IN THE SUPREME COURT OF FLORIDA
CASE NO.: 91,164
FROM THE
ELEVENTH CIRCUIT COURT OF APPEALS NO: 96-3075

GONZALO AGUILAR, M.D., DOROTEO C. AUDIJE, M.D.; DOROTEO M. BARNES, M.D.; JUAN BAUER, M. D.; LEONARDO DEL ROSARIO, M.D.; GONZALO A. C. ESPINO, JR., M.D.; HORTENCIA H. ESPINO, M.D.; FRANK LIN, M.D.; SAM NAJJAR, M. D.; ERLINDA. PEREZ, M.D.; and CERES ROXAS, M.D.

Appellants,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for Southeast Bank N.A., a national banking association, formerly known as First Federal Savings and Loan Association of Jacksonville

Appellee.

On Certification from the United States Court of Appeal for the Eleventh Circuit to the Supreme Court of Florida Pursuant to Article 5, Section 3(b) (6) of the Florida Constitution.

ANSWER BRIEF OF THE DEFENDANT-APPELLEE, ON CERTIFIED QUESTION

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STATEMENT OF THE CASE[1]

The Appellants, along with three additional plaintiffs, commenced this action against Southeast Bank, N.A. by filing a two-count Complaint in the Florida Circuit Court for Duval County. The Appellants asserted a tortious interference claim in count one, and the three remaining plaintiffs asserted a similar claim in count two. The state trial court entered summary judgment against the Appellants on the grounds that their claims are barred by the compulsory counterclaim rule. That summary judgment was appealed to the First District Court of Appeal of Florida. Before that appeal was fully briefed, the Federal Deposit Insurance Corporation was appointed Receiver for Southeast Bank, N.A., and this case was removed to the United States District Court for the Southern District of Florida.

Upon the removal of this case to the federal court, the Appellants filed a Motion to Modify or Vacate Judgment requesting a *de novo* consideration of the merits of the bank's summary judgment motion. After jurisdictional issues not relevant to this appeal were addressed by the court, the appellants renewed their Motion to Modify or Vacate Judgment, and the issues were fully briefed by the parties. Upon considering the undisputed facts of this case and the controlling law,

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[1]The Abbreviation "R.E." will represent information taken from the Record Excerpts prepared for the appeal to the Eleventh Circuit. The abbreviation "App." will represent information taken from the Appendix to the Appellants' Initial Brief filed with the Eleventh Circuit and the abbreviation "Supp. App." will represent information taken from the Supplemental Appendix filed with Appellee's Answer Brief filed with the Eleventh Circuit.

the federal district court entered an order agreeing with the state court's conclusion that the bank was entitled to summary judgment, and a new judgment against the Appellants was entered. The Appellants appealed that judgment to the United States Court of Appeals for the Eleventh Circuit.

Two issues were raised in the appeal to the Eleventh Circuit: (1) whether the Appellants' claims constitute compulsory counterclaims pursuant to Florida Rule of Civil Procedure 1.170, and if so, (2) whether the Appellants' claims fall under an exception to that rule. Applying the "Logical Relationship Test" adopted by this Court, the Eleventh Circuit concluded: "In the case at bar, there is little doubt that the doctor's claims for tortious interference is [sic] logically related to the operative facts of the foreclosure." Aguilar v. Southeast Bank, N.A., 117 F.3d 1368, 1370-71 (11th Cir. 1997). This determination brought the Appellants' claims within the scope of rule 1.170. As for the second issue, the Eleventh Circuit concluded that there is no Florida law addressing the Appellants' argument that their claims come under an exception to the compulsory counterclaim rule, and it therefore certified the following question:

> WHETHER A DEFENDANT WHO IS NOT AN OBLIGOR ON THE ORIGINAL NOTE AND MORTGAGE IN AN *IN REM* FORECLOSURE ACTION IS REQUIRED TO BRING, AS A COMPULSORY COUNTERCLAIM, TORT CLAIMS ARISING OUT OF THE SAME OPERATIVE FACTS AS THOSE OF THE FORECLOSURE ACTION.

This case is now before this Court on the above certified question.

STATEMENT OF FACTS

The Appellants/Plaintiffs will be referred to as the Foreclosed Plaintiffs since summary judgment was entered against them in this action as the result of the foreclosure of their interests in the relevant real estate development in prior litigation.[2]

That foreclosure action was initiated by First Federal Savings and Loan Association of Jacksonville ("First Federal"). Southeast Bank, N.A. ("Southeast") subsequently acquired First Federal and became its successor in interest. Therefore, Southeast and First Federal are referred to interchangeably as "the Bank." Southeast was declared insolvent on September 19, 1991, and The Federal Deposit Insurance

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[2]First Federal Savings & Loan Assn. v. GIPP, et al., Case No. 87-16375 CA (Fla. 4th Cir. Ct.). The Foreclosed Plaintiffs are: Gonzalo Aguilar, M.D.; Doroteo C Audije, M.D.; Doroteo M. Bames, M.D.; Juan Bauer, M.D.; Leonardo Del Rosario, M.D.; Gonzalo A. C. Espino, Jr., M.D.; Hortencia H. Espino, M.D.; Frank Lin, M.D.; Sam Najjar, M.D.; Erlinda A. Perez, M.D.; and Ceres Roxas, M.D.

