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

JANETTA YORK,

Petitioner,

v.

EMMETT ABDONEY,

Respondent.

PETITIONER'S AMENDED INITIAL BRIEF ON JURISDICTION IN SUPPORT OF NOTICE TO INVOKE DISCRETIONARY JURISDICTION TO REVIEW A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND OF THE FACTS

This case involves the interpretation and application of Section 45.0315, Florida Statutes .

Emmett Abdoney was given a second mortgage by Jason and Betty Peterson.[1] Abdoney promised the Petersons that he would not foreclose the second mortgage. The Petersons failed to make payments on their first mortgage with Amerivest Corporation, and Amerivest instituted a foreclosure action against the Petersons and three junior lienors, one of which was Abdoney.

Abdoney entered into an agreement with Amerivest to buy out the first mortgage. Amerivest voluntarily dismissed Abdoney from the foreclosure suit, and the parties filed a joint stipulation for substitution of plaintiff now with him as Plaintiff. The trial court entered a final judgment of foreclosure awarding Abdoney $11,269.27, and ordered a judicial sale. The final judgment specified a deadline for redemption of the issuance of the certificate of sale. Janetta York was the successful bidder with a bid of $15,100, and the clerk issued and filed a certificate of sale.

Shortly thereafter, Abdoney sent York a letter demanding satisfaction of his junior lien. In response, York filed a motion to declare junior lienor with notice

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[1] This statement of the case and facts is taken from the opinion of the Second District Court of Appeal.

barred in the foreclosure action, which the trial court denied as premature. Abdoney then filed a new foreclosure action for his junior lien.

York also renewed her motion to declare junior lienor with notice barred in the first foreclosure action. Abdoney moved to strike her motion arguing lack of standing in the first case by York, the successful purchaser at sale, which the trial court denied. The two cases were consolidated.

After an evidentiary hearing the trial court entered an order making extensive findings of fact, which granted York's motion to declare junior lienor barred on the basis of Section 45.0315, Florida Statutes. The court determined that Abdoney's right to foreclose his junior lien was extinguished upon the by the filing of the certificate of sale in the first foreclosure action. Both parties thereafter filed motions for summary judgment. The court granted York's motion for final summary judgment based upon its factual findings made at the evidentiary hearing and denied Abdoney's.

Abdoney appealed. No competent substantial evidence argument was made to challenge the trial court's findings. The Second District reversed and remanded the trial court with the opinion attached to this petition. York filed a timely motion for rehearing which was denied on June 24, 2005. The Notice to Invoke Discretionary Jurisdiction was filed with the Second District on July 22, 2005.

ISSUES INVOKING THIS COURT'S JURISDICTION

The Second District's opinion held that:

(1) Notice of and participation in the foreclosure sale is irrelevant to application of Section 45.0315, Florida Statutes, which holding expressly and directly conflicts with the opinions of the fifth and third districts in Burns v. Bankamerica Nat'l Trust, 719 So. 2d 999 (Fla. 5th DCA 1998) and YEMC Construction & Development v. Inter ser, USA, Inc., 884 So. 2d 446 (Fla. 3d DCA 2004), respectively; and

(2) Deliberate omission of a junior lienholder in a foreclosure suit has no legal significance which expressly and directly conflicts with the opinion of this court in Quinn Plumbing Co. v. New Miami Shores, 129 So. 690, 692-693 (Fla. 1930) and the third district in Posnansky v. Breckenridge, 621 So. 2d 736 (Fla. 4th DCA 1993) and Cicoria v. Gazi, 901 So 2d 282 (Fla. 5th DCA 2005)

SUMMARY OF ARGUMENT ON JURISDICTION

The Second District Court of Appeal has departed from previously consistent foreclosure law as it pertains to notice and equity, both before and after the passage, in 1993, of Section 45.0315, Florida Statutes.

This departure has created express and direct conflict which must be resolved by this court.

ARGUMENTS ON JURISDICTION

I. NOTICE OF AND PARTICIPATION IN THE FORECLOSURE SALE IS IRRELEVANT TO APPLICATION OF SECTION 45.0315, FLORIDA STATUTES WHICH HOLDING EXPRESSLY AND DIRECTLY CONFLICTS WITH THE OPINIONS OF THE FIFTH AND THIRD DISTRICTS IN BURNS V. BANKAMERICA NAT'L TRUST, 719 SO. 2D 999 (FLA. 5TH DCA 1998) AND YEMC CONSTRUCTION & DEVELOPMENT V. INTER SER, USA, INC., 884 SO. 2D 446 (FLA. 3D DCA 2004), RESPECTIVELY.

