of the trial court's order granting the former wife's motion for lis pendens.

Based on the trial court's erroneous treatment of the former husband's motion to discharge lis pendens as a motion for reconsideration, the trial court did not conduct an evidentiary hearing and did not permit the former husband to introduce the exhibits in support of his argument that the Pompano Beach condominium was indeed his homestead. Thus, because the former husband was not afforded a full and fair opportunity to be heard, his right to procedural due process was violated. See Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth., 795 So. 2d 940, 948 (Fla. 2001) ("Procedural due process requires both fair notice and a real opportunity to be heard."); Bull Motors, L.L.C. v. Brown, 152 So. 3d 32,

[4] The former husband's motion to discharge lis pendens did not address the parcels in Duval County.

36 (Fla. 3d DCA 2014) ("Procedural due process requires that each litigant be given proper notice and a full and fair opportunity to be heard." Carmona v. Wal-Mart Stores, East, LP, 81 So. 3d 461, 463 (Fla. 2d DCA 2011)). Accordingly, we reverse the order under review denying the former husband's motion to discharge lis pendens and remand the case for an evidentiary hearing on the former husband's motion to discharge lis pendens.

As we have reversed the order under review and remanded for an evidentiary hearing, we do not need to address the remaining arguments raised by the former husband.

Reversed and remanded.

Third District Court of Appeal

State of Florida

Opinion filed June 5, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1480
Lower Tribunal No. 14-15968

Gary Goodenow and Mary Goodenow,
Appellants,

vs.

Nationstar Mortgage LLC,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Dennis J. Murphy, Judge.

Pomeranz & Associates, P.A., and Mark L. Pomeranz (Hallandale), for appellants.

Akerman, LLP, and Nancy M. Wallace (Tallahassee), and William P. Heller, (Ft. Lauderdale), and Jeffrey S. Robin, for appellee.

Before SALTER, FERNANDEZ, and LINDSEY, JJ.

PER CURIAM.

The Goodenows appeal a final judgment of foreclosure entered against them after a bench trial, alleging the trial court erred in denying their motion to strike the jury trial waiver. Specifically, the Goodenows assert that Nationstar cannot enforce the jury trial waiver because it is not a party to or assignee of the underlying mortgage. We disagree.

Competent substantial evidence introduced at trial established that Nationstar is the loan servicer, the loan owner's agent and the holder of the note. This evidence provided a sufficient legal basis for the trial to court to enforce the jury trial waiver. See Kinney v. Countrywide Home Loans Servicing, L.P., 165 So. 3d 691, 694 (Fla. 4th DCA 2015) (enforcing jury trial waiver and holding that "the Bank was the holder of the note and mortgage by virtue of an endorsement. See Riggs v. Aurora Loan Servs., LLC, 36 So. 3d 932, 934 (Fla. 4th DCA 2010) (holding that bank's submission of 'the original note with a blank endorsement . . . supported its claim that it was the proper holder of the note and mortgage.'"); see also Greer v. O'Dell, 305 F.3d 1297, 1302 (11th Cir. 2002) ("A servicer is a party in interest in proceedings involving loans which it services."); Traver v. Wells Fargo Bank, N.A., No. 3:14-CV-895-J-32MCR, 2016 WL 7666125 (M.D. Fla. July 26, 2016) (determining loan servicer was entitled to enforce jury trial waiver in mortgage on breach of contract claim); Charles v. Deutsche Bank Nat'l Tr. Co., No. 1:15-CV-21826-KMM, 2016 WL 950968, at *4 (S.D. Fla. Mar. 14, 2016) ("[S]ince SPS

would be able to enforce the mortgage's jury trial waiver given its relationship with Deutsche Bank, by extension, SPS can also enforce the mortgage's notice and cure provision." (footnote omitted)); Martorella v. Deutsche Bank Nat'l Tr. Co., No. 12-80372-CIV, 2013 WL 1136444 (S.D. Fla. March 18, 2013) (applying mortgage waiver to servicer and trustee); Hancock v. Deutsche Bank Nat'l Tr. Co., No. 8:06–CV–1724–T–27EAJ, 2006 WL 6319816 (M.D. Fla. Oct. 24, 2006) (holding assignees of the original lender could enforce a jury trial waiver).

Affirmed.

Third District Court of Appeal

State of Florida

Opinion filed June 5, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-501
Lower Tribunal No. 15-7050

MBlock Investors, LLC,
Appellant,

vs.