The Order Granting Defendant's Motion for Summary Judgment did not apply to the three remaining plaintiffs because they were not named defendants in the Circuit Court foreclosure action. These three remaining plaintiffs are: Maorteza Yavari, M.D.; St. Jude Medical Center Pharmacy, Inc.; and Home Health Systems, Inc. The claims of the three remaining plaintiffs are pending before the trial court and these three plaintiffs are not parties to the instant appeal.

Corporation ("FDIC") was appointed its receiver. It is in that receivership capacity that the FDIC appears as the defendant in this action.

Although the Foreclosed Plaintiffs were defendants in the Bank's foreclosure action, they did not assert any claims in that action. Both state and the federal trial courts have entered Summary Judgment against the Foreclosed Plaintiffs in this action because the Foreclosed Plaintiffs' claims:

> were ***logically related*** to First Federal's foreclosure claim and arose out of the same transaction or occurrence that was the subject of First Federal's foreclosure claim, and, hence, should be barred pursuant to Florida's rule governing compulsory counterclaims.

(R.E. 51, p.3 n.1) (emphasis added).

This action and the prior foreclosure action both relate to the development of a medical office condominium project named the St. Jude Medical Center ("St. Jude"). This project was developed by a partnership known as the GIPP Partnership ("GIPP") with financing from the Bank. In 1987, the Bank filed an action foreclosing on St. Jude. In addition to GIPP, the Foreclosed Plaintiffs each were named as defendants in that action due to the interests they claimed in St. Jude. The Foreclosed Plaintiffs' Complaint in the instant action describes their interests as follows:

> 21. Separately and unrelated thereto, the GIPP partnership formed business relationships with each plaintiff consisting of, generally:

a. A promise on the part of each plaintiff to purchase from the GIPP partnership an office condominium or condominiums for the purpose of the practice of medicine at the St. Jude Medical Center location;

b. ***Based upon the purchase of such condominium units*** as described above, each participating plaintiff would receive ***a direct pro rata share ownership interest in the business center entity*** which would operate the first floor ambulatory surgical center, physical therapy center, radiology center and other attendant services. The ownership by each plaintiff in the first floor facility was to be represented by a share or shares of stock of a corporation or a unit or units of a limited partnership which would own and operate the first floor facility . . . .

(R.E. 4, p.3-4) (emphasis added). The Foreclosed Plaintiffs' Complaint in this action establishes that their interests in the first floor common medical facilities directly resulted from, and correlated with, their foreclosed interests in the individual condominium units.

GIPP filed a counterclaim in the foreclosure action alleging that the Bank agreed to modify the construction loan documents, extend the construction loan

pursuant to a letter dated September 10, 1987, and continue to fund the loan in accordance with the agreement allegedly set forth in that letter. (Supp. App. 1, p.4). If these allegations were found to be true, GIPP could have prevented the Bank from obtaining a foreclosure judgment. Based upon the posture of that case (in which the Foreclosed Plaintiffs did not contest the Bank's right to foreclose), the Bank and GIPP entered into a settlement agreement ***during the jury trial*** on GIPP's counterclaims that provided for the entry of an agreed foreclosure judgment. By the end of that litigation all of the Foreclosed Plaintiffs' interests in St. Jude were foreclosed.

The Foreclosed Plaintiffs' Complaint in this action parallels the allegations GIPP made in its efforts to argue that the Bank did not have the right to foreclose in the first action. The critical facts alleged by the Foreclosed Plaintiffs in support of their claims are that the Bank knew of the business relationships between GIPP and the individual Foreclosed Plaintiffs (R.E. 4, p.4) and subsequently interfered with those business relationships by: repudiating the September 10, 1987 letter, not providing further GIPP funding, and foreclosing the construction loan. (R.E. 4, p.5-6). These very same facts were litigated in the prior action determining the Bank's right to foreclose.

SUMMARY OF ARGUMENT

The issue before this Court is the interpretation and application of Florida's compulsory counterclaim rule as set forth in Florida Rule of Civil Procedure 1.170. Remarkably, the Foreclosed Plaintiffs' Initial Brief attempts to argue that their claims are not subject to this rule without citing the rule even once, much less discussing the language of the rule. A straight-forward review of the rule and the relevant case law conclusively establishes that the Foreclosed Plaintiffs' claims are barred by the compulsory counterclaim rule.