This case concerns whether a foreclosing party who owns two mortgages on a parcel and only forecloses the superior mortgage and who fails to exercise the right of redemption, may then sue the successful purchaser to foreclose on the junior lien. The Second District's interpretation and application of Section 45.0315, Florida Statutes, is in direct conflict with the opinions of other districts.

Section 45.0315, Florida Statutes, provides, in part,

> At any time before the later of the filing of a certificate of sale by the clerk of the court ... 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 ... Otherwise there is no right of redemption.

The Second District ruled:

> This case presents an unusual set of facts in that Abdoney, in his capacity as the senior mortgagee, omitted himself as a junior mortgagee from the original foreclosure action. Abdoney has admitted that this omission was intentional, but we cannot find any

> authority that would justify departing from the general rule that the lien of a junior mortgagee is not affected by a judgment of foreclosure to which he was not a party. Although Abdoney had notice of, and participated in, the judicial sale, he did so in his capacity as senior mortgagee and not as a junior mortgagee.

Opinion at page 6.

It is puzzling that the appellate court committed such tortuous logic in its effort to conclude, contrary to the trial court, that Abdoney was not a party for purposes of Section 45.0315, Florida Statutes, even though he was a party plaintiff and participated fully in the foreclosure proceedings. No authority is provided to support this conclusion, and it is contrary to the law as expressed in Dundee Naval Stores v. McDowell, 61 So. 108, 113 (Fla. 1913), which holds:

> [W]here different persons have rights or interests in specific land, the foreclosure of a mortgage upon the land affects the rights and interests of only such persons as are made parties actually or constructively to the foreclosure proceeding.

The Second District is creating a concept of being a little bit of a party. Abdoney was indeed a party to the case, as Plaintiff, for all of his right title and interest in the property.

Previous rulings by other districts have consistently addressed the concepts of notice and clean hands before redemption rights are lost when one is not a party.

In Burns v. BankAmerica Nat'l Trust, 719 So. 2d 999, 1001 (Fla. 5th DCA 1998) the Fifth District was presented with parties claiming they were not properly

served and sought to exercise their rights of redemption after the certificate of sale was issued. The court held that the tenants with an option to purchase who alleged they were not properly served should have been allowed by the trial court to present evidence about the service of process issue and went on to hold:

> [E]ven if . . . the judgment against them was void for lack of service, ... that would not end our inquiry. . . . Under Section 45.0315, Florida Statutes (1995) 'the mortgagor or the holder of any subordinate interest' may redeem the property any time before the issuance of a certificate of title following foreclosure sale. . . . **However, once the certificate is issued, redemption is precluded, even if the party asserting the right was not made a party to the foreclosure proceedings**. . . . [T]he Burnses received the final judgment of foreclosure and notice of sale. . . . Issuance of the certificate of title precluded any further exercise of the mortgagee's redemption right." (Emphasis added.)

More recently, in YEMC Construction & Development v. Inter se, USA, Inc., 884 So. 2d 446, 448 (Fla. 3rd DCA 2004), the third district examined the situation when tenants in possession/contract vendees who were not served with the suit and were not parties, but filed an objection and motion for relief from foreclosure sale nine days after the certificate of sale was issued. That motion was granted by the trial court which allowed the redemption, but was reversed by Third District which held:

> [T]he trial court was without authority to extend the period of redemption. Here, it is undisputed that the tenants' right of redemption expired upon filing the certificate of sale, § 45.0315, Fla. Stat. (2003).

If one has a lien on property in the Third District or Fifth District the issue

will be if you had notice to determine whether your lien rights were extinguished upon foreclosure. As the Third District held, in one of the earliest cases decided after the 1993 statute was enacted:

> Section 45.0315, Florida Statutes, ... exclusively governs the time, manner and procedure for the claimed exercise of redemptive rights. Otherwise, as the statute so plainly states, there are no redemptive rights.

Emanuel v. Bankers Trust Company, 655 So. 2d 247, 250 (Fla. 3d DCA 1995) rev. den. 663 So. 2d 669 (Fla. 1995).

If the property lies in the Second District, the rights of subordinate lienholders are greater and are not affected by Section 45.0315, Florida Statutes, even if they had notice and were the foreclosing party. No announcements need to be made at sale that a lien held by a party to the case is excluded.

