

IN THE SUPREME COURT OF FLORIDA

Case No. SC17-954

2ND DCA Case No. 2D15-5198

Trial Court Case No.: 41 2014CA002512AX

**THE BANK OF NEW YORK MELLON
FKA THE BANK OF NEW YORK, as
Successor trustee to JPMorgan Chase
Bank, N.A., as Trustee on behalf of the
Certificateholders of the CWHEQ, Inc.,
CWHEQ Revolving Home Equity Loan
Trust, Series 2006-D,**

Petitioner,

v.

**DIANNE D. GLENVILLE A/K/A DIANE
D. GLENVILLE A/K/A DIANE
GLENVILLE and MARK S. GLENVILLE,**

Respondents.

**ON DISCRETIONARY REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA
CASE NO. 2D15-5198**

**AMENDED APPENDIX TO PETITIONER'S
INITIAL BRIEF ON THE MERITS**

Anthony R. Smith (#157147)
Kathryn I. Kasper (#621188)
Kendra J. Taylor (#108896)
Attorneys for Petitioner
SIROTE & PERMUTT, P.C.
1201 S. ORLANDO AVE., SUITE 430
WINTER PARK, FL 32789

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail, postage prepaid and E-Mail, to the following on this 11th day of October, 2017:

Sheryl A. Edwards, Esq.
The Edwards Law Firm, PL
500 S. Washington Boulevard, Suite 400
Sarasota, FL 34236
Counsel for Defendant Dianne D. Glenville a/k/a Diane D. Glenville
a/k/a Dianne Glenville and Mark S. Glenville a/k/a Mark Glenville
eservice@edwards-lawfirm.com
sedwards@edwards-lawfirm.com

Matthew Sirmans, Esq.
Assistant General Counsel
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301
Counsel for Defendant, Florida Housing Finance Corporation
efiling@floridahousing.org

Fairfax Home Owners Association, Inc. .
c/o Scott K. Petersen, Esq.
Becker & Poliakoff, P.A.
6230 University Parkway, Suite 204
Sarasota, Florida 34240
spetersen@becker-poliakoff.com
sarservicemail@bplegal.com

Megan Roach, Esq.
Albertelli Law
PO Box 23028
Tampa, FL 23028
servealaw@albertellilaw.com

/s/Kendra J. Taylor

Anthony R. Smith, Esq.

FL Bar #157147

Kathryn I. Kasper, Esq.

FL Bar #621188

Kendra J. Taylor, Esq.

FL Bar #108896

Attorneys for Petitioner

The Bank of New York Mellon f/k/a The
Bank of New York, as Successor Trustee to
JPMorgan Chase Bank, N.A., as Trustee on
behalf of the Certificateholders of the
CWHEQ, Inc., CWHEQ Revolving Home
Equity Loan Trust, Series 2006-D

OF COUNSEL:

SIROTE & PERMUTT, P.C.

1201 S. ORLANDO AVE., STE. 430

WINTER PARK, FL 32789

TELEPHONE: (954) 828-1100

FACSIMILE: (954) 828-1101

TSMITH@SIROTE.COM

KKASPER@SIROTE.COM

KTAYLOR@SIROTE.COM

INDEX TO APPENDIX

Documents	Date	Page
First Opinion	01/20/2017	5
Motion for Rehearing, Motion for Rehearing <i>En Banc</i> , and Request for Certification	02/04/2017	9
Order Denying Motion for Rehearing and Second Opinion	04/26/2017	20
Manatee Real Foreclose Information	10/10/2017	27

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

THE BANK OF NEW YORK MELLON
FKA THE BANK OF NEW YORK, as
successor trustee to JPMorgan Chase
Bank, N.A., as trustee on behalf of the
Certificateholders of the CWHEQ, Inc.,
CWHEQ Revolving Home Equity Loan
Trust, Series 2006-D,

Appellant,

v.

DIANNE D. GLENVILLE A/K/A DIANE
D. GLENVILLE A/K/A DIANE
GLENVILLE and MARK S. GLENVILLE,

Appellees.

Case No. 2D15-5198

Opinion filed January 20, 2017.

Appeal from the Circuit Court for Manatee
County; John F. Lakin, Judge.

Anthony R. Smith and Kendra J. Taylor
of Sirote & Permutt, P.C., Winter Park;
and Shaun K. Ramey and Matthew R.
Feluren of Sirote & Permutt, P.C.,
Fort Lauderdale, for Appellant.

Sheryl A. Edwards of The Edwards Law
Firm, PL, Sarasota, for Appellees.

SLEET, Judge.

The Bank of New York Mellon appeals the trial court's order denying its claim for surplus funds from a foreclosure sale.¹ Because the bank's claim was untimely, we affirm.