The state and federal trial courts correctly applied the law to the undisputed facts in this case in entering Summary Judgment against the Foreclosed Plaintiffs. Applying the Logical Relationship Test adopted by this Court in Londono v. Turkey Creek, Inc., 609 So.2d 14 (Fla. 1992), the trial courts correctly determined (and the Eleventh Circuit agreed) that the instant action is governed by the compulsory counterclaim rule because the core operative facts in the instant action and the prior foreclosure action are identical (i.e. the facts determinative of whether the Bank had the right to foreclose the interests of GIPP and the Foreclosed Plaintiffs in St. Jude).

Furthermore, both the state and federal trial courts correctly concluded that the Foreclosed Plaintiffs are not excepted from the requirements of the compulsory

counterclaim rule because the court presiding over the foreclosure action clearly obtained personal jurisdiction over each Foreclosed Plaintiff. Because this is a question of Florida law and there are no Florida cases directly addressing the legal question of the existence of the special exception requested by the Foreclosed Plaintiffs, the Eleventh Circuit certified this issue to this Court.

Once it is determined that a claim is a compulsory counterclaim under Florida Rule of Civil Procedure 1.170(a), it is mandatory that it be asserted as a counterclaim, unless it satisfies one of two exceptions. The only exceptions provided by the Rule are that:

> The pleader does not need to state a claim if (1) at the time the action was commenced the plaintiff was the subject of another pending action, or (2) the opposing party brought suit upon that party's claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on the claim and the pleader is not stating a counterclaim under this rule.

Fla. R. Civ. P. 1.170(a).

Since neither of these exceptions apply, the Foreclosed Plaintiffs now seek to create a third exception by arguing that the compulsory counterclaim rule should not apply where a claim and a compulsory counterclaim provide different rights regarding a jury trial. There is no legal or practical support for the creation of a third exception to the compulsory counterclaim rule as requested by the Foreclosed Plaintiffs.

A third exception to the rule would create judicial inefficiency and would preclude parties from litigating or negotiating settlements with the assurance that all of the parties have provided notice of all claims directly relating to the facts underlying the dispute being litigated or negotiated. In fact, the third exception the Appellants seek would create a fundamentally unfair situation contrary to the very purpose of the compulsory counterclaim rule. Such an exception would allow a party who appears to be a nominal defendant to remain quiet while the remaining parties reach what they believe to be a complete resolution of the dispute and then essentially ambush the plaintiff by raising new claims based on the same operative facts as the original claim.

ARGUMENT

I. THE FORECLOSED PLAINTIFFS' CLAIMS CONSTITUTE COMPULSORY COUNTERCLAIMS MEETING THE "LOGICAL RELATIONSHIP" TEST[3]

The state and federal trial courts both properly applied Florida law in concluding that the claims asserted by the Foreclosed Plaintiffs in this action were compulsory counterclaims to the prior foreclosure action. In order for a counterclaim to be compulsory, it must arise out of the "transaction or occurrence that is the subject matter of the opposing party's claim . . . ." Fla. R. Civ. P. 1.170.

As this Court has explained:

> The purpose of the compulsory counterclaim is to promote judicial efficiency by requiring defendants to raise claims arising from the same "transaction or occurrence" as the plaintiff's claim. As the district court noted, the courts have defined "transaction or occurrence" with a **"broad realistic interpretation"** in order to avoid numerous lawsuits from the same facts.

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[3]Although the Eleventh Circuit agreed with both the state and federal trial courts in concluding that the Foreclosed Plaintiffs' claims satisfy the logical relationship test adopted by this Court to determine when a claim is a compulsory counterclaim, the Foreclosed Plaintiffs seek to reargue this issue in an effort to have this Court essentially "reverse" the Eleventh Circuit's conclusion on this question. Therefore, this brief must go beyond the scope of the question certified by the Eleventh Circuit to respond to the Foreclosed Plaintiffs' continued efforts to argue that their claims are not governed by Florida's compulsory counterclaim rule.

Londono v. Turkey Creek, Inc., 609 So.2d 14 (Fla. 1992) (emphasis added). See also Kinney v. Allied Home Builders, 403 So.2d 440, 442 (Fla. 2d DCA 1981) ("The basic rationale, of course, [of the compulsory counterclaim rule] is to avoid a multiplicity of suits"). This is consistent with the United States Supreme Court's long-established conclusion that: "Transaction is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much on the immediateness of their relationship as upon their logical relationship." Moore v. New York Cotton Exchange, 270 U.S. 593, 610, 46 S. Ct. 367 (1926).

This Court has concluded that "the 'logical relationship test' is the yardstick for measuring whether a claim is compulsory," and adopted the federal logical relationship test which provides:

> [A] claim has a logical relationship to the original claim if it arises out of **the same aggregate of operative facts** as the original claim in two senses: (1) that **the same aggregate of operative facts** serves as the basis of both claims; **or** (2) that **the aggregate core of facts** upon which the original claim rests activates additional legal rights in a party defendant that would otherwise remain dormant.

