

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC14-1398

**LOWER TRIBUNAL CASE NO.: 4D13-3214
ON APPEAL FROM THE DISTRICT COURT
OF APPEAL OF THE STATE OF FLORIDA,
FOURTH DISTRICT**

**KERRY WESTON, et al,
Petitioner,**

V.

**HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE
ASSET BACKED PASS-THROUGH CERTIFICATES EQUITY LOAN
TRUST, SERIES 2006-FM2, AP,
Respondent.**

AMENDED JURISDICTIONAL BRIEF OF PETITIONER¹

ATTORNEYS FOR APPELLANT

THE HERMAN LAW GROUP, P.A.

Bruce K. Herman, Esq. (Fla. Bar No. 260622)

1401 East Broward Blvd., Suite 206
Fort Lauderdale, FL 33301
Tel: 954-762-2555
Fax: 954-762-2554

¹ Amended for scrivener's error only.

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I. STANDARD OF REVIEW

Petitioner seeks to invoke the discretionary jurisdiction of the Court pursuant to Article V, section 3(b)(3) of the Florida Constitution. This section grants this Court discretionary jurisdiction to 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.” *Id.* See also Fla. R. App. P. 9.030(a)(2)(A)(iv).

The Fourth District Court’s June 18, 2014 decision of *Kerry Weston v. HSBC Bank, N.A.*, 4D13-3214 (Fla. 4th DCA, June 18, 2014) below (the Opinion), see appendix, conflicts with The Third District Court’s March 26, 2014 decision of *Big Bang Miami Entertainment, LLC. V. Moumina*, 137 So. 3d 1117 (2014).

II. STATEMENT OF THE CASE AND FACTS

On March 13, 2012 Petitioner filed its Motion to Vacate Final Judgment of Foreclosure and to Cancel and/or Rescind Auction Sale (Motion to Vacate) pursuant to Florida Rule of Civil Procedure 1.540(b)(4) for void judgments. On August 1, 2013 the Trial Court denied the Motion to Vacate. Petitioner filed its Notice of Appeal to the Fourth District on August 22, 2013. The Fourth District issued its written opinion in this matter on June 18, 2014, and subsequently issued a mandate on July 7, 2014. Petitioner’s Notice to Invoke the Discretionary Jurisdiction of the Florida Supreme Court for decisions expressly and directly

conflicting with a decision of another district court of appeal on the same question of law was timely filed on July 15, 2014.

On July 20, 2007 Respondent filed its Complaint seeking to foreclose a mortgage given by the Petitioner to Freemont Investment & Loan, on real property in Broward County Florida, and to reestablish a lost promissory note in favor of Freemont Investment & Loan. The only pleading filed in this case was Respondent's original Complaint filed on July 20, 2007. No note or copy of lost note was attached to the Complaint. The exhibits attached to the Complaint indicate that Freemont Investment & Loan was the owner and holder of the note. Paragraph five of the complaint states that Respondent owns and holds [has possession of] the note and mortgage, however Paragraph twenty-four of the Complaint states that Respondent is not presently in possession of the original note and mortgage. It is axiomatic that both of these statements cannot simultaneously be true. Consequently, Respondent failed to state a cause of action upon which relief could be granted. A Clerk's Default was entered against Petitioner on September 26, 2007.

Miraculously, the lost promissory note was found at some point after filing as evidenced by the Notice of Filing Original Documents dated and filed on

October 16, 2007.² A Final Summary Judgment of Mortgage Foreclosure was entered on October 16, 2007.³ For various reasons, including Petitioner's suggestion of bankruptcy, the foreclosure sale did not occur until August 29, 2008.

III. SUMMARY OF THE ARGUMENT

Petitioner is calling upon this honorable Court to exercise its jurisdiction so that litigants are not subject to disparate standards and differing outcomes based solely on geography.

There exists an express and direct conflict between The Fourth District Court's June 18, 2014 decision of *Kerry Weston v. HSBC Bank, N.A.*, 4D13-3214 (Fla. 4th DCA, June 18, 2014), and The Third District Court's March 26, 2014 decision of *Big Bang Miami Entertainment, LLC. V. Moumina*, 137 So. 3d 1117 (2014).

The Fourth District Court in *Condo Ass'n of La Mer Estates, Inc. v. Bank of N. Y. Mellon Corp.* 4D13-17 (Fla. App., 2014) expressly receded from its prior

² There are various issues with this filing. First, in order to travel under the original note the complaint must have been amended, *Feltus v. US Bank National Association*, 80 So. 3rd 375, 377 (Fla. 2d DCA 2012). Secondly, a copy of any evidence on which movant relied was required to be served at least 20 days prior to the hearing, Fla. R. Civ. P. 1.510(c).

