IN THE SUPREME COURT OF FLORIDA
CASE NUMBER: SC05-1304
Lower Tribunal Case Number: 2D04-5257

JANETTA YORK,

Petitioner,

v.

EMMETT ABDONEY,

Respondent.

RESPONDENT'S RESPONSE TO PETITIONER JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent adopts the Petitioner's Statement of the Case and Facts except that the second mortgage was recorded, not included in the foreclosure proceedings or final order, was not in default, and the Petitioner knew this. A competent substantial argument was made to challenge the trial court's findings.

RESPONSE TO PETITIONER'S JURISDICTIONAL BRIEF

This Court does not have jurisdiction to review the decision of the Second District Court in the case of Abdoney v. York, Case No.: 2D04-5257.

The Supreme Court has the power to review decisions based on Article V(3)(b)(3) of the Florida Constitution. The powers of the Supreme Court to review decisions of the District Court of Appeals are limited and strictly prescribed. Jenkins v. State, 385 So. 2d 1356 (Fla. 1980) at 1357.

After April 1st, 1980, Article V(3)(b)(3) of the Florida Constitution reads with respect to review of conflicting decisions:

> (The Florida Supreme Court) May review any decision of a district court of appeal . . . that **expressly** and **directly** conflicts with a decision of another district court of appeal or of the supreme court on the same question of law . . . the Supreme Court acts mainly as a supervisory . . . "with review by the district courts in most instances being final and absolute" . . . (Emphasis Added).

The Jenkins Court defined what expressly and direct meant. Id. at 1359. The conflict that is required in order to give this Court jurisdiction must be **expressed** and **direct** conflict, not indirect conflict, implied conflict or suggested conflict. The

Petitioner's cited cases are not in expressed or direct conflict with the decision of the Second District Court in this case. (Emphasis added).

Florida Statute §45.0315, is a derivation of Florida Statute §45.031, which Statute is titled [**Judicial Sale Procedures**]. Section 45.0315 merely applies to the judicial and court clerk's handling of a foreclosure sale. A holder of a subordinate interest **may** redeem the property any time before entry of final judgment. The new statute, as opposed to §45.031 shortens the time for redemption by mortgagors and holders of subordinate interests, who were named defendants. This statute does not apply to omitted mortgagees. The Legislature specifically did not address omitted mortgagees when they created Florida Statute §45.0315. (Emphasis added).

Abdoney did not attempt to redeem from the sale of the first mortgage.

YORK'S CASES

Petitioner relies on cases where the Courts dealt with instances of non-recorded leases, and served mortgagor defendants and argues they conflict with the Second District Courts decision in this case. Those are not the facts of this case now before this Court.

In Emmanuel v. Bankers Trust Co., 655 So. 2d 247 (Fla. 3d DCA 1995), the mortgagor was made a **party defendant** and he defaulted, (Id. at 248), his rights were extinguished in the Court's final judgment and he tried to redeem from the foreclosure sale nine days after the Clerk issued a certificate of sale to the purchaser. (Emphasis

added).

In Burns v. Bank America National Trust, 719 So. 2d 999 (Fla. 5th DCA 1998), the court concluded the Burns were presumptively served **as defendants and defaulted,** in the foreclosure suit. (Id. at 100). (Emphasis added).

Riley v. Grissett, 556 So. 2d 473 (Fla. 1st DCA 1990), was a case involving an **unrecorded 10 year lease**. The unrecorded lessee's principal and agent participated in the foreclosure proceedings **as party defendants** and filed an answer thereto. The First District stated "Thus, for the reason that the **lease was unrecorded**, the trial court erred in taking cognizance of rights asserted by and through it" (by the Grissetts). Id. at 475. The Riley Court went on to say "having failed to comply with the statute and having waited until after issuance of the certificate of title, appellee P.A. should not have been permitted to redeem the property." Id. at 476. (Emphasis added).

In YEMC Construction v. Inter Ser USA, Inc., 884 So. 2d 446 (Fla. App. 3rd DCA 2004), the tenants in that case had an **unrecorded lease** and filed an objection to the sale before the issuance of the certificate of title. The Third District Court said "however the tenant's objection to the sale provided no basis for relief." What should have happened in YEMC is the Court should have set aside the sale and ordered it resold which they did not do. Therefore the tenant's redemptive rights did not revest at all. More importantly, is the Court's footnote to the order which stated

"We express no opinion whether the lease or the option to purchase contract survives the foreclosure." YEMC at 449, n. 1. (Emphasis added).