Londono, 609 So.2d at 20 (emphasis added).

In short, the "logical relationship" test must be a realistic, practical one. Technical distinctions between different legal theories or their elements of proof are irrelevant. Instead, the test asks a basic question: are the disputes or differences underlying the claims based upon the same operative facts? If so, the claims

should be asserted and resolved in one proceeding to promote uniformity, economy and fairness. See City of Mascotte v. Florida Municipal Liability Self-Insurance Program, 444 So.2d 965, 967 (Fla. 5th DCA 1984). ("If there is a dispute resolve it, once and for all, one way or the other".)

Clearly, the basic disputes underlying the prior foreclosure proceeding and the Foreclosed Plaintiffs' claims in this proceeding arise from the same "aggregate of operative facts." This is evident in two central respects:

(1) The heart of the dispute in both actions is whether the Bank had the right to foreclose on St. Jude in November, 1987, or whether the acceleration of the loan and the foreclosure were improper because the loan had been extended by the letter dated September 10, 1987.

(2) All of the alleged interfering activities of the Bank (described in subparagraphs 24a-f of the Foreclosed Plaintiffs' Complaint) (R.E. 4, p.5-6), were allegedly undertaken by the Bank ***against GIPP***, not against the Foreclosed Plaintiffs. In fact, the Foreclosed Plaintiffs are not alleged to be the object of any of the Bank's supposedly tortious conduct.

Without question, there is a "logical relation" between the claims and defenses in the foreclosure action and the claims in this proceeding. The

Foreclosed Plaintiffs unsuccessfully attempted to circumvent this by arguing to the Eleventh Circuit that the tortious interference claim they assert requires the proof of different ***elements*** than the causes of action and defenses asserted by GIPP in the foreclosure action. The Eleventh Circuit and the trial courts all apparently recognized that this argument is irrelevant to the logical relationship test which is based upon the ***facts*** underlying a potential cause of action, not the ***legal elements*** of a claim. Now the Foreclosed Plaintiffs attempt to have this Court determine that the claims are not logically related because of the jury right ramifications of different legal causes of action. In other words, they now want this Court to focus on the ***legal ramifications*** of the causes of actions they choose to assert. They still ignore the controlling ***facts*** that are identical in both actions.

All that the FDIC must establish to satisfy the logical relationship test is: "(1) that the same aggregate of operative ***facts*** serves as the basis of both claims; ***or*** (2) that the aggregate core of ***facts*** upon which the original claim rests activates additional legal rights in a party defendant that would otherwise remain dormant." Londono, 609 So.2d at 20 (emphasis added). Although the FDIC only has to satisfy one of these alternative tests, both tests are satisfied in the instant case since the claims asserted are grounded on the same alleged operative facts as the foreclosure and because the core of facts upon which the original action was based (i.e. the

facts relevant to the Bank's right to foreclose) are the same facts that the Foreclosed Plaintiffs now claim to have activated their right to assert a tortious interference claim. If the facts asserted by the Foreclosed Plaintiffs on this action (and raised by GIPP in the foreclosure action) were proven to be true in the foreclosure action, the foreclosure action could have resulted in a determination that the Bank did not have the right to foreclose.

This application of the compulsory counterclaim rule is consistent with the "broad, realistic" approach which both Florida and Federal Courts historically have taken to avoid multiplicity of suits. See, e.g., Crutcher v. Aetna Life Insurance Co., 746 F. 2d 1076, 1080 (5th Cir. 1984) (holding that Guarantor's suit against lender alleging that loan default was caused by lender's delays was compulsory counterclaim to previous foreclosure suit by lender); Yost v. American Nat'l Bank, 570 So.2d 350, 353 (Fla. 1st DCA 1990) (indicating that a Borrower's and Guarantors' claims against lender for alleged failure to obtain and fund business loan arose out of the transaction forming the subject matter of [lender's] claim, i.e., the action on the consolidated promissory notes); City of Mascotte v. Florida Municipal Liability Self-Insurers Program, 444 So.2d 965, 966-67 (holding that claim for reformation of insurance policy is barred as compulsory counterclaim to original action for declaratory judgment as to insurer's duty to defend); Kinney v.

Allied Home Builders, Inc., 403 So.2d 440, 442 (Fla. 2d DCA 1981) (stressing that claim by contractor to assert lien on undisbursed construction loan proceeds "arose out of the same transaction" giving rise to prior suit by owner against contractor for filing exaggerated mechanic's lien); Stone v. Pembroke Lakes Trailer Park, Inc., 268 So.2d 400, 402 (Fla. 4th DCA 1972) (holding that suit by principal for return of deposit held by real estate broker "arose out of the same transaction" as broker's prior declaratory judgment suit regarding entitlement to fees and was barred as compulsory counterclaim in prior suit).