The Second District has improperly modified the statute with its interpretation. "Courts are not at liberty to add words to statutes that were not placed there by the legislature." Knowles v. Beverly Enterprises, 898 So. 2d 1, (Fla. 2005) (Cantero concurring) citing Hayes v. State, 750 So. 2d 1, 4 (Fla. 1999); Donato v. American Telephone & Telegraph Co., 767 So. 2d 1146, 1150 (Fla. 2000) (It is an abrogation of legislative power for courts to add words to statutes); Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (courts are "without power to construe an unambiguous statute in a way which would extend, modify or limit its

express terms.")

The Second District has modified the last sentence of the statute to now read:

> Otherwise there is no right of redemption, ***however if you had notice and attended the sale and still did not exercise a right of redemption you may continue to retain your right of redemption if your interest in the property though a matter of public record was not fully identified in the foreclosure case and you did not disclose it at the sale.***

The Second District acknowledges the Burns holding and concedes that Abdoney could not exercise redemption in the first case, but then allows him foreclosure and redemption in a new case. This rewriting of the statute has created conflict among the districts which requires resolution by this court.

> II. THE HOLDING THAT DELIBERATE OMISSION OF A JUNIOR LIENHOLDER IN A FORECLOSURE HAS NO LEGAL SIGNIFICANCE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE OPINION OF THIS COURT IN QUINN PLUMBING CO. V. NEW MIAMI SHORES, 129 SO. 690 (FLA. 1930) , THE THIRD DISTRICT IN POSNANSKY V. BRECKENRIDGE, 621 SO. 2D 736 (FLA. 4TH DCA 1993) AND THE FIFTH DISTRICT IN CICORIA V. GAZI, 901 SO. 2D 282 (FLA. 5TH DCA 2005).

The Second District's statement (Opinion, page 6) after recognizing Abdoney intentionally omitted his junior lien. that it "cannot find any authority that

would justify departing from the general rule that the lien of a junior mortgage is not affected by a judgment of foreclosure to which he was not a party", is unfounded. There is authority on that issue which is expressed in this court's opinion in Quinn Plumbing Co. v. New Miami Shores Corp., 129 So. 690, 692-693 (Fla. 1930):

> If any fraud or *mala fides* was practiced in connection with the failure to make the second mortgagee a party, that might constitute a countervailing equity which would place the matter in an entirely different light, ... If it were shown that the second mortgage was deliberately omitted as a party ... , an entirely different question might be presented.

Prior to the adoption of Section 45.0315, Florida Statutes, which does not expressly require that those holding an interest be parties, the First District and the Fourth District had ruled that an exception to a junior lien or interest surviving foreclosure is "unclean hands." For the Fourth District, a factor indicating unclean hands was "the failure to intervene in a prior foreclosure of which [the junior lienor] had notice" Posnansky v. Breckenridge, 621 So. 2d 736, 738 (Fla. 4th DCA 1993). In Riley v. Grissett, 556 So. 2d 473, 476 (Fla. 1st DCA 1990), which was prior to the adoption of Section 45.0315, Florida Statutes, the First District held that a leasehold interest held by a P.A. which was not a party but had notice and participated in the case was barred from redemption based upon estoppel and clean

hands.

The concept of clean hands still has applicability after Section 45.0315, Florida Statutes. In Cicoria v. Gazi, 901 So. 2d 282, (Fla. 5th DCA 2005), the Fifth District reversed a judgment which allowed redemption after the foreclosure sale and certificate of sale to a third party and remanded the case for more fact finding after mortgagor/defendant questioned service of process with the Fifth District holding "A party seeking justice in a court of equity must have 'clean hands'. Here someone has misled the court."

The Second District's finding that intentional omission of a junior lienholder was of no consequence has created conflict with these decisions and this court should resolve the conflict.

CONCLUSION

The opinion of the Second District is in express and direct conflict with the opinions of other district courts of appeal and of this court. This court should take jurisdiction based upon the conflicts so that the issues raised by the conflicts may be resolved.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by United States Mail, this 15th day of August 2005, upon Emmett Abdoney,

Esquire, Emmett Abdoney P.A., 2506 W. Platt Street, Tampa, Florida 33609.

CERTIFICATE OF COMPLIANCE

I hereby certify that the Petitioner's Amended Initial Brief in Support of Notice to Invoke Discretionary Jurisdiction complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure. The foregoing brief is in Times New Roman 14 point font.

Respectfully submitted,

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APPENDIX

1. Copy of opinion from Second District Court of Appeal in Abdoney v. York (reported at 903 So. 2d 981 (Fla. 2d DCA 2005)).

2. Copy of Order Denying Rehearing.