Bovis Lend Lease, Inc., etc., et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Jennifer D. Bailey, Judge.

Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., and Joy Spillis Lundeen and Johnathan T. Ayers, for appellant.

Kubicki Draper, P.A., and Caryn L. Bellus and Bretton C. Albrecht, for appellee Bovis Lend Lease, Inc., n/k/a Lendlease (US) Construction, Inc.

Before EMAS, C.J., and SALTER and FERNANDEZ, JJ.

EMAS, C.J.

MBlock Investors, LLC ("MBlock") appeals the lower court's entry of final summary judgment in favor of defendant below, Bovis Lend Lease, Inc. n/k/a Lend Lease (US) Construction, Inc. ("BLL"), in a construction defect case brought by MBlock to recover damages following its acquisition of property commonly known as the Midblock Miami East Project ("the Property").

BACKGROUND

The Property was previously owned and developed by EB Development, LLC ("EB"), who hired BLL as its general contractor. The construction of the Property was financed by HSBC Bank, who held a mortgage and lien on the Property at all relevant times. Following the completion of construction in 2008, EB transferred the Property to D/M Midtown Miami Owner, LLC ("D/M Midtown"),[1] and thereafter, BLL sued EB and D/M Midtown for allegedly failing to pay over $3 million in outstanding invoices. In response, EB contended that there were several construction defects in the Property.

In June 2009, EB and BLL settled their claims, and, as part of the consideration, BLL reduced its construction bill, voluntarily dismissed its lawsuit with prejudice, and discharged the lien and lis pendens ("the Close Out Agreement"). EB, in turn, released BLL and others from liability arising from construction of the Property. Specifically, the Close Out Agreement provided:

[1] Both EB and D/M Midtown were managed by Jack Cayre.

8. Subject to the provisions of Paragraphs 7 and 9, EB, for themselves, their employees, agents, managers, members, and their respective successors and assigns, hereby release, acquit and forever discharge BLL, Surety (as to the Performance Bond only) and all of their employees, servants, agents, representatives, successors and assigns (collectively, the "BLL Parties") from any and all claims, actions, causes of action, legal, equitable or administrative proceedings, demands, rights, damages, losses, relief, remedies, costs, expenses, fees and compensation of whatsoever kind or nature which EB may have against any of the BLL Parties on account of any and all acts or omissions from the beginning of the world through the date of this Agreement **which are known to EB, its employees, agents, partners, managers, members, consultants, representatives, predecessors, attorneys, and their respective successors and assigns (collectively "EB Parties") as of the Effective Date**, arising from the construction of the Project, the Construction Contract, or the Performance Bond, including but not limited to the alleged claims set forth in the attached schedule, Exhibit E (the "Released Claims") . . . (emphasis added).[2]

[2] Exhibit E, titled "Schedule of Alleged Outstanding Issues," listed:

1. Cast Stone
2. Quality of installation, staining, and efflorescence of Amenity Deck Pavers
3. Gaps in cavity walls
4. Absence of bond beam in exterior masonry wall at elevator machine room, south wall
5. Thickness of stucco and the associated BLL contribution to the cost for testing
6. Wavy and non-plumb construction of walls, drywall and base
7. Gaps and cracks in balcony waterproofing
8. Corrosion to steel framing
9. Drywall water damage
10. Garage ventilation fans under 6'8" clearance
11. Drains on amenity deck not installed straight
12. Tolerance of concrete slabs not meeting ASTM standards 1/8" per 10' foot in 172,000 s.f.
13. All Punch list issues excluding potential future latent construction defects
14. All items identified in the Condominium Defect Mitigation ("CDM") Reports
15. Any additional OCIP credits

Two years later, D/M Midtown defaulted on the construction loan and mortgage with HSBC and agreed to convey the Property (by way of a deed in lieu of foreclosure) to MBlock, an entity formed by HSBC Bank specifically for the purpose of taking title to the Property.

In 2015, MBlock sued BLL, alleging claims of negligent construction and violations of the Florida Building Code. In response, BLL asserted the affirmative defense of release, contending that the claims were barred by the Close Out Agreement. Both parties moved for summary judgment on the release issue, and after a hearing, the trial court entered final judgment in favor of BLL.

