

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-602

5TH AVENUE REAL ESTATE
DEVELOPMENT, INC., a Florida
Corporation, and WILLIS HALE,

L.T. CASE NO. 4D05-3599
Cir. Ct. CASE NO. 502005CA001823XXXXMB

Petitioners,

v.

AEACUS REAL ESTATE
LIMITED PARTNERSHIP,
a Jersey Channel Islands limited
partnership,

Respondent.

BRIEF ON JURISDICTION OF RESPONDENT,
AEACUS REAL ESTATE LIMITED PARTNERSHIP

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PREFACE

Petitioners, 5th Avenue Real Estate Development, Inc., a Florida Corporation, and Willis Hale (“5th Avenue”), were defendants in the trial court, and appellees before the Fourth District Court of Appeal; respondent, Aeacus Real Estate Limited Partnership (“Aeacus”), was the plaintiff and appellant. A separate notice to invoke this Court’s jurisdiction was filed by appellee/defendant, Real Estate Depot, Inc. (“Depot”) (Case No. SC07-601). The parties will be referred to by name or as to Aeacus as mortgagee and to the defendants collectively as debtors. All emphasis is supplied unless indicated otherwise. References to 5th Avenue’s amended brief on jurisdiction are denoted as (5th Avenue Juris. Br. ____).

STATEMENT OF THE CASE AND FACTS

The Statement of the Case and the Facts submitted by 5th Avenue inappropriately includes a recitation of facts not appearing in, and contradicted by, the decision of the Fourth District Court of Appeal.¹ See Reaves v. State, 485 So. 2d 829, 830 n.3 (Fla. 1986) (“The only facts relevant to our decision . . . are those facts contained within the four corners of the decisions allegedly in conflict.”). Consequently, Aeacus submits the following factual statement.

¹ In fact, 5th Avenue specifically acknowledges that the Fourth District’s decision “fails to address” matters that 5th Avenue now argues constitute error (5th Avenue Juris. Br. 5).

The Fourth District previously reviewed and reversed a summary judgment of foreclosure in favor of Aeacus, the mortgagee, as premature because the record did not conclusively show that Aeacus had given the 30 days notice of application for judgment that was required by a settlement agreement between the parties. See Aeacus v. Real Estate Ltd. P'ship, 948 So. 2d 834, 835 (Fla. 4th DCA 2007). On remand, the trial court found that the notice had not conformed to the settlement agreement. See id. Consequently, Aeacus restarted the foreclosure proceedings and, to comply with the notice provision, requested that the court enter an order allowing the mortgagors a 30-day period to cure the defaults before entry of judgment. See id.

The debtors raised res judicata as a bar to foreclosure, asserting that the finding that the initial notice had not been properly given precluded any future foreclosure and judgment. See Aeacus, 948 So. 2d at 835. The trial court agreed, and entered judgment for the debtors. See id. The Fourth District reversed and remanded for entry of a final judgment of foreclosure and a money judgment on personal guarantees. See id. at 835-36.

The Fourth District explained that the debtors had misread the effect of the trial court's determination that the original notice given did not comply with the settlement agreement. See Aeacus, 948 So. 2d at 835. Nothing in the settlement agreement or its prior opinion suggested that Aeacus had only a single attempt to comply with the notice provision. See id. at 835-36. The court stated:

Nothing in our prior opinion explicitly barred the mortgagee from giving a fresh 30-day notice and, if no cure followed

timely, then seeking a foreclosure and judgment. Indeed it is a fair implication of our opinion that, upon giving such notice anew, the mortgagee would be entitled to a foreclosure judgment. As this was in fact our actual intent, it would be profoundly unfair to hold that only the original failed attempt at giving notice was tolerated by the settlement agreement and, it having failed, the mortgagee is forever barred from resorting to its security for the debt.

Id. at 836.

The clear meaning and purpose of the notice provision was to give the defaulting debtors an opportunity to cure their admitted defaults. See Aeacus, 948 So. 2d at 835-36. Aeacus' latest attempt to foreclose gave notice that was more than sufficient to comply with the settlement agreement. See id.

As to the debtors' res judicata argument, the Fourth District pointed out that it is an equitable doctrine, "not to be invoked where it will inflict pernicious results." Aeacus, 948 So. 2d at 836. The court observed:

Truth be told, what was conceived by their agreement as one final chance to pay has now lengthened into *18 months more* of nonpayment (not to mention the period from the execution of the settlement agreement itself). In spite of having had more than 3 years to correct defaults already old when the original foreclosure was filed, the record fails to disclose that debtors have ever made any tender of the payment required by the mortgage and settlement.

