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In the Supreme Court of Florida

Case No. 81,765
DCA No. 92-01456,
Third District
L.T. No. 92-3925 CA 27 DADE
Honorable S. Peter Capua

ALEXDEX CORPORATION, a
Florida Corporation,

Petitioner,

vs.

NACHON ENTERPRISES, INC.,
a Florida Corporation,

Respondent.
_____/

PETITIONER'S REPLY BRIEF

RICHARD J. BURTON, ESQ.
Geller, Geller, Burton & Garfinkel
Trial Counsel for Appellants
Suite 403
1815 Griffin Road
Dania, Florida 33004

DEBORAH MARKS, ESQ.
Attorney for Petitioner
12555 Biscayne Boulevard
Suite 993
North Miami, Florida 33181
Tel: (305) 895-7803
Bar No. 351490

Deborah Marks, Attorney at Law

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The Respondent has merely stated to this Court, without authority other than the determination below, that a mechanics lien foreclosure action does not effect title. There is a major difference between the establishment of a lien and the foreclosure of it. Once a lien is to be foreclosed, then under the operative statutes and case law, the title to the property is dealt with directly and conclusively within the final judgment, and it is an action which should be exclusively within the province of the circuit court.

Appellant understands that the application of this appropriate determination of subject matter jurisdiction will appear to invalidate numerous foreclosure actions which have been completed in county court actions. That result can be obviated by this Court through the application of the "de facto judge" theory to those cases which are complete, by the requirement that all pending property foreclosure cases of all types be forthwith administratively transferred to circuit court, and by the requirement that henceforth all filings be taken only in the circuit court.

ARGUMENT

THE DISTRICT COURT INAPPROPRIATELY REVERSED THE DETERMINATION OF THE LOWER TRIBUNAL THAT THE MECHANICS LIEN MUST BE DISCHARGED WHERE THE LIENOR FAILED TO COMMENCE AN APPROPRIATE ACTION, OR TO FILE A FORECLOSURE COUNTERCLAIM, WITHIN THE TIME SET FORTH WITHIN THE MECHANICS LIEN STATUTE AFTER THE FILING OF A COMPLAINT FOR ORDER TO SHOW CAUSE

The Respondent has urged this Court to accept that the Third District was correct in equating a lien foreclosure action with a specific performance action, thus finding that the action did not affect the title to real property and holding that exclusive jurisdiction over small foreclosure proceedings was in county court. In so arguing, Respondent did not discuss any of the cases cited by Petitioner which held otherwise.

The Respondent cites to this Court *In Re the Estate of Weiss,* 106 So. 2d 411 (Fla. 1958), also cited in Petitioner's initial brief. The dicta in that case actually supports Petitioner's position, but the case is not conclusive since, in that case, this Court found that there was no conflict jurisdiction. The Respondent also cites to *McMullen v. McMullen,* 122 So.2d 626 (Fla. 2nd DCA 1960) which is factually distinguishable from the case at bar, and also contains support for Petitioner's position. *McMullen* sought a final judgment which would require a party to perform, which included the requirement that the party convey property. The language in the opinion includes an express statement that the reason that a suit for specific performance need not be brought in the county where the land lies is that the decree in such a case cannot operate to transfer the title to the land. There is nothing, the court noted, in the complaint which asks for **any remedy** connected with the property.

The title or any interest in the land which was the subject of the sale is therefore, in the words of the court, in no manner involved, and the judgment sought, if obtained, will not operate upon it.

The rule is stated in 56 Am.Jur.24, thusly:

> "Owing to the fact that courts of equity act *in personam* rather than *in rem*, the rules relating to the venue of local actions at law do not apply with their full rigidity to suits in equity. In the absence of any statutory or constitutional provision to the contrary, a suit in equity may be maintained in any jurisdiction wherein the defendants can be found, even though the suit affects lands not within the territorial jurisdiction of the court. **This is so because the decree made will not of itself necessarily be binding on the lands, but will take effect only through the action which the parties to the suit are compelled to take.**" [emphasis added]

Although county courts were given equitable jurisdiction (a coercive, *in personam,* type of jurisdiction) they were not given *in rem* jurisdiction over realty. As a result, the jurisdiction statutes can be reconciled in the foreclosure context.