³ A summary final judgment was entered. It is clear from the record that the judgment was entered after default, rule 1.510 was not complied with and no trial took place.

opinions⁴ and declared that as of February 19, 2014 the law in the Fourth District is that a default judgment rendered against a defendant based on a complaint that fails to state a cause of action is now voidable rather than void, and must be attacked within one year. However, The Third District, just one month later, expressly rejected that conclusion, and the decision of *La Mer Estates*, in *Big Bang Miami Entertainment, LLC. V. Moumina*, 137 So. 3d 1117 (2014) affirmatively stating that “on the reasoning outlined in *Becerra*⁵, we cannot agree with our sister court’s change in thinking.” Plainly, there exists a direct conflict within the four corners of these opinions and The Opinion at bar.

The Opinion at bar is simply a citation opinion to *La Mer Estates*, adopting it as the governing law in the matter at hand. This creates an express and direct conflict between The Opinion at bar and *Big Bang Miami*. Therefore, this Court should eliminate the uncertainty caused by these conflicting opinions by exercising its jurisdiction and resolving the conflict.

⁴ See *Condo. Ass’n of La Mer Estates, Inc. v. Bank of N. Y. Mellon Corp.* 4D13-17 (Fla. App., 2014).

⁵ *Becerra v. Equity Imports, Inc.*, 551 So. 2d 486, 488 (Fla. 3d DCA 1989).

IV. ARGUMENT

A. THE FOURTH DISTRICT COURT'S DECISION OF *KERRY WESTON V. HSBC BANK, N.A.*, AND THE THIRD DISTRICT COURT'S DECISION OF *BIG BANG MIAMI ENTERTAINMENT, LLC. V. MOUMINA* EXPRESSLY AND DIRECTLY CONFLICT ON THE SAME QUESTION OF LAW

The Opinion at bar is a citation opinion to *La Mer Estates*, adopting *La Mer Estates* as the governing law in the matter at hand. Until *La Mer Estates*, Florida law in both the Third and Fourth District Courts of Appeal was consistent on the specific issue of how courts should address the entry of a default judgment against a defendant when the complaint fails to state a cause of action. Before *La Mer Estates*, it was clear that, in Florida, a default judgment should be set aside as void, not voidable, where the complaint on its face fails to state a cause of action.⁶ However, the Fourth District Court of Appeal caused an intradistrict conflict when

⁶ See *Condo. Ass'n of La Mer Estates, Inc. v. Bank of N. Y. Mellon Corp.* 4D13-17 (Fla. App., 2014)(Citing *Rhodes v. O. Turner & Co.*, 117 So. 3d 872, 875 (Fla. 4th DCA 2013); *Neuteleers v. Patio Homeowners Ass'n*, 114 So. 3d 299, 301 (Fla. 4th DCA 2013); *Lee & Sakahara Assocs. AIA, Inc. v. Boykin Mgmt. Co.*, 678 So. 2d 394, 396 (Fla. 4th DCA 1996); Other courts have also agreed. See *Se Land Developers, Inc. v. All Fla. Site & Utils., Inc.*, 28 So. 3d 166, 168 (Fla. 1st DCA 2010); *Moynet v. Courtois*, 8 So. 3d 377, 378-79 (Fla.3d DCA 2009); *Becerra v. Equity Imports, Inc.*, 551 So. 2d 486, 488 (Fla. 3d DCA 1989); *Ginsberg v. Lennar Fla. Holdings, Inc.* 645 So. 2d 490, 493 (Fla. 3d DCA 1994); See also *Big Bang Miami Entertainment, LLC. V. Moumina*, 137 So. 3d 1117 (2014).

it issued *La Mer Estates*⁷ on February 19, 2014, "receding from [its] prior case law." *Id.*

This holding, and the case at bar, directly conflicts with *Big Bang Miami Entertainment, LLC. V. Moumina*, 137 So. 3d 1117 (2014), where the Third District affirmatively stated that while it recognized its sister court's holding in *La Mer Estates* that "on the reasoning outlined in *Becerra*, we [the Third District] cannot agree with our sister court's change in thinking."⁸ Thus, there has arisen, an express and direct conflict between the Fourth District Court's June 18, 2014 decision of *Kerry Weston v. HSBC Bank, N.A.*, 4D13-3214 (Fla. 4th DCA, June 18, 2014) and the Third District Court's March 26, 2014 decision of *Big Bang Miami Entertainment, LLC. V. Moumina*, 137 So. 3d 1117 (2014).

