IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-508

DANIEL THERAULT,

Petitioner,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR LONG BEACH MORTGAGE TRUST 2006-2,

Respondent.

BRIEF ON JURISDICTION OF DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR LONG BEACH MORTGAGE TRUST 2006-2

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS[1]

I. THE PROCEEDINGS IN THE TRIAL COURT

On May 8, 2007, Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Trust 2006-2 (the "Bank"), initiated this foreclosure action by filing a Complaint against Mr. Therault alleging that the Note was in default, and that the full amount of $451,934.27—plus interest, late charges, and costs—was immediately due and owing. The Bank filed the original Note and Mortgage in the trial court to support its entitlement to a foreclosure judgment. Following a hearing, a Final Judgment of Foreclosure ("Final Judgment") was entered in favor of the Bank on April 15, 2010.

Approximately three months later, Mr. Therault, acting *pro se*, filed a "Motion and Declaration to Vacate Judgment" ("Motion to Vacate") claiming, without record support, that (1) he was never properly served with the Complaint and other papers filed in the action; and (2) that the trial court lacked jurisdiction. The trial court subsequently entered an Order denying his Motion to Vacate ("Order Denying Motion to Vacate").

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[1] Because the February 22, 2012 Order simply grants the Bank entitlement to appellate attorneys' fees and denies Mr. Therault's Motion to Strike, the Statement of Case and Facts sets forth the procedural history of this litigation (referencing the papers contained in the dockets below) in an effort to provide this Court with some context for determining the threshold jurisdictional issue. In addition, because the Order does not set forth the basis for Fourth District's decision, the Bank has set forth the attorney fee provisions contained in the Mortgage that support the Fourth District's finding that the Bank is entitled to attorneys' fees.

II. PETITIONER'S APPEAL TO THE FOURTH DISTRICT COURT OF APPEAL

Mr. Therault appealed both the Final Judgment and the Order Denying Motion to Vacate to the Fourth District Court of Appeal (the "Fourth District"). On the Bank's motion, the Fourth District dismissed the appeal of the Final Judgment for lack of jurisdiction because the notice of appeal was untimely filed, but allowed the appeal of the trial court's Order Denying Motion to Vacate to proceed. On appeal, Mr. Therault raised in his brief the same issues relating to lack of service of process and jurisdiction. He also filed multiple other motions in the Fourth District requesting discovery and dismissal of the foreclosure action, each of which were denied.

The Bank filed, in addition to its brief, a timely Motion for Determination of Entitlement to Appellate Fees ("Attorney Fee Motion"), based on the attorney fee provisions in the Mortgage which formed the basis of the lawsuit. Those provisions include the following, in pertinent part:

> 14. . . . Lender may charge Borrower fees for services performed in connection with Borrower's default . . . including . . . attorneys' fees.
>
> * * *
>
> 22. . . . If the default is not cured on or before the date specified in the notice, Lender…may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.
>
> * * *
>
> 24. Attorneys' Fees. As used in this Security Instrument and Note, attorneys' fees shall include those awarded by an appellate court…

Mr. Therault filed two separate responses to the Attorney Fee Motion: a Motion to Strike and Objection to Appellees' Motion for Determination of Entitlement to Appellate Attorneys Fees ("Motion to Strike") and an Objection to Appellees' Motion for Determination of Entitlement to Appellate Attorneys Fees (collectively the "Objections").

On February 22, 2012, the Fourth District issued a per curiam affirmance of the trial court's Order Denying Motion to Vacate and entered an Order granting the Bank's Attorney Fee Motion and denying Mr. Therault's Motion to Strike (the "Attorney Fee Order").

III. PROCEEDINGS IN THIS COURT

Mr. Therault filed notices of appeal seeking this Court's review of the Fourth District's (1) per curiam affirmance of the Order Denying Motion to Vacate (the "Merits Appeal"); and (2) Order granting entitlement to appellate attorneys' fees (the "Attorney Fee Appeal").[2] Both of these notices were treated as notices to invoke the discretionary jurisdiction of the Court. This Court subsequently dismissed the Merits Appeal finding that the Court was "without jurisdiction" (*see* SC12-504), but issued an order in this appeal, *i.e.*, the Attorney Fee Appeal, requiring the submission of jurisdictional briefs.

On April 20, 2012, after this Court dismissed the Merits Appeal, the Fourth District issued its mandate. Accordingly, all efforts by Mr. Therault to reverse the

[2] Mr. Therault also appealed to this Court the Fourth District's (1) Order Denying Motion to Set Aside Sale (SC12-80); and (2) Order Denying Motion to Take Mandatory Judicial Notice (SC12-506). These appeals were dismissed by this Court based on lack of jurisdiction.

Final Judgment through the appeals process have been exhausted. Thus, the sole remaining issue is whether this Court should accept jurisdiction of the Attorney Fee Appeal. For the reasons discussed below, this Court respectfully should not so do.