The courts have consistently held that a court cannot cause its own judgment to effect a title transfer unless that court has *in rem* jurisdiction. *See, e.g., **Greene v. A.G.B.B. Hotels, Inc.,*** 505 So. 2d 666 (Fla. 5th DCA 1987)(also holding that once a mechanics lien was transferred to bond the suit was converted from one *in rem* to one *in personam*) Although a mortgage foreclosure is equitable, it is actually *quasi in rem. See, **Cohen v. Century Ventures, Inc.***, 163 So.2d 799 (Fla. 2nd DCA 1964) and cases cited therein. *Quasi in rem* proceedings have been defined as those proceedings where the direct object of the action is to reach and dispose of or to adjudicate title or status of, property owned by the parties, or of some interest claimed by them, and duly put in issue

by the allegations of the pleadings therein. ***Alternative Development, Inc., etc., v. St. Lucie Club and Apartment Homes Condominium Association, Inc., etc.,*** 608 So. 2d 822 (Fla. 4th DCA 1992)

Respondent chose not to address ***Publix Supermarkets, Inc. v. Cheesbro Roofing, Inc.,*** 502 So. 2d 484 (Fla. 5th DCA 1987) or ***Alternative Development, Inc., etc., v. St. Lucie Club and Apartment Homes Condominium Association, Inc., etc.,*** 608 So. 2d 822 (Fla. 4th DCA 1992). Those two cases contain relatively clear discussions of the application of the "local action rule" which determines what class of proceedings do involve title to real property.

Although ***Alternative Development, Inc., etc., v. St. Lucie Club and Apartment Homes Condominium Association, Inc., etc.,*** 608 So. 2d 822 (Fla. 4th DCA 1992) was addressed in the initial brief, it merits further quotation. Judge Polen discusses that the fact that to effectuate a transfer of title to property, even in the foreclosure context, a court **must have** "in rem" jurisdiction.

F.S. §45.031(5) states that the certificate of title recorded in furtherance of a judicial sale - the object of a foreclosure action - transfers title without the necessity of any further proceedings or instruments. This distinguishes a foreclosure case from an action for specific performance, and directly proves that the action effects the boundaries and title to property - making the case exclusively within the province of the circuit courts. Why would there be a provision for "transfer to bond" of the lien was not inextricably attached to the property action?

Respondent argues that since payment of money would stop a sale, the action is not really one which necessarily involves property. This argument would be valid if the action were one to adjudicate the validity of a lien rather than to foreclose it. The argument fails for three additional reasons. The first is that the distinguishing feature of a foreclosure action, as opposed to an action

on a debt, is that the sale of property is effected. The second is that it ignores the precedent established in ***Sales v. Berzin,*** 212 So.2d 23 (Fla. 4th DCA 1968) where that court held that where one form of relief sought was that in the event of a failure to specifically perform the judgment act as a document of conveyance, the action was no longer one which was personal but had been transmuted into one dealing with realty. The request for foreclosure takes this class of cases out of the realm of personal collections and into the circuit court real property jurisdiction. *See also,* ***MML Development Corp. v. Eagle National Bank of Miami,*** 603 So.2d 646 (Fla. 5th DCA 1992); ***Skeeter's Big Biscuit Houses of America, Inc. v. Sullivan,*** 456 So.2d 1336 (Fla. 2nd DCA 1984); ***Crescent Beach, Inc. v. Jarvis,*** 435 So.2d 396 (Fla. 5th DCA 1983)(footnote 2) The last, and to Petitioner's mind most convincing, is that the form foreclosure judgment approved by this Court as an appendage to the Florida Rules of Civil Procedure, and by the legislature in Chapter 45, sets forth that a particular parcel of property to which the lien had attached, described by legal description, will be sold by the Court at a date certain. That is not a judgment for payment of money. The payment may stop the sale, it may redeem the title, but the judgment orders the sale. The judgment, and its attendant certificate of title, effects a transfer of title without the intervention of the party or further court proceedings.