The Foreclosed Plaintiffs attempt to argue that Whigum v. Heilig-Meyers Furniture, Inc., 682 So.2d 643 (Fla. 1st DCA 1996), provides precedent for this Court to find an exception to the rule for non-obligor defendants with tort counterclaims to foreclosure actions. Appellant's Initial Brief, p. 26. Whigum is not analogous to the instant case because the claims analyzed in that action did not arise from the same core of operative facts. In Whigum, the plaintiff failed to make payments on furniture purchased on credit from the defendant's store. After the plaintiff's payments became past-due, agents of the defendant tacked a printed Notice entitled "Legal Notice for Return of Property" on the door of her residence. She then sued the defendants contending that the printed Notice was an unlawful practice under the Florida Consumer Collection Practices Act. She sought relief

individually and as a representative of a class of persons subjected to the same collection practices. Whigum, 682 So.2d at 644.

The trial court in Whigum denied the Motion for Class Certification, and that Order was appealed. Since the class consisted of individuals subjected to allegedly improper debt collection practices, the trial court concluded that the defendant would assert claims against each member of the class for the amounts allegedly due. The existence of a large number of compulsory counterclaims can be grounds for denying class certification. Whigum, 682 So.2d at 645.

The court quite properly concluded in Whigum that an action on a debt is a permissive counterclaim to an action under the Florida Consumer Collection Practices Act. As the court noted:

> The actions do not "arise" out of the same set of operative ***facts***. The debtor's action under the statute is based on the commission of prohibited debt collection practices, and the creditor's action is based on the failure to pay for consumer goods sold on credit. Furthermore, the filing of one action does not "activate" the filing of the other action in a circumstance in which the second action might otherwise remain dormant.

Whigum, 682 So.2d at 646. The facts relating to whether debts were due were totally irrelevant to facts relating to illegal debt collection practices. Therefore, Whigum is not at all analogous to the instant case.

The only other case the Foreclosed Plaintiffs cite as precedent for the argument that their claims are outside the scope of the compulsory counterclaim rule is Cordero v. Capital Bank, 693 So.2d 720 (Fla. 3d DCA 1997). The opinion in Cordero is limited to one paragraph in which the court states its ruling without providing enough factual background for the opinion to have any precedential value. All that can be ascertained from the opinion is that the court concluded that: "The foreclosure action concerning Old Cutler's liability under the mortgage and the presently asserted claims as to Capital's wrongful conduct involve ***distinct facts*** and legal issues."[4] Cordero, 693 So.2d at 720. The court concluded that "the basis of both claims is not the same aggregate of operative facts and the aggregage core of facts supporting the initial foreclosure action does not activate the requisite additional legal rights." Cordero, 693 So.2d at 720. The instant case cannot be compared with Cordero for the simple reason that Cordero does not provide sufficient facts to make a comparison.[5]

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[4]The Foreclosed Plaintiffs describe this case by stating that "a mortgagee brought various fraud and conspiracy claims after a bank foreclosed on his real estate project," but the only description in Cordero of the type of claims asserted in the second action is that they allege "wrongful conduct."

[5]The extent of the relationships between the parties in Cordero is unknown. One factual scenario that could have led to the court's conclusion would have been if the "wrongful conduct" giving rise to the second action related to transactions that did not involve the property subject to the prior foreclosure action.

In the instant case, the Foreclosed Plaintiffs seek to assert a claim for tortious interference based upon the Bank's actions in foreclosing GIPP's interest in St. Jude. One of the elements that the Foreclosed Plaintiffs must prove to prevail in the tortious interference claim is that there was "an intentional and ***unjustified*** interference with the relationship by the defendant. Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So.2d 812, 814 (Fla. 1995) (emphasis added). If the Bank's foreclosure of GIPP's interests in St. Jude was justified, the Foreclosed Plaintiffs' tortious interference claim is doomed to failure. See Smith v. Emery Air Freight Corp., 512 So.2d 229, 230 (Fla. 3d DCA 1987) (directed verdict in tortious interference case is proper where defendants' action was justified).

For these reasons, the Eleventh Circuit and both trial courts correctly concluded that Foreclosed Plaintiffs' claims are compulsory counterclaims to the Bank's foreclosure action.

II. THE FORECLOSED PLAINTIFFS CLAIMS ARE NOT EXCEPTED UNDER THE COMPULSORY COUNTERCLAIM RULE

The reason the Eleventh Circuit gave for certifying its question to this Court is that "it is unclear whether there are exceptions to the compulsory counterclaim rule reaffirmed in broad terms in Londono." Aguilar, 117 F.2d at 1371. Therefore

the real issue before this Court is whether there is an applicable exemption to the rule. As stated below, no such exception exists or should be created.