Unlike Petitioner's cases, that is not the case here. **Abdoney's second mortgage was recorded** and not yet in default as well as the fact that it had not been included in the foreclosure judgment of the first mortgage, (which York knew prior to the actual foreclosure sale). Therefore, the foreclosure did not extinguish this second mortgage and it remained intact and enforceable. Nevertheless, York purchased the property in spite of the existing second mortgage of which she had actual knowledge. (Abdoney v. York Second District Court opinion, p. 5 and 6). (Emphasis added).

In Posnansky v. Breckenridge Estates Corp., 621 So. 2d 736 (Fla. App. 4 DCA 1993), plaintiff's vendee's lien arose when Posnansky gave Breckenridge a deposit to build a house and Breckenridge defaulted. Id. at 737 (Note 2).

Posnansky had **no recorded lien**, but Glendale had knowledge of the lien, and Posnansky was not made a party defendant, in the foreclosure suit, Id. at 737, (factual paragraph and head note 3) and the 4th District Court stated:

> "general rule is that in order for a foreclosure action to affect a junior lien, the junior lienholder has to be made a party to it; failure to join the holder of a junior lien leaves the holder in the same position as if no foreclosure took place. Kurz v. Pappas, 116 Fla. 324, 156 So. 737 (1934); Crystal River Lumber Co. v. Knight Turpentine Co., 69 Fla. 288, 67 So. 974 (1915); Marks Bros. Paving Co. v. Ouellet, 124 So. 2d 514 (Fla. 3rd DCA 1960). The owner of a property may re-foreclose in a later action against the omitted junior lienor."

Posnansky actually supports the 2nd District's decision in that the 4th District "held that lienors did not lose any rights in their present action by failing to intervene in mortgagee's prior foreclosure action, to which mortgagee had not made lienors party defendants." Id. at 736 and 737, n. 1.

The Second District relied on Quinn Plumbing v. New Miami Shores, 129 So. 2d 690 (Fla. 1930), in rendering their opinion. Quinn, involved a non-named party as a defendant and the purchaser had knowledge of the encumbrance when they purchased the property. In Quinn, a first mortgage on real property was foreclosed and sold. Quinn, 129 So. At 691. A second mortgage was not made a party defendant to the foreclosure of the first mortgage. Id. at 691. The purchaser had to re-foreclose to clear their title to the property they purchased.

The operative fact is that the omitted mortgagee was "**under no legal obligation**" to exercise his right of redemption. Id. at 695. Abdoney's choice of not redeeming from the judicial sale does not affect his second mortgage which was not a part of the initial foreclosure lawsuit and not part of the final judgment of foreclosure.

"A decree is valid as to those who were joined as parties but of course is not binding upon or does it otherwise affect, the rights of a junior mortgagee who has been omitted." Quinn at 692. Further, "if the junior mortgagee had been joined in the original foreclosure **an appropriate decree against it** would have been to either

redeem or be barred of its right of redemption." Id. at 693. The words **"decree against it"** would not involve the plaintiff but could only involve the defendant. Those three words, dispel York's argument that participating as a plaintiff in a foreclosure action makes you a party. Quinn clearly states that you must be a party which **a decree can be entered against you** which necessarily means you were a named defendant in that action. Quinn at 693. (Emphasis added)

The Quinn Court made a number of statements which support the plaintiff's position in this case. First, "the purchaser at a foreclosure sale takes the premises subject to the right of the junior mortgagee who is not made a party to the foreclosure of a prior mortgage, to redeem from the senior mortgage." Id. at 692, Note (1). Second, "it is well established in this jurisdiction that the purchaser of mortgaged property at a foreclosure sale, when, ***for any reason***, the foreclosure proceedings are imperfect or irregular, becomes subrogated to all the rights of the mortgagee in such mortgage and to the indebtedness that it secured." Id. at 692, . . . and becomes entitled to a ***suit de novo***, for the foreclosure of such mortgage against all parties holding junior incumbrances who were omitted as parties to the foreclosure proceedings under which the purchaser bought." Id. at 693.

