

IN THE SUPREME COURT OF FLORIDA

**CASE NO.: SC _____
4DCA CASE NO.: 4D 04-1350**

MICHAEL GLYNN,

Petitioner,

v.

FIRST UNION NATIONAL BANK,

Respondent.

_____/

PETITIONER'S AMENDED BRIEF ON JURISDICTION

**On Discretionary Review from the District Court of Appeal of Florida, Fourth
District**

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS AND AUTHORITIES CITED.....	ii
PREFACE.....	iii
1. STATEMENT OF THE FACTS AND CASE.....	1
2. SUMMARY OF ARGUMENT.....	5
3. JURISDICTIONAL STATEMENT.....	6
4. ARGUMENT:	
Point 1) The decision of the district court of appeals in this case, expressly and directly conflicts with the district court decision in <u>Contractors Unlimited, Inc. vs. Nortax</u> , 833 so.2d 286 (Fla. 5 th DCA 2002).....	6,7
Point 2) The decision of the district court of appeals in this case, expressly and directly conflicts with this Court’s decision in <u>Mariana vs. Maund</u> , 56 So. 670 (Fla. 1911) and <u>Voges vs. Ward</u> , 123 so. 785 (Fla. 1929).....	8,9
5. CONCLUSION.....	9,10
6. CERTIFICATE OF SERVICE.....	10
7. CERTIFICATE OF COMPLIANCE.....	10

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Contractors Unlimited, Inc. v. Nortrax Equipment Co., S.E.,</u> 833 So.2d 286 (Fla. 5 th DCA 2002).....	6,7, 8
<u>Jeff Ray vs. Jacobson,</u> 566 So.2d 885 (Fla. 4 th DCA 1990).....	4,8
<u>Marianna & B. R. Co. v. Maund,</u> 56 So. 670 (Fla. 1911).....	6,8
<u>State Street Bank vs. Lord,</u> 851 So.2d 790 (Fla. 4 th DCA 2003).....	4
<u>Vogues v. Ward,</u> 123 So. 785 (Fla. 1929).....	8,9
 <u>RULES</u>	
Fla. R. App. P. 9.030(a)(2)(A)(iv).....	6
 <u>OTHER</u>	
Art. V. Sec. 3(b)(3) Fla. Const. (1980).....	6

STATEMENT OF THE FACTS AND CASE

The Petitioner is Michael Glynn (Glynn), (Appellant/Mortgagor) who together with his wife, owned a single family home in Broward County, as their homestead.

Respondent, FIRST UNION National Bank (FIRST UNION), was the Appellee/Mortgagee/Plaintiff in the underlying appeal and trial Respondent, FLORIDA PHOENIX FINANCE, INC., was also an Appellee in the underlying appeal and was the third party bidder at the foreclosure sale.

This case results from the Fourth District Court of Appeals affirmance of circuit court orders in summary foreclosure proceedings which overruled Glynn's Objection to a February 9, 2004 clerk's sale and Glynn's Motion to Vacate the Final Judgment and Certificate of Sale. Specifically, the Fourth District first entered a per curiam affirmance of the circuit court orders referenced above. (A1) Pursuant to the Petitioner's motion for rehearing and rehearing en banc, the Fourth District then substituted a written opinion in place of the PCA. (A2) The Fourth District has also denied the Petitioner's motion for clarification and request for certification. (A3)

On April 26, 1999, the Petitioner (Appellant), Michael Glynn and his wife purchased their home, financed with a conventional mortgage ("the Mortgage") from National Lending Center, Inc. ("National"). The Mortgage to National was recorded in due course. Unbeknownst to Glynn, the mortgage and the promissory note ("Note") began circulating among financial institutions. Over the next three years at least four institutions claimed to have some interest in the Mortgage.

GLYNN fell behind on his mortgage payments and on April 2, 2002, FIRST UNION, filed a complaint to foreclose the Mortgage. FIRST UNION brought an additional count to reestablish the Note alleging that the original promissory note

was lost or destroyed subsequent to its acquisition thereof.

It is undisputed from the record that when the case was filed, FIRST UNION did not own or hold the Note and Mortgage. It seems obvious from this that it could not have ever had possession of the promissory Note prior to its becoming lost. In fact, in two foreclosures filed by FIRST UNION's predecessor, Fairbanks, they also sought to reestablish the lost Note. At no time in the prior foreclosures did Fairbanks reestablish the lost Note. Thus, if the Note was lost prior to or while in Fairbank's possession, it could not have been transferred to FIRST UNION and then lost.

Five months after the filing of the complaint by FIRST UNION, Fairbanks purported to assign the Mortgage to FIRST UNION (execution date September 24, 2002). This Assignment was not recorded until March 5, 2003, some ten months after the suit was filed. Fairbanks indeed held an assignment (recorded in the public records) from its predecessor Equicredit Corporation of America ("Equicredit"). However, there was, at the time of the summary final judgment, and is, as of today, a break in the chain of title to the Mortgage. The record in the circuit court action and the public records in and for Broward County, Florida are devoid of any document purporting to evidence any transfer(s) or assignment(s) of the Note and Mortgage from National (the initial lender/mortgagee) to Equicredit. In essence Equicredit assigned to Fairbanks and Fairbanks assigned to FIRST UNION (albeit too late under the law), but there is no transfer or trail from the GLYNN's original lender (National) to Equicredit.

