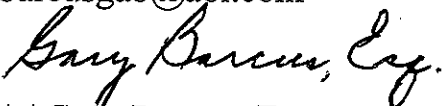


IN THE SUPREME COURT OF FLORIDA

)	CASE NO.: SC14-1400
)	L.T. No.: 4D14-1745
CARMEN C. GUIDO,)	L.T. No.: 2009 CA 039928 AW
)	
Petitioner/Appellant,)	FLA. BAR NO.: 480400
v.)	
)	Senior Judge Eli Breger
BRANCH BANKING AND)	
TRUST COMPANY,)	
)	
Respondent/Appellee.)	
_____)	

PETITION FOR JURISDICTION

Respectfully submitted by
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I. Statement of the Case:

Branch Banking and Trust Company (BB&T) sued Mr. Carmen Guido to foreclose a fraudulently obtained mortgage and promissory note. Mr. Guido counterclaimed for fraud, for BB&T's violations of the Florida Fair Debt Collection Practices Act, and Abuse of Process arising from the mortgage fraud. BB&T voluntarily dismissed its complaint, and failed to file its answer to the counterclaim after being given 30 days to do so by court order. Mr. Guido moved for Default. Judge Hoy entered the Default. Mr. Guido moved for Entry of Final Judgment late on a Friday afternoon, which Judge Richard Oftedal refused to sign. Mysteiously, almost inexplicably, and maybe miraculously, another unrelated law firm, the law firm of Greenspoon Marder, P.A., made a record appearance as counsel the very next day on Saturday! How could they have possibly known? Hmm. BB&T filed a Motion to Vacate the Default thirty (30) months after the Default was entered, that failed to allege any specific "meritorious defense" and that was never supported by any affidavit of any specific affirmative meritorious defense by BB&T. The attorney for BB&T, Mr. David Merkur, did sign and file a Verified Motion that generally alleged that BB&T has an unspecified "meritorious defense" but did not specify any specific meritorious defense. Nor did BB&T justify that seeking thirty months after the entry of a Default how their motion to vacate the judicial Default

was done with “due diligence.” Moving to vacate a Default must be done within 30 days, not more than 30 months later. Nor did BB&T allege any facts that would constitute “excusable neglect” for its failure to comply with the agreed order directing it to file an Answer to the counterclaim in its motion to vacate the Default. In fact, the prior law firm of Spear and Hoffman, P.A. admitted that it had failed to answer the counterclaim through “inadvertence.” Inadvertence and/or mistake are not enough when moving to vacate a Default, “Excusable Neglect” must be shown which was not done here. This situation is governed by the precise and dispositive decision in the case of Vanguard Group, Inc. v. Vanguard Sec., Inc., 409 So.2d 1219 (Fla. 3rd DCA 1982), that forbids vacating a Default on the bare unsupported allegations of counsel that there exists an unspecified meritorious defense. The court order granting BB&T’s Motion to Vacate the Default should be reversed, with instructions to enter the Default Final Judgment against BB&T for failure to answer the counterclaim without proper legal excuse to violate the agreed court order that it answer the counterclaim, and for failure to meet the legal standards necessary to vacate the Default of (1) excusable neglect, (2) due diligence in moving to vacate the default, and (3) the party, not the party’s attorney, alleging an actual specific meritorious defense, and not merely a general allegation of an unspecified meritorious defense.

II. Facts:

1. About six months after Mr. Guido filed his counterclaim for lender fraud by BB&T, BB&T voluntarily dismissed its foreclosure lawsuit against Mr. Guido. BB&T filed a Motion to Dismiss the Counterclaim insisting it needed more factual allegations. The attorneys for the parties on July 8, 2010, entered into an Agreed Order denying the BB&T Motion to Dismiss the Counterclaim, granting Mr. Guido 30 days to file a More Definite Statement, then BB&T was supposed to file its answer to Mr. Guido's Counterclaim 30 days thereafter. Mr. Guido timely filed his More Definite Statement, and BB&T FAILED TO FILE ANY RESPONSE to Mr. Guido's Counterclaim, which was due by September 6, 2010. More than a year passed with no filed response from BB&T to Mr. Guido's Counterclaim. BB&T, was represented by Spear and Hoffman, P.A. which is, according to the records of the Florida Secretary of State still active and current, and admits through "inadvertence" it neglected to answer the counterclaim. After no Answer from BB&T for more than a year, on September 27, 2011, a judicial Default was entered against BB&T for failure to serve an answer as required by law since more than a year earlier on September 6, 2010.