Under section 45.031(7)(b), Florida Statutes (2015), any person claiming a right to surplus funds must file a claim with the clerk of court within sixty days of the foreclosure sale. The record reflects that the underlying property was sold at public auction on July 2, 2015, and that the bank filed its claim for surplus funds as a subordinate lienholder on September 2, 2015, sixty-two days after the date the property was sold. The trial court denied the bank's claim as untimely filed. On appeal, the bank argues that a foreclosure sale is not complete until the clerk issues the certificate of sale. Because the certificate of sale in this case was issued on July 6, 2015, the bank claims that it had until September 4, 2015, to file a claim and that therefore its September 2, 2015, filing was timely. We disagree.

"The interpretation of a statute is a question of law, and it is therefore subject to a de novo review." Mathews v. Branch Banking & Tr. Co., 139 So. 3d 498, 500 (Fla. 2d DCA 2014) (citing W. Fla. Reg'l Med. Ctr., Inc. v. See, 79 So. 3d 1, 8 (Fla. 2012)). "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious

¹Diane and Mark Glenville were the property owners and defendants in the foreclosure action. They are entitled to the surplus funds remaining with the clerk more than sixty days after the foreclosure sale pursuant to section 45.031(7)(b), Florida Statutes (2015).

meaning." Gulf Atl. Office Props., Inc. v. Dep't of Revenue, 133 So. 3d 537, 539 (Fla. 2d DCA 2014) (quoting Hess v. Walton, 898 So. 2d 1046, 1049 (Fla. 2d DCA 2005)).

This court has previously explained that "the language in section 45.031(7)(b) is clear and unambiguous: any person claiming a right to the surplus funds must file a claim with the clerk no later than sixty days after the sale." Dever v. Wells Fargo Bank Nat'l Ass'n, 147 So. 3d 1045, 1047 (Fla. 2d DCA 2014); see also Mathews, 139 So. 3d at 500 ("The language of section 45.031(7)(b) is clear and unambiguous in requiring that any person claiming a right to the surplus funds 'MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE.' " (emphasis omitted)). This subsection only refers to the "sale," not the "certificate of sale." § 45.031(7)(b). This is significant because section 45.031 assigns particular and distinct meanings to the terms "sale" and "certificate of sale" and does not use them interchangeably. See § 45.031(4) ("After a sale of the property the clerk shall promptly file a certificate of sale and serve a copy of it on each party" (emphasis added)); .031(5) ("If no objections to the sale are filed within [ten] days after filing the certificate of sale, the clerk shall file a certificate of title and serve a copy of it on each party." (emphasis added)). Reading subsection (7)(b) to require a claim for surplus funds to be filed within sixty days of the certificate of sale—instead of the actual sale itself—would render subsection (4) meaningless and would confuse the meaning of other subsections of the statute.

Additionally, such a reading would be inconsistent with this court's prior case law interpreting section 45.031(7)(b). In Mathews, this court explained that the bank "was required to file a claim with the clerk within sixty days after the sale of the

property to preserve any claim it may have had to the surplus funds." 139 So. 3d at 500 (emphasis added). Similarly, in Dever, this court used the date the property was sold at auction, not the date the certificate of sale was issued, as the start date for the sixty-day period. 147 So. 3d at 1047. Although using either date would not have changed the fact that the banks' claims were untimely, in both cases this court interpreted the language of the statute to refer to the date of the actual sale, not the issuance of the certificate of sale. See Mathews, 139 So. 3d at 499-500; Dever, 147 So. 3d at 1047.

Accordingly, the bank filed its claim outside the statutory window, and we must affirm the trial court's order denying the claim. In so doing, we note that the two cases on which the bank relies on appeal—In re Jaar, 186 B.R. 148, 154 (Bankr. M.D. Fla. 1995), and Shlishey the Best, Inc. v. CitiFinancial Equity Services, Inc., 14 So. 3d 1271, 1275 (Fla. 2d DCA 2009)—are inapplicable here because they both concern a mortgagor's right of redemption, which is governed by section 45.0315, not section 45.031.

Affirmed.

LaROSE and BADALAMENTI, JJ., Concur.

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT**

Case No. 2D15-5198

Trial Court Case No.: 41 2014CA002512AX

**THE BANK OF NEW YORK MELLON
FKA THE BANK OF NEW YORK, as
successor trustee to JPMorgan Chase
Bank, N.A., as Trustee on behalf of the
Certificateholders of the CWHEQ, Inc.,
CWHEQ Revolving Home Equity Loan
Trust, Series 2006-D,**

Appellant,

v.

**DIANNE D. GLENVILLE A/KIA DIANE
D. GLENVILLE A/KIA DIANE
GLENVILLE and MARKS. GLENVILLE,**

Appellees.