In support of its application for a summary judgment, FIRST UNION filed an Affidavit of Lost Original Document which appears to be false in that FIRST UNION's Affiant, Andrea Rumpler, attested that "FIRST UNION was in possession when the loss occurred"

Despite these record deficiencies, on May 15, 2003, FIRST UNION was

granted a summary final judgment. A Clerk's Sale date was ultimately re-set for February 9, 2004.

Effectively, the circuit court allowed FIRST UNION to summarily foreclose on a Mortgage that, based on the record, it did not hold when the suit was filed and which, as far as the record is concerned, it did (does) not own.¹

On February 6, 2004, GLYNN filed an Emergency Motion to Cancel the February 9, 2004 Clerk's Sale, raising several of these deficiencies in the judgment and process which was set for hearing at 8:45 a.m., February 9, 2004 and was partially heard by Judge Miette Burnstein who could not fully air the issues; the Judge decided to allow the sale to continue and instructed the Glynn's to re-raise these issues in an objection to the sale. An Order was entered denying Glynn's Motion to Cancel the Clerk's Sale, and the Glynn's home was auctioned to FLORIDA PHOENIX FINANCE, INC. whose bid was far in excess of the judgment awarded to FIRST UNION.

On February 23, 2004, GLYNN timely filed an Objection to the Clerk's sale and a Motion to Vacate Final Judgment and Certificate of Sale. On March 1, 2004, FIRST UNION filed its Reply to the Motion, and GLYNN filed a Supplemental Objection to February 9, 2004 Clerk's Sale and Motion to Vacate Final Judgment and Certificate of Sale. After a hearing, the Court entered an Order denying any relief to the Glynn's. From these Orders, GLYNN took an Appeal to the Fourth District Court of Appeal. The primary focus of the effort on appeal was to seek reversal based upon the Fourth's own precedent.

¹ Note: perhaps these deficiencies were initially overlooked by the presiding judge as no answer was filed by the homeowner, and the Glynn's prior counsel, Mitchell J. Olin, never appeared for any Court hearings and never filed any pleadings directed to these issues. These issues were raised to the presiding judge post-judgment and before the Clerk's sale.

Specifically, Glynn set forth that the “PCA” conflicted with the established precedent in State Street Bank vs. Lord, 851 So.2d 790 (Fla. 4th DCA 2003) and Jeff Ray vs. Jacobson, 566 So.2d 885 (Fla. 4th DCA 1990).

On October 5, 2005, the Fourth District Court of Appeals entered an order *per curiam* (with an opinion) denying Glynn’s motion for rehearing *en banc*. (A2) The Fourth District panel opined that the defect below was one of “standing” which was waived by Glynn. The Panel affirmed the circuit court’s orders on the basis that FIRST UNION held “equitable title” to the Mortgage². (A3)

Glynn then timely filed a motion for clarification and request for certification based upon an issue of great public importance. The Fourth District denied Glynn’s motion for clarification. (A3). The Fourth District never addressed the total lack of an assignment from National (the original mortgagee) to Appellee’s predecessor in interest, Equicredit. (A3). The effect of the affirmance below is that a claimant may sue and then acquire the cause of action, and that a lack of ownership of a cause of action is waivable.

Glynn now seeks review of this change in the law by petition to this Court.

SUMMARY OF ARGUMENT

The law has always required a Plaintiff to own a cause of action prior to suit. There is no policy reason to depart from that requirement now, or if there is an overwhelming reason to change the law, only this Court should do so. In today’s era of multiple portfolio assignments of notes and mortgages, this is an important issue. The decision of the Fourth District chips away at the fundamental precepts of mortgage foreclosure and real property law that require a party to own and hold a mortgage before filing suit to effect a change in title to the collateral therefore.

²This position does not appear to have been advanced by FIRST UNION in its pleadings.

A foreclosing lender must be required to abide by the principles laid out in the Florida Statutes and case law on this point.

In light of the foregoing, The Fourth District Court of Appeals decision in this case directly and expressly conflicts with: Contractors Unlimited, Inc. vs. Nortax, 833 So.2d 286 (Fla. 5th DCA 2002); Marianna vs. Maund, 62 So. 670 (Fla. 1911); and Voges vs. Ward, 123 So. 785 (Fla. 1929); on the necessity for the Plaintiff to own and hold the cause of action on the date suit is filed.