ANALYSIS

On appeal, MBlock raises two primary issues: (1) that the Close Out Agreement does not preclude MBlock from suing BLL because MBlock is not EB's successor as a matter of law; and (2) that even if the Close Out Agreement applies to MBlock, the construction defects alleged in its complaint against BLL were latent defects, and thus, were not covered by the terms of the Close Out Agreement.[3] We must therefore determine whether the Close Out Agreement applies to MBlock in the first instance, and, if so, whether the Close Out Agreement precludes the specific claims brought by MBlock in the underlying litigation.

[3] We do not reach the third issue raised by MBlock on appeal, related to policy considerations, as it is not necessary to the resolution of this case.

We review the trial court's order granting summary judgment de novo. Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000); Gallagher v. Dupont, 918 So. 2d 342, 346 (Fla. 5th DCA 2005) (noting: "The standard of review for construction of a contract and for summary judgment is de novo.")

1. The Trial Court Correctly Determined MBlock is a Successor of EB Under the Terms of the Close Out Agreement

As to the first issue, we agree with the trial court's determination that MBlock is EB's successor, and therefore, affirm that portion of the order granting summary judgment in favor of BLL.

The Florida Supreme Court has previously explained that under the doctrine of res judicata:

> A judgment on the merits[4] rendered in a *former* suit between the same parties **or their privies**, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.

[4] "As a general rule, a voluntary dismissal with prejudice operates as an adjudication on the merits, barring a subsequent action on the same claim." W&W Lumber of Palm Beach, Inc. v. Town & Country Builders, Inc., 35 So. 3d 79, 83 (Fla. 4th DCA 2010) (quoting Capital Bank v. Needle, 596 So. 2d 1134, 1136 (Fla. 4th DCA 1992)); see also Arrieta-Gimenez v. Arrieta-Negron, 551 So. 2d 1184, 1186 (Fla. 1989) (holding that a consent judgment "is entitled to the same preclusive, res judicata effect as any other judgment issued by a Florida court.") Thus, the fact that the final judgment in the case between EB and BLL ended with a settlement and voluntary dismissal does not preclude this court from applying the doctrine of res judicata if it otherwise applies.

Florida Dep't of Transp. v. Juliano, 801 So. 2d 101, 105 (Fla. 2001) (quoting Kimbrell v. Paige, 448 So. 2d 1009, 1012 (Fla. 1984)) (bold emphasis added). "Res judicata bars a subsequent lawsuit when there is (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality in the person for or against whom the claim is made." Albrecht v. State, 444 So. 2d 8, 12 (Fla. 1984) (superseded by statute on other grounds).

Generally, "one who is not a party to a settlement agreement cannot be bound by its terms." Gallagher, 918 So. 2d at 348 (citing Ahern v. Odyssey Re (London) Ltd., 788 So. 2d 369, 371-72 (Fla. 4th DCA 2001)); see also Security Prof., Inc. v. Segall, 685 So. 2d 1381, 1383 (Fla. 4th DCA 1997) (same); Udick v. Harbor Hills Dev., L.P., 179 So. 3d 489, 491-92 (Fla. 5th DCA 2015) (noting: "[A] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings"); Whetstone Candy Company v. Kraft Foods, Inc., 351 F.3d 1067, 1073 (11th Cir. 2003) (noting: "Generally, a contract does not bind one who is not a party to the contract, or who has not in some manner agreed to accept its terms.")[5]

[5] In addition, Florida follows "the traditional corporate law rule which does not impose the liabilities of the selling predecessor upon the buying successor company except under some limited circumstances. Bernard v. Kee Mfg. Co., Inc., 409 So. 2d 1047 (Fla. 1982); see also Corp. Express Office Prods., Inc. v. Phillips, 847 So. 2d 406, 412 (Fla. 2003) (holding: "A corporation that acquires the assets of another business entity does not as a matter of law assume the prior liabilities of the prior