2. In this lawsuit, the attorneys for BB&T Spear and Hoffman, P.A., did file an update of their email information into this court record in 2013, and

included the case heading for both this lawsuit and the second FV-1, Inc. *et cetera* so the attorneys for BB&T were aware of the second lawsuit and did not move to vacate the Default against BB&T entered more than 30 months before. Almost another year passed, and BB&T finally moved to vacate the judicial Default entered September 27, 2011, more than thirty months after Default was entered and more than 40 months from when BB&T was required to file an Answer.

3. The two motions to vacate the default are each legally deficient.

The first motion to vacate the default was filed by attorney Iris Hernandez on September 27, 2011, a year after the default was entered, and attorney Iris Hernandez, in paragraph 12, admits that the failure to file an Answer to the Counterclaim was inadvertent, and therefore does not meet the criteria to vacate a default. Ms. Hernandez admits:

“Due to the service release and retention of new counsel by servicer, undersigned counsel believed it was no longer involved in said foreclosure and inadvertently failed to respond to defendant’s more definite statement and discovery requests, resulting in entry of default against Branch Banking and Trust Company on September 27, 2011.”

This extraordinary admission by BB&T’s counsel of outright negligence eliminates and negates the essential element of “excusable neglect” necessary to vacate a Default, and therefore that Motion to Vacate Default is inadequate.

4. The second “Plaintiff’s Verified Renewed Motion to Vacate the Default” was filed February 6, 2014, over two years after Default was entered on September 27, 2011, by attorney David Merkur and his motion to vacate is also legally deficient, as it does not factually aver sufficient facts to meet the three conjunctive requirements to vacate a default of (1) due diligence in moving to vacate; (2) excusable neglect in failing to answer the counterclaim, and (3) meritorious defense. A “verified” by trial counsel Motion to Vacate a Default is legally insufficient. The defaulted party, BB&T, was required to file an affidavit within 30 days (not more than 40 months) after default is entered in which it alleges with specificity the details of any purported “excusable neglect” and what is its specific “meritorious defense.” BB&T never did this. BB&T’s failure is fatal to any motion to vacate a default, as detailed in the excellent (and dispositive) case of Vanguard Group, Inc. v. Vanguard Sec., Inc., 409 So.2d 1219 (Fla. 3rd DCA 1982) which this court should adopt the legal reasoning in Vanguard and definitely declare to be the law on defaults statewide going forward, which would also have the benefit of definitively and authoritatively resolving default issues statewide by a new guiding Supreme Court opinion. Accepting jurisdiction to definitely decide and define the law of defaults authoritatively statewide in a pithy and succinct opinion is an opportunity to be seized. Carpe Diem.

III. Issues to be Considered in this Petition for Jurisdiction:

Can and will this court accept jurisdiction to hear this appeal?

IV. Analysis of Law of Jurisdiction:

1. Twice the trial court has “departed from the essential requirements of the law” in the two now combined cases brought by BB&T and then MORGAN STANLEY against Mr. Guido. First, the Senior Judge Eli Breger vacated Judge Hoy’s judicial default while completely ignoring the lack of sufficient facts, lack of due diligence in seeking to vacate the default, lack of any excusable neglect in failing to timely answer the Counterclaims, and absolutely no factually detailed meritorious defense, only a factually unsubstantiated allegation of a meritorious defense made by BB&T’s counsel, David Merkur. This departed from the essential requirements of the law to vacate defaults as detailed in Vanguard Group, Inc. v. Vanguard Sec., Inc., 409 So.2d 1219 (Fla. 3rd DCA 1982).

2. Because the court did not enforce the essential requirements of the law, Mr. Guido has been litigating for five years two cases that should have been ruled in his favor years ago. The elements for jurisdiction are (1) departure from the essential requirements of law, (2) cause material injuries for the remainder of the trial to Mr. Guido, and (3) that cannot be corrected on post-judgment appeal have been met, see Parkway Bank v. Fort Myers Armature Works, Inc., 658 So.2d 646 (Fla. 2d DCA 1995). This court has jurisdiction to hear these matters and

correct the injustices inflicted below; to rule against BB&T, that the vacating of the judicial default against it should stand, reversing the trial judge, remand and order the trial judge to reinstate the judicial Default.

3. Another basis for jurisdiction is “**irreparable harm**” done to Mr. Guido who has suffered great financial damages, had his life upturned for five years, had his construction business hamstrung by these two lawsuits is definitely irreparable harm. He will never be able to get those years back nor the many business opportunities lost during the past five years. He has been irreparably harmed and this court should take jurisdiction to correct the departures from the essential requirements of the law that have caused him irreparable harm.