Although the county court Judges have not had appropriate subject matter jurisdiction over the numerous foreclosure cases which they have entertained within the past few years, this Court need not retroactively invalidate those judgments and sales - nor should it be scared into finding "concurrent jurisdiction" in order not to invalidate that class of past cases. This Court has, in appropriate cases, found that a judge improperly assigned, acting under color of authority and without objection could be found to be a "de facto

judge" so as to validate questionable judicial acts. *See, Stein v. Foster,* 557 So.2d, 861 (Fla. 1990), *Card v. Wainwright,* 497 So.2d 1169 (Fla. 1986). But for an order of temporary assignment to circuit court, these judges would have been capable of hearing the foreclosure proceedings. The clerks office is shared between the county and circuit courts. So as not to do violence to the state of title in Florida, the Petitioner would suggest that this is another situation where the past completed actions must be validated, but that the Clerks of the Courts of this State must be directed to administratively transfer all pending foreclosure actions and to henceforth file all foreclosure actions only in circuit court.

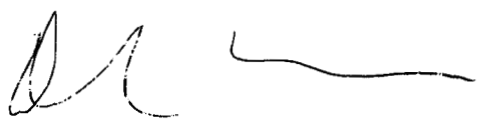
The application of the de facto judge theory would not, however, validate the action of the District Court in this case. Herein, the lower tribunal correctly chose not to recognize an uncompleted county court action, and the Respondents did nothing to timely cure their defect. The order of the lower tribunal should have been affirmed.

Since the filing of the initial brief, the issue raised herein was extended to all foreclosure actions. In *Brooks v. Ocean Village Condominium Association, Inc.,* 18 Fla. Law. W.D 2211 (Fla. 3rd DCA October 12, 1993) the Third District extended the perverted "logic" of the within case to condominium lien foreclosures. Mortgage foreclosures cannot be far behind. This issue is of the utmost importance.

CONCLUSION

It is respectfully requested that the Decision of the Third District Court of Appeal be reversed with directions to reinstate the Order of the lower tribunal. It is further requested that this Court find that the exclusive jurisdiction over foreclosure actions, of all types, is in the circuit court but that all completed foreclosure actions which had taken place in the county courts are valid as a result of the de facto judge theory. Further, it is suggested that this Court should Order that all pending foreclosure actions be administratively transferred to circuit court, and that all new foreclosure filings be taken only in circuit courts of this State.

Respectfully Submitted



DEBORAH MARKS

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing Reply Brief was served by mail this 22nd day of November, 1993 upon Pedro F. Martel, Esq., Counsel for Appellant, 717 Ponce de Leon Blvd., Suite 319, Coral Gables, Florida 33134; to Larry R. Leiby, Esq., Counsel for the Real Property, Probate and Trust Law Section of the Florida Bar, 290 N.W. 165th Street, Penthouse 2, Miami, Florida 33169 this 7th day of October, 1993; to Charles R. Gardner, Esq., Counsel for the Real Property, Probate and Trust Law Section of the Florida Bar, 1300 Thomaswood Drive, Tallahassee, Florida 32312; to Jerry R. Linscott, Esq., Attorneys for American Resort Development Association, 2300 Sun Bank Center, 200 South Orange Avenue, Post Office Box 112, Orlando, Florida 32802; to William D. Palmer, Esq., Attorney for the Family Law Section of the Florida Bar, P.O. Box 1171, Orlando, Florida 32802; to Barry Kalmanson, Esq., 135 N. Magnolia Avenue, Orlando, Florida 32801; and to Gerald Fincke, Esq., 2401 East Graves Avenue, Orange City, Florida 32763.

RICHARD J. BURTON
Geller, Geller, Burton & Garfinkel
Trial Counsel for Petitioner
1815 Griffin Road, Suite 403
Fort Lauderdale, Fl. 33004
and
DEBORAH MARKS
12555 Biscayne Boulevard
Suite 993
North Miami, Florida 33181
Ph: (305) 895-7803

By:_____
DEBORAH MARKS
Bar No. 351490