"The junior encumbrancer redeems from the mortgage, not from the foreclosure sale to which he was not a party." Id. at 693, n. 8. This writer concludes that "party" as used in the preceding statements had to mean party

defendant in order to reconcile the Court's use of party with its statement regarding **"an appropriate decree against it."** Id. at 693 n. 7. The most controlling statements that the Quinn Court makes are, . . . **"the right of redemption arises from the mortgage and not from the foreclosure sale**.", Id. 693, Note 8, . . . "such a redemption, after foreclosure and sale, by the junior mortgagee, ***who is under no legal obligation to redeem***, Id. at 695, Note 11. "Even against the purchaser at the foreclosure sale, for such ***purchaser has elected to purchase under a defective foreclosure which does not affect the original right of the second mortgagee to redeem from the first mortgage."*** Id. at 694. York wants this Court to ignore the holding in Quinn Plumbing that directly applies to her i.e. "that the purchaser, by electing to purchase under a defective foreclosure, subject to an outstanding junior interest of which he has actual or constructive notice, thereby elects to take an indefeasible estate in a part of the property and a defeasible estate in the other part covered by the junior mortgage, thus consenting to a separation of the two parts, so as to entitle the junior incumbrancer or owner to redeem his portion of the incumbered premises" . . . Id. at 694. (Emphasis added).

York admitted she knew of Abdoney's existing second mortgage. Abdoney v. York Opinion, p. 5 and 6.

"The omitted junior mortgagee's status is as if no foreclosure took place as to

him. . . his interests are neither diminished or enlarged." Id. at 695.

Dundee Naval Stores Company v. McDowell, 61 So. 108 (Fla. 1913), supports the Second District's decision and is not in conflict at all with the decision being considered here.

York left out the pertinent part regarding a second mortgagee being made a party to the foreclosure proceeding. The Supreme Court in Dundee Naval Stores pronounced "an owner of the title may be cut off by **foreclosure against him**, but one having a duly recorded lease upon the land, but not made a party to the foreclosure proceeding, is not affected thereby." Id. at 113. Dundee Naval Stores **had a recorded lease**. Dundee was not made a party defendant to the foreclosure proceeding. McDowell knew of the lease when they purchased the property at the foreclosure sale. These facts are not dissimilar to the facts of this case before this Court, i.e. York knew of Abdoney's existing second mortgage and that it was not in default and not included in the foreclosure proceeding nor the final order of foreclosure and York bid for the property anyway. Therefore, no conflict exists between the cases. (Emphasis added).

Abdoney v. York is very similar to R.W. Holding Corp. v. R.I.W. Waterproofing and Decorating, Inc., 179 So. 753 (Fla. 1938). One parcel R.I.W. Waterproofing owned during the foreclosure suit was not included in the mortgage foreclosure proceeding. **R.W. Holding had actual notice of the foreclosure**

proceeding, Id. at 758, and removed fixtures from the premises. This **intentionally omitted junior mortgage** was unaffected by the original foreclosure suit. Id. at 758. The **intentional omission** of a junior mortgagee who has **knowledge of the foreclosure** does not wipe out that mortgagee that was not a "**party defendant**" in the foreclosure suit. Id. at 758. The gist of R.W. Holding is the junior mortgagee has to be made a **party defendant,** Id. at 758**,** to the lawsuit and has to have his rights judicially determined in that lawsuit (**"a decree against it**" Quinn, Id. at 692), therefore it requires the purchaser to re-foreclose. Otherwise, the existing non-included mortgage is unaffected. (Emphasis added).

The Supreme Court stated specifically that the omitted junior encumbrances had to be a **named party defendant**. Id. at 758. Abdoney's second mortgage was not a **named party defendant** in the first mortgage foreclosure and his second mortgage was not extinguished by the final judgment therein. (Emphasis added).

CONCLUSION

The Abdoney v. York decision from the Second District Court of Appeal is not in conflict with any of the cases or Florida Statute cited by the Petitioner.

Therefore, the Petition should be dismissed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered to Anita Brannon, Esquire, 608 W. Horatio Street, Tampa, FL, 33606, by

U.S. Mail on: September 13, 2005.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Response filed herein complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

Respectfully submitted,

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