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review a decision of a district court that expressly and directly conflicts with a decision of the Supreme Court or another district of appeal on the same point of law. Art. V. Sec. 3(b)(3) Fla. Const. (1980) Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

- 1) The decision of the district court of appeals in this case, that FIRST UNION was entitled to foreclose on a mortgage which it did not own until five months after its complaint was filed (recorded ten months later), expressly and directly conflicts with the district court decision in Contractors Unlimited, Inc. vs. Nortax, 833 So.2d 286 (Fla. 5th DCA 2002)

The Fourth District's decision in this case directly and expressly conflicts with the Fifth District's decision in Contractors Unlimited, Inc. vs. Nortax, 833 So.2d 286 (Fla. 5th DCA 2002) on the point of law that where a party is suing on an instrument it must own and attach the cause of action as a prerequisite.

In Contractors, the Defendants appealed an order denying their motion to vacate a final judgment. The Fifth District agreed with Appellant that the Plaintiff's failure to attach to its complaint a legible copy of the instrument which formed the basis of the cause of action was fatal to its cause of action.

In vacating the default and default final judgment, the Fifth District held that "a complaint based upon a written instrument does not state a cause of action until the instrument or adequate portion thereof, is attached to or incorporated into the complaint." Contractors, at 288.

Here, Glynn also filed a motion to vacate which was denied by the circuit court. The Plaintiff below failed to attach or incorporate assignments from the mortgagee named in the note and mortgage to the Plaintiff (or a chain of assignments as the case may be). The Fourth District recast the issue as one of "standing" and then decided that Glynn had "waived" his objection by failing to raise it as an affirmative defense. The issue is not one of standing, but as was properly cast by the Fifth District is one of having a cause of action at all. Especially where FIRST UNION acknowledged "confusion" in the record transfers in this matter, the Circuit Court should have, at a minimum, denied summary judgment. (A2).

Under the Contractors holding, FIRST UNION could not have stated a cause of action in this case, as a result of receiving an assignment five months after the case was filed. FIRST UNION's demonstrated failure to account for the chain of title with respect to the Mortgage's multiple assignments, requires FIRST UNION to cure this defect and to re-file its suit. (See, Jeff Ray, supra). As such, the Fourth District's decision in this case is in direct conflict with the Fifth District's decision in Contractors.

2) The decision of the district court of appeals in this case, expressly and directly conflicts with this Court's decision in Mariana vs. Maund, 56 So. 670 (Fla. 1911) and Voges vs. Ward, 123 So. 785 (Fla. 1929).

The Fourth District's decision in the case at bar is in direct conflict with the Supreme Court of Florida's decision in the foreclosure action of Marianna vs. Maund, 62 So. 670 (Fla. 1911).

Specifically, in Mariana, the underlying Plaintiff at the trial level, obtained an assignment of a claim for damages against property after initially filing suit. Although the Plaintiff alleged the fact of the assignment in an amended pleading, this Court held that the assignment created a "new" cause of action subsequent to the bringing of the suit: "(D)it is stated in this case that, where the right to sue arises out of a transaction subsequent to the institution of the suit, relief cannot be had by a supplemental or amended complaint, for the obvious reason that the cause of action did not then exist." Mariana; at 670 and 673. Under this long standing and clear law, the assignment is part of the cause of action.

Therefore, under the holding in Mariana, FIRST UNION could not have had cause of action to foreclose a mortgage not assigned to it until five months post suit. Nowhere has this Court authorized an action on an equitable ownership basis, particularly where ownership was created post suit.

The Fourth District's decision in the case at bar is also in direct conflict with this Court's decision in the foreclosure action of Voges vs. Ward, 123 So. 785 (Fla. 1929).

Specifically, in Voges, the alleged holder of a chattel mortgage brought suit to foreclose its lienhold interest against a truck. Ultimately, the trial court found that the Plaintiff was not in possession of the promissary note at the time the case was filed and found that the case was prematurely brought. This Court then affirmed the lower court decision with findings that the suit was prematurely brought and that the Plaintiff on the pleadings and evidence was not entitled to recover. Voges, at 331.

The Fourth District's holdings in this case is clearly in conflict with Voges. FIRST UNION, even upon a trial, could not and should not succeed under Voges.

Lastly, given the lack of a chain of title to the mortgage, the foreclosure sale in this matter appears to violate the Florida Constitutional protection against the forced sale of one's homestead by a party who lacks a legal interest thereon.

CONCLUSION

This issue has great importance in this state as the number and frequency of assignments seems to have accelerated. Serious title issues will persist on this and other properties if this issue is not dealt with clearly. This Court should undertake discretionary review of this case to resolve the conflicts and to clearly establish (re-establish) the law on these points.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on February 9, 2006 to: MARSHALL C. WATSON, PA, 1800 N.W. 49th Street, Suite 120, Fort Lauderdale, Florida, 33309; and DENNIS ROSE, ESQUIRE, 9495 SW 72nd Street, Suite B-285, Miami, FL 33173.

CERTIFICATE OF

COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in compliance with the Fla.R.App.P.9.210(a)(2) font requirements. It has been written in Times New Roman 14 point font.

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