_____ /

**MOTION FOR REHEARING, MOTION FOR REHEARING *EN BANC*,
AND REQUEST FOR CERTIFICATION**

Appellant The Bank of New York Mellon f/k/a the Bank of New York, as successor Trustee to JPMorgan Chase Bank, N.A., as Trustee on Behalf of the Certificateholders of the CWHEQ Inc., CWHEQ Revolving Home Equity Loan Trust, Series 2006-D (“Appellant”) respectfully moves this Court for rehearing and certification of a question of great public importance pursuant to Florida Rule of

Appellate Procedure 9.330, and for rehearing *en banc* pursuant to Florida Rule of Appellate Procedure 9.331, and shows the court:

I. MOTION FOR REHEARING

A. The Court Misapprehended Fla. Stat. 45.031

On January 20, 2017, this Court held that Appellant’s claim for surplus funds from a foreclosure sale was untimely due to the claim being filed sixty-two (62) days after the date of the foreclosure auction. The Court overlooked or misapprehended controlling points of law in deciding this issue in favor of the Appellee Dianne D. Glenville (“Appellee” or “Glenville”), and Appellant asks the Court for a rehearing.

The Court misapprehended the law in defining “sale” solely by relying on Fla. Stat. §45.031(7) and not considering Fla. Stat. §45.032, which is titled Disbursement of Surplus Funds after Judicial Sale. Section 45.032 expressly declares that the deadline for the filing of a claim to surplus funds falls sixty days after the issuance of the certificate of disbursements. Notably, the certificate of disbursements cannot be issued until the sale has been confirmed, which would have followed the issuance of the certificate of title, which follows the certificate of sale.

This declaration does not conflict with the statement relied upon by Appellee in Section 45.031 which provides that a surplus claim must be filed within sixty (60) days of the “sale” because Section 45.031 does not define when the date of the “sale” should be deemed to fall. Rather, that definition is found in Section 45.032.

Furthermore, Section 45.032 (specifically entitled “Disbursement of Surplus Funds after Judicial Sale”) overrides any statement in Section 45.031 (generally entitled “Judicial Sales Procedure”) with regards to ascertaining the deadline to file a claim for disbursement of surplus funds. Thus, Appellant’s claim for surplus funds was timely filed as within sixty days of the certificate of disbursements.

This issue was decided by one of this Court’s sister court’s, the Fourth District Court of Appeals, in Straub v. Wells Fargo Bank, N.A., 182 So. 3d 878, 881 (Fla. 4th DCA 2016), which stated that “a foreclosure ‘sale’ takes place when ownership of the property is transferred upon filing of the certificate of title.”¹ The Fourth District went on to state that “[a] subordinate lienholder's claim to surplus from the sale is timely under section 45.032(2) when it is filed no later than sixty days after the clerk issues and files the certificate of title.” Id.

While Appellant took a more conservative approach in this appeal in claiming that the deadline for filing a claim to surplus should be based on the clerk’s filing of the certificate of sale, because a party has ten (10) days to object to any defects in the auction before a court can deem the auction valid, Appellant’s argument is not inconsistent with Straub. The ruling in Straub, clearly shows that it is not even the certificate of sale, but the later issued certificate of title which triggers the sixty (60)

¹ While not discussing the issue of surplus, the First and Third Districts have also stated that a judicial sale stood confirmed when a certificate of title was issued. See Confederate Point Partnership, Ltd. v. Schatten, 278 So.2d 661 (Fla. 1st DCA 1973) and Commercial Laundries, Inc. v. Golf Course Towers Associates, 568 So.2d 501 (Fla 3rd DCA 1990).

day time frame for a lienholder to submit a request for surplus. Consequently, Appellant petitions this Court to reconsider its prior ruling.

B. The Court Misapprehended its Prior Ruling in Dever

In its opinion, the Court states that “in Dever, this court used the date the property was sold at auction, not the date the certificate of sale was issued, as the start date for the sixty-day period.” See Glenville at *2. In Appellant’s review of the Dever opinion, it finds no such statement, but does, however, find contradictory statements to same. This Court held in Dever that Wells Fargo was “barred from claiming any interest in the surplus funds because it failed to file a claim for the surplus within the sixty days after the sale.” Dever v. Wells Fargo Bank Nat. Ass’n, 147 So.3d 1045, 1047 (Fla. 2nd DCA 2014). Moreover, what this Court did acknowledge in Dever is that “a foreclosure sale was held on April 25, 2012” and that the certificate of disbursements was filed on May 8, 2012 and included the following language as required by section 45.031(70(b): If you are a person claiming a right to funds remaining after the sale, you must file a claim with the clerk no later than 60 days after the sale...” Id. Further, this Court in Dever went on to state that “Section 45.032(3) provides that the clerk shall hold the surplus for sixty days after the certificate of disbursements is issued, pending Court order.” Id. at 1048. The reading of those two statements cannot bring about the conclusion that the sixty (60) day period commences from the date of the auction, since this Court stated in Dever

that the notice provided was not sent out on the date the auction was held, but instead thirteen (13) days after when the certificate of disbursement was filed. Id. Those statements by this Court, added to the statement that the clerk shall hold the surplus for sixty(60) days after the certificate of disbursements is issued, contradict the Court's ruling here that the time frame begins to run as of the date of the auction. For those reasons, this Court should review its opinion in Dever and grant a rehearing and reconsider this action.