In *Big Bang Miami*, Appellant failed to respond to the complaint and a default judgment was entered against Appellant. Appellant filed a 1.540 motion to set aside a default judgment claiming the judgment was void. Appellant's 1.540 motion, claiming the judgment was void for failure to state a cause of action, was denied. The Third District, consistent with the precedent in Florida, held that "a default judgment should be set aside [as void] where the complaint on its face fails

⁷ The Opinion at bar, *Kerry Weston v. HSBC Bank, N.A.*, 4D13-3214 (Fla. 4th DCA, June 18, 2014), creates the identical conflict as well.

⁸ *Big Bang Miami Entertainment, LLC. V. Moumina*, 137 So. 3d 1117 (2014)(See footnote two).

to State a cause of action.” The 3rd District, correctly relying on the reasoning in *Becerra* stated:

“A default judgment operates as an admission of the truth of the well pleaded allegations of the pleading ... It does not admit facts not pleaded, not properly pleaded or conclusions of law. Fair inferences will be made from the pleadings but forced inferences will not be made. The party seeking affirmative relief may not be granted relief that is not supported by the pleadings or by substantive law applicable to the pleadings. (Emphasis added by the Third District Court)

The Court went on to explain that, "failure to state a cause of action, unlike formal or technical deficiencies, is a fatal pleading deficiency not curable by a default judgment."⁹

This is identical to the case at bar, however, due solely to a geographic difference in district court location, an opposite decision was reached. In The Opinion at bar, Petitioner failed to respond to the complaint and a default judgment was entered against Petitioner. Petitioner filed a 1.540(b)(4) motion to set aside the default judgment. Petitioner’s 1.540(b)(4) motion, claiming the judgment was void for failure to state a cause of action, was denied. On this identical set of facts and identical point of law the Fourth District court decided that a default judgment should only be voidable, not void, where the complaint on its face fails to state a cause of action. This is in direct contradiction to, and is Fourth District’s recent

⁹ *Big Bang Miami Entertainment, LLC. V. Moumina*, 137 So. 3d 1117 (2014).

departure from, the established precedent that a default judgment should be set aside as void where the complaint on its face fails to state a cause of action.

Contrary to the Third District Court's opinion in *Big Bang Miami Entertainment, LLC. V. Moumina*, 137 So. 3d 1117 (2014), the Fourth District Court of Appeals opinion in *Kerry Weston v. HSBC Bank, N.A.*, 4D13-3214 (Fla. 4th DCA, June 18, 2014) if left the stand would lead to a disparate application of the law and differing legal outcomes based solely and exclusively on where a defendant's property happens to be located within the state¹⁰. This cannot stand. If left without resolution by this Court, *Weston* and *La Mer Estates* would undermine the very fabric of proper legal pleading in Florida. No longer would a party, faced with a complaint that fails to state a cause of action, be able to rely on the limitation that a default only operates as an admission of the truth of the well pleaded allegations of the pleading and that a default does not admit facts not pleaded, not properly pleaded or conclusions of law. This limitation has been gutted by *Weston* and *La Mer Estates*. *Big Bang Miami* and its venerable reasoning that a default judgment should be set aside as void where the complaint on its face fails to state a cause of action must prevail, lest pleading in Florida will forever be changed.

¹⁰ It is concerning that the 3rd and 4th districts are contiguous, and solely depending on which side of the line you happen to be on will determine the outcome on this identical point of law.

V. CONCLUSION

Accordingly, based on the foregoing, it is respectfully requested that this honorable Court invoke its discretionary jurisdiction pursuant to Article V, section 3(b)(3) of the Florida Constitution, and Fla. R. App. P. 9.030(a)(2)(A)(iv) to provide its guidance to unify and resolve the express and direct conflict caused by the Fourth District Court of Appeal's recent rescission and departure from long established precedent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail on this 25th day of July, 2014 to *Counsel for Appellee*, Frenkel Lambert Weiss Weisman & Gordon, LLP, Todd Drosky, Esq., One East Broward Blvd, Suite 1111, Fort Lauderdale, FL 33301, email service: fleservice@flwlaw.com, tdrosky@flwlaw.com; N. Alejandra Arroyave, Esq., Lapin & Leichtling, LLP, 255 Alhambra Circle, Suite 1250, Coral Gables, FL 33134, Service Email: aarroyave@LL-lawfirm.com, eservice@ll-lawfirm.com.

THE HERMAN LAW GROUP, P.A.

By: 

Bruce K. Herman, Esq. (Fla. Bar No. 260622)
service@thlglaw.com

1401 East Broward Blvd., Suite 206
Fort Lauderdale, FL 33301
Tel: 954-762-2555
Fax: 954-762-2554

CERTIFICATE OF FONT COMPLIANCE

I hereby certify that the fonts used in this brief comply with the font requirements of Fla. R. App. P. 9.210(a)(2).

By: 

Bruce K. Herman, Esq. (Fla. Bar No. 260622)