SUMMARY OF ARGUMENT

The Attorney Fee Order entered by the Fourth District does not expressly and directly conflict with a decision of this Court or of another district court of appeal. Indeed, there is no language (or even a legal citation) in the Attorney Fee Order which could form the basis for invoking the discretionary jurisdiction of this Court. Instead, it is an order which grants entitlement to attorneys' fees based on the attorney fee provisions in the Mortgage executed by the parties. It is settled law that the prevailing party on appeal is entitled to appellate fees if there is a substantive basis for the award, which there clearly is here. Mr. Therault has not provided this Court with any authority to support discretionary review, but has, instead, improperly argued that this Court should accept jurisdiction because the Final Judgment itself was, according to Mr. Therault, improperly entered. That issue is not before this Court, and is otherwise without merit.

ARGUMENT

I. THE DECISION OF THE FOURTH DISTRICT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF THIS COURT OR OF ANOTHER DISTRICT COURT OF APPEAL

The only potential basis for invoking this Court's discretionary jurisdiction is "express and direct conflict." The Attorney Fee Order merely grants the Bank entitlement to attorneys' fees pursuant to the Mortgage executed by the parties.

There is nothing in the Attorney Fee Order (indeed there is no authority cited) that demonstrates that a potential conflict might exist with a decision of this Court or another district court of appeal. *See* Art. V, § 3(b)(3), Fla. Const.; *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986) (the conflict must appear within the four corners of the majority opinion). This alone should be enough for denial of discretionary review.

Not only is there no basis in the Attorney Fee Order itself for express and direct conflict, but Mr. Therault has advanced no basis for invoking this Court's jurisdiction. Instead, he has improperly argued that the Final Judgment was erroneously entered because the trial court did not have jurisdiction over this case. This argument was considered and properly rejected below, and the Fourth District has issued the mandate. Mr. Therault has, thus, exhausted his appellate rights on the Merits Appeal. His persistence in raising this issue again in his jurisdictional brief—which is limited to the Attorney Fee Order—is simply wrong.

Because Mr. Therault has not provided this Court with any basis to accept jurisdiction of this appeal, and there is no guidance that can be gleaned from the Attorney Fee Order itself, the Bank has been left to speculate regarding this Court's potential jurisdiction. In doing so, the Bank has not identified any legal authority that would even arguably provide a basis for express and direct conflict. To the contrary, entitlement to appellate fees is based on settled legal principles set forth in the appellate rules and case law.

As a threshold matter, appellate attorneys' fees must be requested in compliance with the procedure set forth in Florida Rule of Appellate Procedure

9.400. *See, e.g., Nationwide Mut. Ins. Co. v. Nu-Best Diagnostic Labs, Inc.*, 810 So. 2d 514, 515 (Fla. 5th DCA 2002) (on motion for rehearing). In addition, the party requesting appellate fees must also establish that there is a substantive basis for entitlement, which most often is a statute or contract. *White v. White*, 3 So. 3d 400, 403 (Fla. 2nd DCA 2009) (a party's entitlement to appellate fees is created by contract or statute). And, if there is a substantive basis, appellate fees will be awarded if the party prevails on appeal. *See, e.g., Douglas v. G.E.E.N. Corp.*, 415 So. 2d 130, 132 & n. 2 (Fla. 5th DCA 1982).

Entirely consistent with these indisputable legal principles, the Bank timely requested by motion that the Fourth District find that it was entitled to appellate fees pursuant to the Mortgage executed by the parties if it prevailed on appeal. The Mortgage clearly provides for an award of appellate fees in the event that the Bank is required to pursue foreclosure by judicial proceeding—which is exactly what occurred here. And, the Bank ultimately prevailed on appeal. The fact that Mr. Therault appeared *pro se* makes no difference as Florida courts have awarded attorneys' fees against *pro se* parties, which were likewise based on a contractual provision, and there is no law to the contrary. *See Sheth v. C.C. Altamonte Joint Venture*, 40 So. 3d 916, 916 (Fla. 5th DCA 2010) (affirming award of attorneys fees entered against a *pro se* party based on a fee provision in a guarantee

agreement).[3] Thus, the Attorney Fee Order was based on the application of settled legal principles for which no express and direct conflict exists.

CONCLUSION

Based on the foregoing, the Bank respectfully requests the Court to deny discretionary review.

(Attorney's Signature Appears on the Following Page)

[3] Appellate courts have also imposed attorneys' fees against *pro se* parties as a sanction for filing a frivolous appeal. *Morales v. Marques*, 931 So. 2d 169, 170-71 (Fla. 5th DCA 2006). The Second District has questioned whether an award of fees as a sanction is appropriate against a *pro se* or indigent party, but nevertheless found that fees as a sanction against the *pro se* litigant in that case was appropriate. *Biermann v. Cook*, 619 So. 2d 1029, 1031 (Fla. 2d DCA 1993). Research has not revealed a decision in which attorneys' fees as a sanction against a *pro se* litigant has been prohibited in Florida. Thus, there appears to be no conflict on this issue either, which is, of course, distinguishable from the present case, which is premised on entitlement to attorneys' fees based on contract.

Dated: June 8, 2012

Respectfully submitted,

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By:_____
Kimberly S. Mello

Counsel for Deutsche Bank National Trust Company, as Trustee

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by U.S. Mail on June 8, 2012 to:

Daniel H. Therault
2216 Palm Grass Drive
Boca Raton, Florida 33428

_____
Kimberly S. Mello

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
Kimberly S. Mello