II. MOTION FOR REHEARING *EN BANC*

In support of this Motion for Rehearing *en banc*, Appellant contends that the Glenville panel misapprehended the operation of the time frame to file a claim for surplus funds by a junior lienholder as reflected by the Straub decision, misapprehended the reading of Florida Statute sections 45.031 and 45.032, calls into question the efficacy and operation of all surplus claims, has the effect of abrogating the clear rights of junior lienholders to payment by way of a surplus, conflicts with a ruling of its sister court, and will cause confusion and uncertainty in foreclosure and related surplus proceedings as parties may be denied an opportunity to seek their own remedies and limit due process.

A. Rehearing *En Banc* is Proper Because Both the Case and Issues are “of Exceptional Importance.”

A rehearing *en banc* of the panel's opinion is appropriate because “the case or issue is of exceptional importance.” Fla. R. App. P. 9.331(d)(1). As discussed below,

both this case and the issues in this case are exceptionally important for multiple reasons.

- 1. FIRST, this case, and the issues therein, are “exceptionally important” because of their impact on a large part of the community.**

A case is of “exceptional importance” if:

the outcome of the case (or its notoriety) is of greater moment or impact within the community rather than its effect upon the law of the state, and either (a) the case is important beyond the effect it will have on the litigants or (b) will affect the ability of other potential litigants to seek their own remedies, or (2) the outcome of the case may reasonably and negatively influence the public's perception of the judiciary's ability to render meaningful justice.

See University of Miami v. Wilson, 948 So. 2d 774, 791 (Fla. 3d DCA 2006).

This standard is satisfied here. Because Florida has exceptionally high foreclosure rates, “the outcome of the case (or its notoriety) is of greater moment or impact within the community,” and the case is “important beyond the effect it will have on the litigants.” Wilson, at 791. Furthermore, because this case involves the payment of funds to lienholders it clearly “will affect the ability of other potential litigants to seek their own remedies.” Id. As this Court has now attempted to define when a foreclosure sale occurs, the Court's opinion significantly impacts foreclosure cases that may have a surplus going forward.

2. SECOND, the “exceptional importance” standard is also satisfied because the panel's opinion conflicts with a rule of law announced by other courts.

Another way in which a case may satisfy the “exceptional importance” standard under Rule 9.331(d) is if the panel's opinion conflicts with a rule of law announced by other courts. See State v. Diamond, 553 So. 2d 1185, 1199 (Fla. 1st DCA 1988) (Ervin, J., concurring) (“I consider that the case at bar falls within the ‘exceptional importance’ category, because I regard the panel's decision...to conflict with a rule of law announced in certain decisions of the Florida Supreme Court ... and of the Second District Court of Appeal.”). This standard is met here as noted earlier since the opinion issued by this Court directly conflicts with the Fourth DCA’s standard set forth in Straub.

B. In the Alternative, the Court Should Certify to the Florida Supreme Court that the Panel's Opinion Passes Upon a Question of Great Public Importance, and is in Direct Conflict With Straub

Should the Court not grant a rehearing *en banc*, Appellant requests the Court to make two certifications as set forth below.

1. The panel's decision passes upon a question of great public importance.

The Florida Rules of Appellate Procedure allows discretionary jurisdiction to the Florida Supreme Court to review decisions of district courts of appeal that “pass upon a question certified to be of great public importance.” Fla. R.App.P. 9.030(a)(2)(A)(v).

Prior to this opinion of the panel, a litigant relying on existing decisions would have properly determined that a junior lienholder had 60 days from either the Certificate of Sale or the Certificate of Title to file their claim for surplus. Dever v. Wells Fargo Bank Nat. Ass'n, 147 So.3d 1045, 1047 (Fla. 2nd DCA 2014); Straub v. Wells Fargo Bank, N.A., 182 So. 3d 878, 881 (Fla. 4th DCA 2016). This Court's opinion, however, calls into question that certainty.

As discussed above, because foreclosure and related surplus actions are prevalent in Florida, the issue in this case impacts a large portion of the community, and is therefore "of great public importance." See discussion *supra* Part A.1.

2. The panel's decision directly conflicts with Straub.

Florida Rule of Appellate Procedure 9.030(a)(2)(vi) allows discretionary jurisdiction to the Florida Supreme Court to review decisions of district courts of appeal that "are certified to be in direct conflict with decisions of other district courts of appeal." As explained above, the panel's decision directly conflicts with the Fourth District Court of Appeal's decision in Straub and hence, certification is warranted.