However, there is an exception to this rule "when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." Udick, 179 So. 3d at 491 (quoting Richards v. Jefferson Cty., Ala., 517 U.S. 793, 798 (1996)). A "party may be said to be a privy of another whenever there is a mutual or successive relationship to the same right." Id. (quoting Osburn v. Stickel, 187 So. 2d 89, 91-92 (Fla. 3d DCA 1966)); see also Fabal v. Florida Keys Memorial Hosp., 452 So. 2d 946, 950 (Fla. 3d DCA 1984) (noting: "Although the term 'privity' has no definition which can be applied uniformly, it is not completely elusive, but denotes a mutual or successive relationship to the same interest in property" (internal citations omitted)); AMEC Civil, LLC v. PTG Const. Servs. Co., 106 So. 3d 455, 456 (Fla. 1st DCA 2012) (holding the doctrine of res judicata barred action where defendants were privies of prior litigant and noting: "Privity is a mutuality of interest, and identification of interest of one person with another, and includes privity of contract, the connection or relationship which exists between contracting parties." (quoting Radle v. Allstate Ins. Co., 758 F.Supp. 1464, 1467 (M.D. Fla. 1991))). Compare Ventana Condo. Ass'n, Inc. v. Chancey Design P'ship,

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business.") This principle applies to LLCs. See Collier HMA Physician Mgmt, LLC v. Menichello, 223 So. 3d 334 (Fla. 2d DCA 2017). Importantly, however, one such exception to the general rule is **where the successor expressly or impliedly assumes obligations of the predecessor**. See Bernard, 409 So. 2d at 1049; Phillips, 847 So. 2d at 412.

203 So. 3d 175 (Fla. 2d DCA 2016) (holding where there is a substantial issue of fact in dispute as to whether Association was a successor or assign of developer, summary judgment is inappropriate.)

MBlock contends that it is not in privity with EB and therefore, it cannot be bound by the Close Out Agreement. However, a review of the Close Out Agreement itself, along with the other record evidence, including the documents generated between MBlock and EB when the Property was transferred, demonstrates that: (1) EB intended that its successors and assigns would be bound by the Close Out Agreement; (2) MBlock is the successor to EB's rights and liabilities related to the Property; and (3) HSBC, which formed MBlock for the sole purpose of taking over EB's property rights, was fully aware of the litigation and settlement between EB and BLL.[6]

The Close Out Agreement provides:

> **EB, for themselves**, their employees, agents, managers, members, and their respective **successors and assigns**, hereby **release, acquit and forever discharge BLL**, Surety (as to the Performance Bond only) and all of their employees, servants, agents, representatives, successors and assigns (collectively, the "BLL Parties") **from any and all claims, actions, causes of action, legal, equitable or administrative proceedings, demands, rights, damages, losses, relief, remedies, costs, expenses, fees and compensation of whatsoever kind or nature which EB may have against any of the BLL Parties** on account of any and all acts or omissions from the beginning of the world

[6] "A settlement is a contract. An unambiguous contract provision must be afforded its plain meaning." Lazzaro v. Miller & Solomon General Contractors, 48 So. 3d 974, 975 (Fla. 4th DCA 2010).

> through the date of this Agreement **which are known to EB, its employees, agents, partners, managers, members, consultants, representatives, predecessors, attorneys, and their respective successors and assigns** (collectively "EB Parties") as of the Effective Date, **arising from the construction of the Project**, the Construction Contract, or the Performance Bond, including but not limited to the alleged claims set forth in the attached schedule, Exhibit E (the "Released Claims") . . .

The term "successor" is generally defined by Black's Law Dictionary (10th ed. 2014) as:

> 1. A person who succeeds to the office, rights, responsibilities, or place of another; one who replaces or follows a predecessor. 2. A corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation.

"Florida courts have generally defined a successor as "he that followeth or cometh in another's place" or, more recently, as one "who follows or takes the place another has left and sustains the like part or character." Argonaut Ins. Co. v. Commercial Standard Ins. Co., 380 So. 2d 1066, 1068 (Fla. 2d DCA 1980) (quoting Beatty v. Ross, 1 Fla. 198, 209 (1847)). An assignee is one "to whom property rights or powers are transferred by another." Black's Law Dictionary (10th ed. 2014); see also Larkin v. City of Burlington, 772 A.2d 553, 557 (Ver. 2001) (noting the term "successors and assigns" is "boilerplate language . . . [and] ordinarily applies only when another corporation, through legal succession, assumes the rights and obligations of the first corporation.")