A. **Existing Exceptions to the Compulsory Counterclaim Rule do not Apply.**

The compulsory counterclaim rule contains only the following two exceptions:

> The pleader does not have to assert a claim [that otherwise would be a compulsory counterclaim] if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon that party's claim by attachment or other process ***by which the court did not acquire jurisdiction to render a personal judgment*** on the claim and the pleader is not stating a counterclaim under this rule.

Fla. R. Civ. P. 1.170(a)(2) (emphasis added). The Foreclosed Plaintiffs sought to avoid the requirements of the compulsory counterclaim rule by arguing to the Eleventh Circuit and the trial courts that they come under the second exception to that rule because the foreclosure was an *in rem* action. The issue raised by that exception, however, is not the nature of the action - it is the nature of the jurisdiction over the defendant. The Eleventh Circuit, like the trial courts, recognized that:

> The court had personal jurisdiction over the doctors. In other words, even though the foreclosure was an *in rem* action, the doctors were named as defendants *in personam*.

Aguilar, 117. Although the Foreclosed Plaintiffs do not address this exception in the brief filed with this Court, it is the only existing exception that it has argued in this case.[6] Therefore, a brief analysis of this exception is provided here to place the Foreclosed Plaintiffs' arguments in context.

The distinction between *in personam* and *in rem* jurisdiction has been nullified by the United States Supreme Court in Shaffer v. Heitner, 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977). In Shaffer, the Supreme Court stated:

> The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.

Shaffer, 433 U.S. at 212. The Court also observed:

> The overwhelming majority of commentators have also rejected [the] premise that a proceeding "against" property is not a proceeding against the owners of that property. Accordingly, they urge that the 'traditional notions of fair play and substantial justice' that govern a State's power to adjudicate *in personam* should also govern its power to adjudicate personal rights to property located in the State.

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[6]It is undisputed that the Foreclosed Plaintiffs' claims were not filed prior to the foreclosure action, so the first exception is irrelevant to any analysis in this case.

Shaffer, 433 U.S. at 205. Therefore, the Supreme Court concluded that a court can only acquire jurisdiction over an individual in an *in rem* proceeding if the standards for *in personam* jurisdiction are satisfied. Shaffer, 433 U.S. at 212.

Florida Rule of Civil Procedure 1.170(a) was adopted in 1966 in a form substantially identical to the then-existing Federal Rule of Civil Procedure 13(a). The Advisory Committee Notes to the federal rule explain the reason for the exception provided in subsection (2) of both rules.

> 1963 AMENDMENT
>
> When a defendant, if he desires to defend his interest in property, is obliged to come in and litigate in a court **to whose jurisdiction he could not ordinarily be subjected,** fairness suggests that he should not be required to assert counterclaims, but should rather be permitted to do so at his election.

(Emphasis added.) This exception recognized that a person over whom a court normally could not obtain personal jurisdiction could be brought before the court in an *in rem* proceeding even if that person did not have minimum contacts with the forum. In 1977, however, Shaffer provided that a court must satisfy the personal jurisdiction requirements in order to adjudicate a defendant's interest in real property.

The Foreclosed Plaintiffs have relied on Neil v. South Fla. Auto Painters, 397 So.2d 1160 (Fla. 3d DCA 1981), to support their argument that the exception to the

compulsory counterclaim rule applies to them because they were named as defendants in an *in rem* proceeding in which no personal judgment was sought against them. Neil did not recognize that the Shaffer decision had changed the jurisdictional requirements for an *in rem* action to meet the requirements of an *in personam* action. Furthermore, Neil relied on the fact that the plaintiff did not seek a personal judgment. Rule 1.170(a) does not require that a personal judgment be sought. It only requires that the court obtain personal jurisdiction.

The authority relied upon in Neil is one footnote in the United States Supreme Court's decision in Baker v. Gold Seal Liquors. Inc., 417 U.S. 467, fn.1, 94 S. Ct. 2504, 41 L. Ed. 2d 243 (1974), which pre-dated the change in state court jurisdictional standards in 1977 resulting from Shaffer, and which was based on then-existing (1974) differences in jurisdiction over individuals. Neil, 397 So.2d at 1163. As the Supreme Court recognized in Shaffer, all such prior judicial pronouncements recognizing differences in jurisdictional standards were overruled by the 1977 opinion. Shaffer, 433 U.S. at 212 n.39.