III. REQUEST FOR CERTIFICATION OF QUESTION OF GREAT PUBLIC IMPORTANCE

Because the holding of this case will affect foreclosure and related surplus proceedings and the rights of lenders and property owners throughout the state, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v) and the related

provision in the Florida Constitution, the Appellant moves this court to certify the following as a question of great public importance:

WHAT EVENT IN THE FORECLOSURE PROCESS TRIGGERS THE SIXTY (60) DAY TIME FRAME TO CLAIM THE SURPLUS AFTER A FORECLOSURE SALE

IV. STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this case or the issues contained in this case are of exceptional importance, and that the panel decision in Glenville is contrary to the Straub decision of the Fourth District Court of Appeals and that a consideration by the full court is necessary to maintain uniformity of decisions of this Court as well as to answer questions of exceptional importance.

V. CONCLUSION

For the reasons set forth above, Appellant seeks rehearing of the Court's opinion, requests the Court to grant a rehearing *en banc* of the panel's January 20, 2014 opinion, or, in the alternative, certify that (1) the panel's opinion passes upon a question of great public importance; and (2) the panel's opinion is in direct conflict with Straub, and requests the Court seek input from *amici curiae* in the real estate and mortgage banking industries on the effect the Glenville opinion will have on Florida foreclosure law and the real estate and mortgage banking industries, including therein seeking input from the Real Property, Probate and Trust Law and

the Business Law Sections of the Florida Bar to determine their understanding of the law and practice in this area.

Respectfully Submitted,

/s/ Julio C. Bertemati

Anthony R. Smith (#0157147)

Shaun K. Ramey (#0117906)

Julio C. Bertemati (#0068231)

Attorneys for Appellant

The Bank of New York Mellon fka

The Bank of New York, as Successor

Trustee to JPMorgan Chase Bank,

N.A., as Trustee on behalf of the

Certificateholders of the CWHEQ,

Inc., CWHEQ Revolving Home

Equity Loan Trust, Series 2006-D

SIROTE & PERMUTT, P.C.
1115 EAST GONZALEZ STREET
PENSACOLA, FL 32503
Tel.: (850) 462-1500
Fax: (850) 462-1599
E-mail addresses:
tsmith@sirote.com
sramey@sirote.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail, postage prepaid and E-Mail, to the following on this 4th day of February, 2017:

Sheryl A. Edwards, Esq.
The Edwards Law Firm, PL
500 S. Washington Boulevard, Suite 400
Sarasota, FL 34236
Counsel for Defendant Dianne D. Glenville a/k/a Diane D. Glenville
a/k/a Dianne Glenville

eservice@edwards-lawfirm.com
sedwards@edwards-lawfirm.com
Mark S. Glenville a/k/a Mark Glenville
4521 Dover St Cir. E
Bradenton, FL 34203

Matthew Sirmans, Esq.
Assistant General Counsel
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301
Counsel for Defendant, Florida Housing Finance Corporation
efiling@floridahousing.org

Fairfax Home Owners Association, Inc.
c/o Scott K. Petersen, Esq.
Becker & Poliakoff, P.A.
6230 University Parkway, Suite 204
Sarasota, Florida 34240
spetersen@becker-poliakoff.com
sarservicemail@bplegal.com

Megan Roach, Esq.
Albertelli Law
PO Box 23028
Tampa, FL 23028
servealaw@albertellilaw.com

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this motion complies with Florida Rule of Appellate Procedure 9.100(l) and has been formatted in Times New Roman 14 point font.

/s/ Julio C. Bertemati

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

April 26, 2017

THE BANK OF NEW YORK MELLON,)
f/k/a THE BANK OF NEW YORK, as)
successor trustee to JPMorgan Chase)
Bank, N.A., as trustee on behalf of the)
Certificateholders of the CWHEQ, Inc.,)
CWHEQ Revolving Home Equity Loan)
Trust, Series 2006-D,)
Appellant,)
v.)
DIANNE D. GLENVILLE, a/k/a DIANE D.)
GLENVILLE, a/k/a DIANE GLENVILLE;)
and MARK S. GLENVILLE,)
Appellees.)
_____)

Case No. 2D15-5198

BY ORDER OF THE COURT:

Appellant's motion for rehearing and request for certification are granted to the extent that the prior opinion dated January 20, 2017, is withdrawn, and the attached opinion is issued in its place. The motion for rehearing en banc is denied. No further motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL, CLERK

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

THE BANK OF NEW YORK MELLON,
f/k/a THE BANK OF NEW YORK, as
successor trustee to JPMorgan Chase
Bank, N.A., as trustee on behalf of the
Certificateholders of the CWHEQ, Inc.,
CWHEQ Revolving Home Equity Loan
Trust, Series 2006-D,

Appellant,

v.

DIANNE D. GLENVILLE, a/k/a DIANE D.
GLENVILLE, a/k/a DIANE GLENVILLE;
and MARK S. GLENVILLE,

Appellees.

Case No. 2D15-5198

Opinion filed April 26, 2017.