In Whetstone, 351 F.3d at 1071 n. 4, the Eleventh Circuit Court of Appeals considered whether, under Florida law, a settlement agreement between Kraft Foods North America, Inc. and Whetstone Candy Company was binding on Kraft N.A.'s subsidiary, Kraft Foods UK, Ltd. where the settlement agreement provided that "[t]he terms and provisions of this Agreement shall inure to the benefit of and bind the successors and assigns and legal representatives of both Kraft and Whetstone." The settlement agreement between Kraft N.A. and Whetstone came about when Kraft N.A. sued Whetstone for trade dress violations related to the packaging of a chocolate-orange product. In the settlement agreement, Whetstone agreed to modify the packaging of its product in exchange for Kraft N.A.'s agreement to release Whetstone from any claims regarding a trade dress violation. After it signed the settlement agreement, Whetstone tried to market its chocolate-orange product in the United Kingdom and Kraft UK threatened legal action. Whetstone sued, seeking, inter alia, declaratory relief as to its rights under the settlement agreement with Kraft N.A. In determining that Kraft UK was not bound by Whetstone's settlement agreement with Kraft N.A., the court honed in on the fact that Kraft UK, although Kraft N.A.'s subsidiary, was not its "successor" or "assign," but "merely related to Kraft N.A. through its corporate structure." Id. at 1075-76.

Conversely, in this case, it is rather clear that MBlock is in fact, EB's "successor" for purposes of the settlement agreement with BLL because MBlock

took over the Property and all of EB's rights with regard to the Property. Thus, MBlock clearly met the privity requirement for the application of res judicata in this case: it has a mutual or successive relationship to the same right that EB had when it settled with BLL: a reduction in the amount owed to BLL for its services in exchange for releasing BLL from any claims of construction defects, as provided for in the Close Out Agreement.

2. The Trial Court Erred in Granting Summary Judgment in Favor of BLL on MBlock's Latent Defect Claims

Having determined that MBlock, as a successor, is bound by the terms of the Close Out Agreement, we must next determine whether the trial court erred in determining that the Close Out Agreement precluded MBlock from litigating its latent defect claims and erred in entering summary judgment in favor of BLL.

The Close Out Agreement released BLL from **known** claims arising from the Project's construction, including, but not limited to, specified claims identified in Exhibit E to the Close Out Agreement. See note 2 *supra*. Thus, under the plain language of the Close Out Agreement, any **unknown** claims (e.g., latent defects), were not covered by the Close Out Agreement, and BLL was not released from liability for such claims. See generally, Falsetto v. Liss, No. 3D18-794, 2019 WL 2202543 (Fla. 3d DCA May 22, 2019). As to each claim raised by MBlock, it asserted below that the particular defects at issue were latent and were unknown at the time the Close Out Agreement was executed. MBlock supported this assertion

with the affidavit of its expert, John Medina, who averred: "No one, whether a professional engineer or an untrained layperson, could have reasonably discovered the latent defects at the Project without the destructive and forensic evaluation I performed." Additionally, Medina averred that, in his expert opinion, none of the items listed in Exhibit E "provided any notice of the specific latent defects" that were later discovered by Medina's forensic evaluation.

The Medina affidavit created genuine issues of disputed fact, and the trial court erred in entering summary judgment in favor of BLL, requiring reversal. See Garcia v. First Cmty. Ins. Co., 241 So. 3d 254 (Fla. 3d DCA 2018) (holding the trial court erred in granting summary judgment where there were conflicting expert reports on a material issue); RV-7 Prop., Inc. v. Stefani De La O, Inc., 187 So. 3d 915, 917 (Fla. 3d DCA 2016) (observing: "The trial court must interpret every possible inference in favor of the non-movant, and should not enter summary judgment unless the facts are so crystallized that nothing remains but questions of law" (quoting Campaniello v. Amici P'ship, 832 So. 2d 870, 872 (Fla. 4th DCA 2002)); Virtual Computacion Y Communicaciones, S.R.L. v. Fischzang, 776 So. 2d 327, 328 (Fla. 3d DCA 2001) (noting: "Summary judgment should not be granted 'unless the facts are so crystallized that nothing remains but questions of law'") (quoting McCraney v. Barberi, 677 So. 2d 355, 357 (Fla. 1st DCA 1996)); Seay v. Service Am. Corp., 614 So. 2d 2 (Fla. 3d DCA 1993) (same).

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

MARK JOEL FASSY,
Appellant,

v.

THE BANK OF NEW YORK MELLON, SUCCESSOR BY MERGER TO THE BANK OF NEW YORK as Successor in Interest to **JPMORGAN CHASE BANK NA** as Trustee for **STRUCTURED ASSET MORTGAGE INVESTMENTS II INC., BEAR STEARNS ALT-A TRUST 2005-9, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-9,**
Appellee.