4. Mr. Guido’s substantive and procedural rights to Due Process of Law under the Florida constitution and the 5th Amendment to the U.S. Constitution applicable to the states through the 14th Amendment, it is obvious, blatant, and glaringly outrageous, and yet another basis to grant jurisdiction.

5. There are the empowerments in the rules for jurisdiction in this case. This court has jurisdiction to hear this Interlocutory Appeal on four grounds based upon *Writ of Certiorari*, *Writ Quo Warranto*, *Writ of Mandamus* and on the Constitutional basis of denial of Due Process of Law. Specifically, this court has appellate jurisdiction to seek remediation of the grossly unfair to the point of denying constitutional Due Process of Law lower court’s order

pursuant to Fla.R.App.P. 9.030(a)(3); 9.030(a)(3) *Certiorari Jurisdiction*; and 9.030(a)(3) Original Jurisdiction to issue a Writ *Quo Warranto*, *Writ of Certiorari*, and *Writ of Mandamus*. See also Swanky v. Rooney, 38 Fla. L. Weekly D853a (Fla. 3rd DCA 2013), “to prevent manifest injustice” to Mr. Guido. Clearly, the foregoing facts, case law, constitutional rights violations, and specified appellate procedural rules do authorize, substantiate and justify this court in accepting jurisdiction with a Writ of Certiorari, a Writ Quo Warranto, a Writ of Mandamus, and to correct multiple, serious, and egregious, violations of Mr. Guido’s constitutional rights to Due Process of Law under the US Constitution through the 5th and 14th Amendment and the Florida Constitution for the courts’ multiple departures from the essential requirements of the law and the irreparable harm that these departures from the essential requirements of the law have caused to Mr. Guido. The Fourth District Court of Appeal specifically erred in its order “An order vacating a clerk’s default is not appealable.” See **Appendix #1**. This case does not involve a clerk’s default, it involves a judicial default. The Fourth District also erred in its finding “Irreparable harm for extraordinary writ jurisdiction, such as certiorari, is lacking.” From Mr. Guido’s standpoint that conclusion is clearly erroneous as has been demonstrated in this petition, and irreparable harm is not the only basis upon which Mr. Guido sought and seeks extraordinary writ jurisdiction.

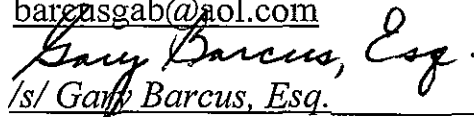
Conclusion:

The Default was entered properly on September 27, 2011. BB&T did not meet the legal requirements to vacate the Default. BB&T has failed to allege and demonstrate in its Motions to Vacate Default that all three necessary and indispensable elements required to exist conjunctively to set aside a Default occurred. BB&T's Motions to Vacate the Default both fail the Due Diligence requirement of within 30 days and therefore are more than three years too late. The Motions to Vacate allege no Excusable Neglect, admit only the mistakes and inadvertence that are insufficient to vacate Default and do not meet the legal standard of Excusable Neglect to vacate a Default. And, the Motions to Vacate present not a single specific, not one, Meritorious Defense to the fraudulent behavior of BB&T required to vacate a Default if BB&T had also established Due Diligence in moving to vacate the Default and had established Excusable Neglect. The Motions to Vacate Default should have been Denied. This court should accept jurisdiction, reverse the trial order vacating the Default and reinstate the Default, which would "eliminate useless effort" a criteria that is a purpose of granting interlocutory jurisdiction and extolled in the Committee Notes to Fla.R.App.Pro. 9.130. The dispositive case "on all fours" is Vanguard Group, Inc. v. Vanguard Sec., Inc., 409 So.2d 1219 (Fla. 3rd DCA 1982).

Thank you for your consideration of this appeal.


Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing Petition and Appendix with one exhibit of the order from the Fourth District Court of Appeal were emailed September 24, 2014 to: Mr. Victor Kline, Esq., Greenspoon Marder, P.A., Trade Centre South, Suite 700, 100 West Cypress Creek Road, Fort Lauderdale, Florida 33309 at victor.kline@gmlaw.com; and to Ms. Iris G. Hernandez, Esq., Spear and Hoffman, P.A., 9700 South Dixie Highway, Suite 610, Miami, Florida 33156 and 1800 Coral Way, #67, Miami, Florida 33145-2700 IGHernandez@iCloud.com; Mortgage Electronic Registration Systems, Inc., c/o Electronic Data Systems Corp., Registered Agent, 1901 East Voorhees Avenue, Suite C, Danville, IL 61834 (no email address available).

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Certificate of Compliance

I HEREBY CERTIFY that this Initial Brief complies with the Times New Roman 14-point font requirements as detailed in Rule 9.210.

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