Appeal from the Circuit Court for
Manatee County; John F. Lakin, Judge

Anthony R. Smith and Kendra J.
Taylor of Sirote & Permutt, P.C.,
Winter Park; and Shaun K. Ramey and
Matthew R. Feluren of Sirote &
Permutt, P.C., Fort Lauderdale, for
Appellant.

Sheryl A. Edwards of The Edwards
Law Firm, PL, Sarasota, for Appellees.

SLEET, Judge.

The Bank of New York Mellon appeals the trial court's order denying its claim for surplus funds from a foreclosure sale.¹ Because the bank's claim was untimely, we affirm.

Under section 45.031(7)(b), Florida Statutes (2015), any person claiming a right to surplus funds must file a claim with the clerk of court within sixty days of the foreclosure sale. The record reflects that the underlying property was sold at public auction on July 2, 2015, and that the bank filed its claim for surplus funds as a subordinate lienholder on September 2, 2015, sixty-two days after the date the property was sold. The trial court denied the bank's claim as untimely filed. On appeal, the bank argues that a foreclosure sale is not complete until the clerk issues the certificate of sale. Because the certificate of sale in this case was issued on July 6, 2015, the bank claims that it had until September 4, 2015, to file a claim and that therefore its September 2, 2015, filing was timely. We disagree.

"The interpretation of a statute is a question of law, and it is therefore subject to a de novo review." Mathews v. Branch Banking & Tr. Co., 139 So. 3d 498, 500 (Fla. 2d DCA 2014) (citing W. Fla. Reg'l Med. Ctr., Inc. v. See, 79 So. 3d 1, 8 (Fla. 2012)). "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious

¹Diane and Mark Glenville were the property owners and defendants in the foreclosure action. They are entitled to the surplus funds remaining with the clerk more than sixty days after the foreclosure sale pursuant to section 45.031(7)(b), Florida Statutes (2015).

meaning." Gulf Atl. Office Props., Inc. v. Dep't of Revenue, 133 So. 3d 537, 539 (Fla. 2d DCA 2014) (quoting Hess v. Walton, 898 So. 2d 1046, 1049 (Fla. 2d DCA 2005)).

This court has previously explained that "the language in section 45.031(7)(b) is clear and unambiguous: any person claiming a right to the surplus funds must file a claim with the clerk no later than sixty days after the sale." Dever v. Wells Fargo Bank Nat'l Ass'n, 147 So. 3d 1045, 1047 (Fla. 2d DCA 2014); see also Mathews, 139 So. 3d at 500 ("The language of section 45.031(7)(b) is clear and unambiguous in requiring that any person claiming a right to the surplus funds 'MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE.' " (emphasis omitted)). This subsection only refers to the "sale," not the "certificate of sale." § 45.031(7)(b). This is significant because section 45.031 assigns particular and distinct meanings to the terms "sale" and "certificate of sale" and does not use them interchangeably. See § 45.031(4) ("After a sale of the property the clerk shall promptly file a certificate of sale and serve a copy of it on each party" (emphasis added)); .031(5) ("If no objections to the sale are filed within 10 days after filing the certificate of sale, the clerk shall file a certificate of title and serve a copy of it on each party." (emphasis added)). Reading subsection (7)(b) to require a claim for surplus funds to be filed within sixty days of the certificate of sale—instead of the actual sale itself—would render subsection (4) meaningless and would confuse the meaning of other subsections of the statute.

Additionally, such a reading would be inconsistent with this court's prior case law interpreting section 45.031(7)(b). In Mathews, this court explained that the bank "was required to file a claim with the clerk within sixty days after the sale of the

property to preserve any claim it may have had to the surplus funds." 139 So. 3d at 500 (emphasis added). Similarly, in Dever, this court used the date the property was sold at auction, not the date the certificate of sale was issued, as the start date for the sixty-day period. 147 So. 3d at 1047. Although using either date would not have changed the fact that the banks' claims were untimely, in both cases this court interpreted the language of the statute to refer to the date of the actual sale, not the issuance of the certificate of sale. See Mathews, 139 So. 3d at 499-500; Dever, 147 So. 3d at 1047.

For the first time on rehearing, the bank argues that the date of the sale should be calculated from the date of the issuance of the certificate of title. In support, it cites Straub v. Wells Fargo Bank, N.A., 182 So. 3d 878, 881 (Fla. 4th DCA 2016), which was published prior to the filing of the bank's initial brief. In Straub, the Fourth District held that "[u]nder section 45.01(1)(a), (2)(f), and (7)(b), a foreclosure 'sale' takes place when ownership of the property is transferred upon filing of the certificate of title." The bank waived this argument by failing to raise it in its appellate briefs. See Fla. R. App. P. 9.330(a) (stating that a motion for rehearing shall not include "issues not previously raised in the proceeding"); see also Teitelbaum, v. S. Fla. Water Mgmt. Dist., 176 So. 3d 998, 1005 n.3 (Fla. 3d DCA 2015) (holding that an argument raised for the first time in a motion for rehearing was waived), review denied, SC15-1994 (Fla. Mar. 16, 2016); Tillery v. Fla. Dep't of Juvenile Justice, 104 So. 3d 1253, 1255 (Fla. 1st DCA 2013) ("[A]n argument not raised in an initial brief is waived."); Philip Morris USA, Inc. v. Naugle, 103 So. 3d 944, 949 (Fla. 4th DCA 2012) ("It is a rather fundamental principle of appellate practice and procedure that matters not argued in the briefs may not be

raised for the first time on a motion for rehearing." (quoting Ayer v. Bush, 775 So. 2d 368, 370 (Fla. 4th DCA 2000))).