No. 4D18-1548

[June 5, 2019]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Edward A. Garrison, Judge; L.T. Case No. 50-2012-CA-018474-AA.

Mysha F. Browning and Kendrick Almaguer of The Ticktin Law Group, Deerfield Beach, for appellant.

Brandi Wilson of DeLuca Law Group, PLLC, Fort Lauderdale, for appellee.

CONNER, J.

Mark Joel Fassy ("the Borrower") appeals the trial court's order denying his motion for attorney's fees and costs after he successfully obtained an involuntary dismissal of the Bank of New York Mellon's ("the Bank") mortgage foreclosure complaint. The case proceeded to a nonjury trial. After the Bank presented its evidence, the Borrower moved for involuntary dismissal, arguing a lack of standing at the time suit was filed. The trial court entered a written order granting the motion, simply stating that the "case is involuntarily dismissed." However, it is clear from the portion of the trial transcript addressing the motion for involuntary dismissal that the trial court agreed with the Borrower's arguments that the Bank failed to prove standing at the time suit was filed.

After the trial court dismissed the case, the Borrower moved to tax costs and attorney's fees. The trial court entered an order denying both the motion for fees and the motion for costs. We affirm the denial of the fee motion without discussion. We reverse the denial of the motion for costs.

We reject the Bank's argument that the Borrower's arguments on appeal regarding costs are not preserved. The Borrower's motion specifically referenced Florida Rule of Civil Procedure 1.420 (albeit in the context of trying to obtain an award of attorney's fees as an element of costs).

Rule 1.420(d) clearly provides that "[c]osts in any action dismissed under this rule *shall* be assessed and judgment for costs entered in that action, once the action is concluded as to the party seeking taxation of costs." Fla. R. Civ. P. 1.420(d) (emphasis added). In the instant case, the record is clear that the trial court granted an involuntary dismissal under Florida Rule of Civil Procedure 1.420(b) after the Bank completed its presentation of evidence in a nonjury trial. "Because the case was involuntarily dismissed, the homeowner is entitled to taxable costs [under rule 1.420(d)]." *Torres v. Bank of N.Y.*, 252 So. 3d 274, 274 (Fla. 4th DCA 2018). Similar to the situation in *Torres*, "any costs awardable to the homeowner flow from rule 1.420 and not from the subject mortgage and/or note." *Id.*

We affirm the trial court's denial of the motion for attorney's fees. We reverse the trial court's denial of the motion for costs and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

GERBER, C.J., and MAY, J., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE FOR RESIDENTIAL ACCREDIT LOANS, INC., MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES 2006-QO1,
Appellant,

v.

JB INVESTMENT REALTY, LLC, BW HOMEOWNERS' ASSOCIATION, INC., BOCA FALLS HOMEOWNERS ASSOCIATION, INC., HENRY R. ENSLER, HOMECOMINGS FINANCIAL, LLC f/k/a **HOMECOMINGS FINANCIAL NETWORK,** Inc., a dissolved Florida corporation, by and through Jill M. Horner, its president, and
KIMBERLY A. ENSLER,
Appellees.

No. 4D18-3240

[June 5, 2019]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Howard H. Harrison, Senior Judge; L.T. Case No. 50-2017-CA-003675-XXXX-MB.

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

Donna Greenspan Solomon of Solomon Appeals, Mediation & Arbitration, Fort Lauderdale, and Donald J. Thomas of Lewis & Thomas, LLP, Boca Raton, for appellees JB Investment Realty, LLC, and the Enslers.

LEVINE, J.

The trial court entered an involuntary dismissal in this case after determining that the bank was required to enter into evidence the entire payment history in order to proceed with its mortgage foreclosure action. We find the trial court erred in granting an involuntary dismissal and requiring the entire payment history "from the beginning" to be in evidence before the bank could proceed with the foreclosure action. We therefore reverse and remand for a new trial.

Deutsche Bank ("the bank") brought a mortgage foreclosure action against appellees. The complaint alleged that the loan originated in 2005 and that a default occurred on July 1, 2012. At trial, the bank presented testimony from a default case analyst with the current servicer who also worked for a prior servicer. The witness generally testified about what a "boarding process" is, but never expressly testified that the loan documents in the instant case had been boarded. During the witness's testimony, the loan payment history from February 2008 to August 2018 was introduced into evidence over objection.