Shaffer establishes that the court presiding over the foreclosure action clearly obtained personal jurisdiction over each of the Foreclosed Plaintiffs. The record is undisputed that each Foreclosed Plaintiff was a physician practicing in Florida, received service of process (Supp. App. 2, p.2.) and either answered the foreclosure

complaint or was defaulted by the Clerk of the Court. (App. 12-21.). Under these circumstances, the court in the Bank's foreclosure action, as a matter of law, obtained personal jurisdiction over the Foreclosed Plaintiffs. See Laslie v. Kirksey, 528 So.2d 57, 58 (Fla. 1st DCA 1988) (stating that Appellee was "a resident of Florida at the time of service of process in this suit and, further, he was validly served with process within the State of Florida. Therefore, personal jurisdiction in the State of Florida attached as to Appellee"). Because the court acquired personal jurisdiction over the Foreclosed Plaintiffs, their claims do not fall under the exception stated in rule 1.170(a)(2).

B. **Foreclosed Plaintiffs' Request for the Creation of a Special Third Exception to the Rule is Without Merit.**

The Foreclosed Plaintiffs' primary argument to this Court is that the Court should create a special third exception to the compulsory counterclaim rule for Defendants in foreclosure actions who are not obligors on the debt being foreclosed and who are entitled to jury trials for their counterclaims. There is absolutely no legal or practical support for the Foreclosed Plaintiffs' argument that this Court should create such a new special exception to the compulsory counterclaim rule.

The Foreclosed Plaintiffs begin their argument by stating: "In considering whether a tortious interference claim should be considered a compulsory

counterclaim to a foreclosure action, it is appropriate to look at the **nature** of each action." Appellants' Initial Brief, p.13 (emphasis added). Just as the legal elements of each claim are irrelevant to determine whether the claim is a compulsory counterclaim, the "nature" of each legal action is also irrelevant.

The compulsory counterclaim rule is not driven by the legal theories behind a claim or the potential legal ramifications of such theories. It is driven by the facts. As this Court noted in adopting the logical relationship test, claims are governed by the compulsory counterclaim rule when they arise "out of the same aggregate of operative facts." Londono, 609 So.2d at 20.

This Court has stated that: "[t]he purpose of the compulsory counterclaim is to promote judicial efficiency." Londono, 609 So.2d at 19. Despite the Appellants' contention to the contrary, the application of the compulsory counterclaim rule to the facts of this case promotes judicial efficiency. In addition, the application of the rule to this case promotes basic fairness.

The Foreclosed Plaintiffs argue that a conflict arises because their claim for tortious interference is a common law tort for which they are entitled to a jury trial while the foreclosure action is an equitable remedy with no right to a jury. The Foreclosed Plaintiffs argue that their claims should be excepted from the

compulsory counterclaim rule to resolve this perceived conflict. In making this argument, the Appellants state:

> If the foreclosure and tortious interference claim[s] are tried together, one of two things must occur as to this singular point. Either the mortgagee loses its statutory right to a non-jury trial, or the defendant's right to a jury trial is impaired.

Appellant's Initial Brief, p.15. This is misleading. The fact that foreclosure and tortious interference claims are filed in the same action does not mean that they will be tried together. The courts deal with cases including both jury and non-jury claims on a regular basis pursuant to Florida Rule of Civil Procedure 1.270(b), which provides for separate trials, and pursuant to this Court's guidance in Hightower v. Bigoney, 156 So.2d 501 (Fla. 1963).

The Foreclosed Plaintiffs' concern regarding the preservation of their right to a jury is baseless. This Court has held:

> The filing of a compulsory counterclaim for relief cognizable at law in an action for equitable relief does not constitute the counterclaimant's waiver to the right to a jury trial of the issues raised by said compulsory counterclaim, provided, jury trial is timely demanded.

Hightower v. Bigoney, 156 So.2d 509 (Fla. 1963). See also Barth v. Florida State Constructors Service, Inc., 327 So.2d 13, 15 (Fla. 1976) (same). Therefore, contrary to the Foreclosed Plaintiffs' argument, the requirement that they file their

compulsory counterclaim to a foreclosure action does not impair their right to a jury.

"The right to a trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate," Fla.R.Civ.P. 1.430. A trial court therefore cannot disregard the right to a jury at its discretion.

> [W]here the compulsory counterclaim entitles the counterclaimant (upon timely demand) to a jury trial on issues which are sufficiently similar or related to the issues made by the equitable claim that a determination by the first fact finder would necessarily bind the later one, such issues may not be tried non-jury by the court since to do so would deprive the counterclaimant of his constitutional right to trial by jury.

Adams v. Citizens Bank, 248 So.2d 682, 684 (Fla. 4th DCA 1971).

The procedure for handling the situation described by the Foreclosed Plaintiffs as a conflict justifying the exclusion of their claims from the compulsory counterclaim rule is simple and well-established. If a defendant to an equitable action files a compulsory counterclaim for which that defendant is entitled to a jury trial, the courts sever the counterclaim for the purposes of trial pursuant to Florida Rule of Civil Procedure 1.270(b). See, e.g., Spring v. Ronel Refining, Inc., 421 So.2d 46, 47 (Fla. 3d DCA 1982) (court should conduct jury trial on issues common to foreclosure claim and fraud counterclaim and the consider unrelated equitable issues).