However, we recognize that our holding in this opinion conflicts with the Fourth District's holding in Straub. Therefore we must certify conflict. And we note that construing the term "sale" to refer to the issuance of the certificate of title confuses the meaning of several subsections of section 45.031. See, e.g., § 45.031(1)(a) (requiring the trial court to "direct the clerk to sell the property at a public sale" and stating that "[a] sale may be held more than 35 days after the date of final judgment"); .031(2) (requiring publication of a "[n]otice of sale" that "shall contain . . . [t]he time and place of sale"); .031(3) (stating that "[t]he sale shall be conducted at public auction" and requiring the highest bidder to post a deposit "[a]t the time of the sale"); .031(5) (requiring the clerk to file a certificate of title "[i]f no objections to the sale are filed within 10 days after filing the certificate of sale"); .031(6) ("When the certificate of title is filed the sale shall stand confirmed." (emphasis added)).

Because the bank filed its claim outside the statutory window, we must affirm the trial court's order denying the claim. In so doing, we note that the two cases on which the bank relies on appeal—In re Jaar, 186 B.R. 148, 154 (Bankr. M.D. Fla. 1995), and Shlishey the Best, Inc. v. CitiFinancial Equity Services, Inc., 14 So. 3d 1271, 1275 (Fla. 2d DCA 2009)—are inapplicable here because they both concern a mortgagor's right of redemption, which is governed by section 45.0315, not section 45.031.

Affirmed, conflict certified.

LaROSE and BADALAMENTI, JJ., Concur.

[Home](#) [About Us](#) [FAQ](#) [Contact Us](#)

Judicial Sales

Foreclosure sales (and/or any other type of judicial sale) are sales of properties ordered sold pursuant to final judgments in civil actions. The properties are offered for sale to the highest bidder in order to satisfy the judgment. The Clerk's Office conducts the sale or public auction in accordance with Florida Statutes. The information below offers a general overview of the foreclosure process, however these proceedings are governed by Florida Statutes and appellate case law interpreting these statutes. Anyone participating in these auctions should research not only the properties involved but the foreclosure court case and all the law governing the process.

Foreclosure Sale Process

In actions to foreclose mortgages or liens on real property, the court, in its final judgment will order a judicial sale of the property. The clerk conducts the sale in accordance with statutes governing judicial sales, set forth in Chapter 45, Florida Statutes. The plaintiff is entitled to a setoff bid up to the amount of the judgment plus any additional amounts due the plaintiff by court order or affidavit filed with the clerk. The Plaintiff is not required to tender a deposit and/or bid amount as the Plaintiff has a credit of the Judgment amount.

If the Plaintiff's bid amount exceeds the judgment amount, the Plaintiff IS required to provide the Clerk with an affidavit of additional amounts due reflecting the bid amount over and above the judgment amount. If an affidavit is not filed; the expectation is for the amount over and above the judgment amount to be paid to the Clerk by 9:00am on the next business day after the sale. If an affidavit and/or funds are not received by 9:00AM, a Certificate of No Sale will be issued.

While foreclosure judgments foreclose the interests of inferior mortgagees, lienholders and any other persons or entities named as parties to the action, served with process and whose interests are legally foreclosed by the court, title issued by the clerk after a judicial sale is not warranted to be free of any potential claims. **BUYER BEWARE!** All properties are sold "**AS IS**". Bidders are responsible for conducting their own research as to the property being sold, its location or condition, the condition of any structures or fixtures thereon, its marketability, potential uses, zoning, or whether any other potential liens or other defects in title that may exist.

The Clerk's Office is not authorized to give legal advice. If you require legal advice, you should obtain it from an attorney or some other source. The Clerk's office makes no representation about the condition, marketability, existing or potential uses, title, or encumbrances or existence of any condition, zoning regulation or law that may affect current or future uses of the property, regarding any property and structures or fixtures thereon offered for sale by the Clerk

Foreclosure Sales Information

Please visit our web site at: www.manateeclerk.com for further information on any case file you may be interested in bidding on. Our files are available on line by selecting Court Records. You can search by names or case number. Case numbers are listed on our Foreclosure Calendar by sale date. All sales scheduled for online auction will be listed with the letters OL in front of the case number and listed in green. Click on the case number and it brings you directly to the case docket screen. If you have not already done so, we invite you to become a subscriber to Public Records on our web site. This allows you to then view the images on line. This service is free of charge. You can fill out the attached subscriber agreement and return to our office: http://manateeclerk.com/Portals/0/docs/SubscriberAgreements/sa_pub.pdf

If you have any questions, please contact the foreclosure clerk at (941)741-4025, between the hours of 8:30am and 4:30pm, Monday thru Friday.