Under these circumstances, it would be quite inappropriate to apply res judicata here.

Id. (emphasis in original).

The Fourth District concluded that “the dominant equity is that it is not fair or just” for the debtors to be enriched at Aeacus’s expense. Aeacus, 948 So. 2d at 836. The Fourth District reversed and remanded for entry of judgment of foreclosure, after calculation of the sums necessarily included in the judgment. See id. The court specified that “no further notice need be required, for the one contemplated by the settlement agreement has been given to a long fare-thee-well.” Id.

SUMMARY OF ARGUMENT

No express and direct conflict exists between the decision of the Fourth District Court of Appeal and Singleton v. Greymar Associates, 882 So. 2d 1004 (Fla. 2004), or Stadler v. Cherry Hill Developers, 150 So. 2d 468 (Fla. 2d DCA 1963).² 5th Avenue cites Singleton and Stadler as “carv[ing] out an exception to the application of the doctrine of res judicata, but argues that a subsequent foreclosure action is barred absent a new or different breach (5th Avenue Juris. Br. 6). Nothing in the Fourth District’s decision conflicts with Singleton or with Stadler or with this principle. It is clear on the face of the Fourth District’s decision that the focus was on compliance with a notice requirement in a settlement agreement, not on a subsequent breach. As such, Singleton and Stadler were not relevant. Consequently, 5th Avenue’s statement that the Fourth District “failed to

²This court specifically disapproved Stadler in Singleton, 882 So. 2d at 1008.

apply the legal principles set forth in” Singleton and Stadler cannot provide a basis for conflict jurisdiction.

The Fourth District addressed the notice requirement central to this case, and properly applied the principles relevant to the equitable doctrine of res judicata. The decision is specific to the circumstances of this case, and properly deals with whether the parties to a settlement complied with a specific provision requiring notice before foreclosure.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH SINGLETON v. GREYMAR ASSOCIATES, 882 So. 2d 1004 (Fla. 2004), AND STADLER v. CHERRY HILL DEVELOPERS, 150 So. 2d 468 (Fla. 2d DCA 1963).

This Court only has discretion to review decisions that expressly and directly conflict with the decisions of this Court or another district court of appeal. See Art. V, § 3(b)(3), Fla. Const.; Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980). 5th Avenue argues that the Fourth District’s decision conflicts with Singleton v. Greymar Associates, 882 So. 2d 1004 (Fla. 2004), and Stadler v. Cherry Hill Developers, 150 So. 2d 468 (Fla. 2d DCA 1963). However, neither Singleton nor Stadler resolved the same issues of law and fact differently from the Fourth District’s decision. See, e.g., Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). Rather than establishing conflict, 5th Avenue simply reargues its position and disagrees with the Fourth District’s resolution. Such

disagreement cannot confer jurisdiction on this Court. See, e.g., id. There is no conflict. Review should be denied.

In this case, the Fourth District dealt with a very narrow and fact-specific issue concerning compliance with a notice requirement in a settlement agreement, and found res judicata inapplicable to bar the mortgagee from “restart[ing] the foreclosure proceedings” and “giving a fresh 30-day notice” after a finding that its first notice was insufficient. Aeacus, 948 So. 2d at 835-36. In Singleton, this Court held that res judicata does not bar a subsequent foreclosure action based on an alleged subsequent and separate default. Singleton is distinguishable. The Fourth District’s decision does not involve the issue of a new or separate breach. The only common ground in these cases is that they both involved mortgage foreclosures due to the mortgagor’s default in payment. The similarity ends there. The conclusions in these cases are not in conflict.

The decision also does not conflict with Stadler. Stadler was disapproved in Singleton and is no longer good law.

Certainly, it cannot be presumed that the Fourth District was unaware of this court’s Singleton decision. In fact, 5th Avenue’s same arguments were made and rejected in the Fourth District.

5th Avenue has failed to establish any express and direct conflict with Singleton or Stadler. Neither involve a similar factual context.

CONCLUSION

There is no conflict and no basis for this court to exercise its discretionary jurisdiction. Review should be denied.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF FONT

Brief on Jurisdiction of Respondent, Aeacus Real Estate Limited Partnership, has
been typed using the 14-point Times New Roman font.

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