Significant to the issue in this case, the payment history did not include the period from the loan's inception in 2005 to February 2008. The witness did not know who serviced the loan during this period or why the principal of the loan had increased during this timeframe. The witness testified that the last payment received was in 2008, but that the bank was not seeking any interest or damages from prior to 2012. The witness testified to the amount of unpaid principal as well as taxes and insurance.

Appellees moved for involuntary dismissal based on failure to prove damages due to the lack of any payment history between 2005 and February 2008. The trial court stated that the Fourth District requires the "entire history of the loan . . . from the beginning," and as a result, the trial court granted the motion for involuntary dismissal based on the fact that the bank did not have the loan's complete financial history. This appeal ensues.

"The applicable standard of review for a motion for involuntary dismissal is *de novo*." *Rouffe v. CitiMortgage, Inc.*, 241 So. 3d 870, 872 (Fla. 4th DCA 2018). "A motion for involuntary dismissal under Fla. R. Civ. P. 1.420(b) in a non-jury trial can be equated to a motion for directed verdict in a jury trial . . . ." *Id.* "An involuntary dismissal or directed verdict is properly entered only when the evidence considered in the light most favorable to the non-moving party fails to establish a *prima facie* case on the non-moving party's claim." *Bayview Loan Servicing, LLC v. Luciano Del Lupo*, 208 So. 3d 97, 98 (Fla. 4th DCA 2017) (citation omitted).

"To establish a prima facie case, a foreclosure plaintiff must prove . . . the amount due." *Liberty Home Equity Sols., Inc. v. Raulston*, 206 So. 3d 58, 60 (Fla. 4th DCA 2016). "In other words, the plaintiff must introduce . . . some evidence regarding the outstanding debt." *Id.*

Courts have "made a distinction between cases in which evidence of indebtedness was improperly admitted or was insufficient [and] those in which no evidence of the amount of indebtedness was admitted." *Paeth v.*

U.S. Bank Nat'l Ass'n for C-Bass Mortg. Loan Asset-Backed Certificates, 220 So. 3d 1273, 1275 (Fla. 2d DCA 2017). In cases with insufficient evidence, "courts have remanded for further proceedings at which the plaintiff [can], in essence, try again." *Id.* In cases with no evidence of the amount of indebtedness, courts have "remand[ed] for an involuntary dismissal rather than . . . give the party making the error an opportunity to retry its case." *Id.* (citation and quotation marks omitted).

Consistent with this rule, in *Wells Fargo Bank, N.A. v. Eisenberg*, 220 So. 3d 517, 522-23 (Fla. 4th DCA 2017), this court reversed an involuntary dismissal where the bank made a prima facie showing of the amounts due and owing, even though the portion of the payment history showing the date on which the borrower was alleged to have initially defaulted was not admitted into evidence. Similarly, in *Deutsche Bank National Trust Co. v. Baker*, 199 So. 3d 967, 968-69 (Fla. 4th DCA 2016), this court found the trial court erred in granting an involuntary dismissal where the bank presented prima facie evidence of damages, even though the evidence of damages was based on inadmissible hearsay that was erroneously admitted at trial.

Applying the above authority to the instant case, the bank made a prima facie showing of the amount of indebtedness by offering the payment history from February 2008 to August 2018 as well as witness testimony as to the amounts due and owing. Further, contrary to the trial court's finding, this court has never held that the entire loan history is required in order to foreclose on a mortgage.

Significantly, the bank sought damages only from 2012 onward. It did not seek any damages for the period during which there was no evidence as to the loan payment history. Following the trial court's reasoning, if a bank did not have the entire payment history in its business records, then it never would be able to foreclose. This is not the law, as each subsequent default creates a distinct cause of action subject to a different calculation of damages. *See Bartram v. U.S. Bank, N.A.*, 211 So. 3d 1009, 1019 (Fla. 2016). Thus, how much of the payment history is required to be entered into evidence generally will depend on the damages sought.

In sum, the trial court erred in granting an involuntary dismissal based on an incomplete payment history. When considered in the light most favorable to the bank, the evidence regarding the payment history was sufficient to establish a prima facie case on damages. Having admitted that evidence, the trial court erred by granting an involuntary dismissal. As such, we reverse the involuntary dismissal and remand for a new trial. *See Bayview*, 208 So. 3d at 98.

Reversed and remanded.

DAMOORGIAN and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.