Location of Sale

Effective January 6th 2009, although the majority of sales are held via online auctions, there are foreclosure sales ordered to be held at our annex office pursuant to Judgment or Order of the Court and Chapter 45, Florida Statutes.

Date & Time of Sale

Tuesday thru Friday beginning at 11:00 AM ET, on the specified date, (except legal holidays).

Viewing Foreclosure Files

You must do your own research for each property.

Foreclosure actions and Sales Data may be viewed in person at our Public Access viewing area Monday thru Friday 8:30am to 4:30pm at the Manatee Historical Courthouse, 1115 Manatee Ave West. Bradenton FL 34205 or by using our web site: www.manateeclerk.com.

As mentioned above you may also become a subscriber to our website to view the files in the convenience of your home or office. Please fill out the subscriber agreement form attached above.

If you have any questions, please contact the foreclosure clerk at (941)741-4025, between the hours of 8:30am and 4:30pm, Monday thru Friday.

Bidding

Anyone may bid on a property however they must register on this web site and place a deposit prior to the sale. The site provides information for each pending sale, including the court case number and legal description. The Clerk and Realauction are not responsible for the quality or accuracy of any information provided on this site.

The following procedures for Chapter 45 sales apply unless the Final Judgment directs otherwise: Prior to participating in the sale, you will be required to place a deposit equal to 5% of your estimated successful final bid(s), either on this site via electronic check (ACH) or in person in cash or cashier's check or money order. **CASHIER'S CHECK or MONEY ORDERS SHALL NOT BE MORE THAN SIX (6) MONTHS OLD**, and shall be payable to: **CLERK OF THE CIRCUIT COURT**. If you choose to place your funds on deposit by ACH deposit, **PLEASE NOTE:** Deposit payments made via ACH require 4 full working days to arrive (settle) in the Clerk's account. Deposits made by ACH must be settled and cleared in the Clerk's account prior to the start of a sale in order to be able to bid on a property.

Successful Bidder

If a bidder is successful, the funds initially deposited will be deducted and credited toward the total amount due. **The successful bidder must pay the balance of the final bid plus the registry of the court service charge no later than 9:00AM ET on the next business day after the sale via electronic check (ACH), or in person with cash or cashier's check or money order at the clerk's office. If funds are not received by 9:00am on the next business day after the sale, a certificate of no sale will be issued. THERE WILL BE NO EXCEPTIONS.** Documentary stamp taxes must be paid within 10 days after the sale.

Registry of the Court Service Charge

The clerk will charge the successful bidder a registry of the court service charge on the full amount of the successful bid. Pursuant to Florida Statute 28.24(10) the service charge assessed will be 3% of the first \$500.00 and 1.5% for each subsequent \$100.00. This charge must be paid at the time of the final payment. In the event the Foreclosure Sale is set aside by order of the court, there is no refund of the registry of the court service charge.

Documentary Stamp Taxes

Documentary stamp taxes for the transfer of title to the successful bidder are due to the State of Florida. Prior to the issuance of the Certificate of Title, the successful bidder is required to pay the clerk all documentary stamp taxes due. This amount due is \$.70 per \$100.00 of the final bid. Successful bidders will be informed of the amount of documentary stamp taxes due in the email confirming a successful bid. This amount is paid along with the sale amount balance and registry of the court service charge or within 10 calendar days of the sale.

Forms of Final Payment

Payment must be made in the form of electronic check (ACH), cash, cashier's check, or money order payable to the Clerk of the Circuit Court.

Failure to Pay

Failure to pay the balance due of the final bid and required service charge, no later than 9:00am on the next business day after the sale, will result in the sale being declared VOID, and a resale will be scheduled. The bidder's deposit is forfeited, non-refundable and will be used to pay all cost of the resale. As permitted under Florida Statute 28.24, the clerk will assess from the deposit, the registry of the court service charge and the cost of advertising the resale. Any remaining funds from the deposit shall be applied toward the judgment.

Certificates

A Certificate of Sale is issued by the clerk provided all amounts due are paid in full. Objections to the sale may be filed with the Clerk of the Circuit Court within ten (10) days after the filing of the Certificate of Sale. If an objection to the sale is filed, the clerk will not issue a certificate of title until the court enters an order on the objection.

A Certificate of Title will be issued by the clerk after ten (10) full days have elapsed from the issuance of the Certificate of Sale and provided there is no objection or other action relating to the subject proceeding pending.