Florida Rule of Civil Procedure 1.270(b) provides that a court can order a separate trial of any claim and pursuant to this rule, and courts routinely order separate trials of counterclaims to protect a party's right to a jury trial. The Foreclosed Plaintiffs claim that "there is currently no requirement that a trial court sever counterclaims in a foreclosure action." Appellants' Initial Brief, p.16. This assertion is only half right. There is no requirement that a court sever counterclaims if there is no right to a jury on those claims, but there is a requirement that a court sever counterclaims if there is a right to a jury.

The Foreclosed Plaintiffs' argument that the severance of such counterclaims is less judicially efficient than allowing the defendants to file their claims after the foreclosure action has been completed is also baseless. The standard practice when such counterclaims are brought in a foreclosure action is that the action proceeds through the pleading and discovery stage as one action with the Judge severing the counterclaims only for purposes of trial so that the counterclaimants proceed to a jury trial on the issues so triable. The Foreclosed Plaintiffs apparently believe it would be more judicially efficient to have two entirely separate cases occurring at different times with separate pleadings, separate and duplicative discovery, as well as separate trials on issues.

Furthermore, the exception the Foreclosed Plaintiffs seek to create would be fundamentally unfair. One of the primary benefits of the compulsory counterclaim rule is that a plaintiff who files an action to resolve a dispute based upon a set of facts can obtain a final resolution of the dispute based upon those core aggregate facts (by negotiation or judicial determination) with the assurance that all legal claims relating to the dispute based on these facts are on the table. If the Foreclosed Plaintiffs' position were adopted by this Court, there would no longer be such an assurance. A plaintiff foreclosing on a property by suing the obligor on the note and others who purport to have legal interests in the property will never be able to conclude the litigation with the assurance that all claims regarding the right to foreclose on a property are resolved.

In Mascotte, the court observed that the compulsory counterclaim rule helps create a fair playing field for litigants.

> It is in the interest of all litigants and the courts in cases where a dispute over a contract exists that all elements of that dispute be tried and resolved at one time and not by trying one tactic, then another and still another until all approaches are made. If there is a dispute resolve it, once and for all, one way or the other. This case is a prime example of what misery can be suffered and expense incurred by multiple bites at the same apple.

Mascotte, 444 So.2d at 967.

It should be remembered that the argument underlying the Foreclosed Plaintiffs' current claim against the Bank is that the Bank tortiously interfered with the Foreclosed Plaintiffs' business relationship by foreclosing when the Bank did not have a right to foreclose. The Bank's right to foreclose has already been litigated. For the Foreclosed Plaintiffs now to assert that it is more judicially efficient for them to wait until after the completion of the foreclosure action to litigate their claim that the Bank did not have the right to foreclose is illogical.

Finally, the application of the compulsory counterclaim rule to the facts of this issue is in the interest of fairness. The Bank's settlement of the foreclosure action was reached in April, 1990, and as part of the settlement, GIPP consented to the foreclosure. The Bank negotiated this settlement based upon the understanding that all parties to the case had put all relevant claims on the table for consideration. Three months after the foreclosure was completed, the Foreclosed Plaintiffs filed this suit in which they are represented by the same attorney who represented their co-venturer, GIPP, in the foreclosure action. Although it is not known whether the Foreclosed Plaintiffs' delay in asserting their purported claims was intentional in this case, it is clear that Appellants (who were joint ventures with GIPP) could have waited intentionally to assert their claims so as not to interfere with GIPP's settlement and then filed their action to take a second "bite

at the apple" after the GIPP claims were resolved. Such tactics not only would be unfair, they are precisely what Florida Rule of Civil Procedure 1.170(a) is designed to prevent. As the Fifth District Court of Appeal stated so succinctly: "If there is a dispute resolve it, once and for all, one way or the other." Mascotte, 444 So.2d at 967.

CONCLUSION

The state and federal trial courts and the Eleventh Circuit properly interpreted Florida law and correctly applied it to the uncontested facts in this case in determining that the Foreclosed Plaintiffs' claims are governed by the compulsory counterclaim rule. These claims do not come under the two existing exceptions to the rule, and there are no grounds for creating a special third exception to the Foreclosed Plaintiffs. Therefore, the Foreclosed Plaintiffs are barred from bringing this claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. mail this 20th day of October, 1997 to **William G. Cooper, Esquire** and **Morgan Gaynor, Esquire**, Toole, Beale & Cooper, P.A., 6900 Southpoint Drive, North, Suite 500, P.O. Box 551069, Jacksonville, Florida 32255-1069 and to **George E. Ridge, Esquire**, Ridge & Lantinberg, P.A., 200 West Forsyth Street, No. 1200, Jacksonville, Florida 32202.

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