

IN THE SUPREME COURT OF FLORIDA

MARIE ANN GLASS)	
)	
Petitioner,)	SC Case No.: SC17-1387
)	
v.)	DCA Case No.: 4D15-4561
)	
NATIONSTAR MORTGAGE, LLC)	LT Case No.:
)	CACE-12-027304 (11)
Respondent.)	

RESPONDENT’S RESPONSE TO PETITIONER’S NOTICE OF FILING SUPPLEMENTAL AUTHORITY

Respondent Nationstar Mortgage, LLC (“Nationstar”) submits the following response to Petitioner Marie Ann Glass’s Notice of Supplemental Authority.

Glass’s reliance on *Madl v. Wells Fargo Bank, N.A.*, 5D16–53, ___ So. 3d ___, 2017 WL 6624243 (Fla. 5th DCA, Dec. 29, 2018) as supplemental authority is misplaced. *Madl* creates no direct conflict with this case because there is no indication that the Fifth District Court of Appeals’ award of appellate fees was based upon Fla. Stat. § 57.105(7). See **Exhibit 1** (order granting fees). Indeed, the *Madl* appellant’s lead argument for fees was based on Fla. Stat. § 48.23. See **Exhibit 2** (relevant portion of *Madl*’s motion for fees).

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Respectfully submitted,

January 17, 2018

/s/ Marc James Ayers

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2018, a copy of the foregoing was served via electronic mail upon the following:

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/s/ Marc James Ayers

OF COUNSEL

Exhibit 1

STRICKMAN

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JOE MADL AND MELISSA MADL,

Appellants,

v.

CASE NO. 5D16-0053

WELLS FARGO BANK, N.A., AS TRUSTEE UNDER
THE POOLING AND SERVICING AGREEMENT
RELATING TO IMPAC SECURED ASSETS CORP.,
MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2005-2, ET AL.,

Appellees.

_____ /

DATE: December 29, 2017

BY ORDER OF THE COURT:

ORDERED that Appellants' Second Amended Motion For Attorney's Fees, filed June 8, 2017, is granted and the above-styled cause is hereby remanded to the Circuit Court for Brevard County, Florida, pursuant to Florida Rule of Appellate Procedure 9.400(b), to determine and assess reasonable attorney's fees for this appeal.

*I hereby certify that the foregoing is
(a true copy of) the original Court order.*

Joanne P. Simmons
JOANNE P. SIMMONS, CLERK



Panel: Judges Orfinger, Wallis, and Edwards

cc:

Albert D Gibson

Manuel Santiago Hiraldo

David S Ehrlich

Nicole R Topper

Michael H Casanover

Jacob A Brainard

Adam Shamir

Clerk Brevard

(05-2009-CA-28637)

Beau Bowin

Scott C Davis

Monika E Siwec

Exhibit 2

STRICKMAN

THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT, FLORIDA

JOE MADL and MELISSA)
MADL)

APPELLANTS')

vs.)

Case No. 5D16-0053

Cir. Ct. Case No. 05-2009-CA-28637
Brevard County, Florida

WELLS FARGO BANK, N.A.)

APPELLEE)
_____)

**APPELLANTS' SECOND AMENDED
MOTION FOR STATUTORY FEES AND COSTS**

The Appellants, pursuant Fla. Stat. § 48.23, and the contract between the parties, move the Court for an order taxing attorney's fees and cost incurred in dissolving the lis pendens filed in this action, and as grounds states:

A. Pursuant to Florida Statute § 48.23, Appellants are entitled to recover attorneys fees and costs incurred in dissolving the lis pendens filed in this case. *See S & T Builders v. Globe Properties, Inc.*, 944 So. 2d 302, 304 (Fla. 2006)

Florida Statute § 48.23(3) provides that "the court shall control and discharge the recorded notice of lis pendens as the court would grant and dissolve injunctions." Because dissolving an injunction authorizes the court to award attorney fees to the prevailing party, section 48.23(3) authorizes an award of attorney fees to the owner

of the property for successfully discharging a lis pendens on his property. *See S & T Builders v. Globe Properties, Inc.*, 944 So. 2d 302, 305 (Fla. 2006) (“Since the attorney's fees incurred in obtaining the dissolution of an injunction are recoverable from a surety bond, we conclude that section 48.23 of the Florida Statutes similarly permits a recovery of the attorney's fees incurred in obtaining a discharge of a lis pendens.”); *Abner v. Johnson*, 56 So. 3d 137, 139 (Fla. 4th DCA 2011) (“We therefore reverse the trial court's order denying the purchaser attorney's fees under section 48.23. Because the dissolving of a lis pendens operates as an adjudication of its validity, ***a property owner should be entitled to attorney's fees whether or not a bond was posted.***”)¹ (emphasis added); *McMillan/Miami, LLC v. Krystal Capital Managers, LLC*, 1 So. 3d 312, 315 (Fla. 3d DCA 2009) (“McMillan/Miami should be allowed to show that Krystal wrongfully filed its notice of lis pendens and that it incurred foreseeable damages in attempting to dissolve the lis pendens so as to be entitled to recover attorney's fees.”).

By its express language, § 48.23 authorizes fees where “the action no longer affects the subject property...” and “applies to all actions now or hereafter pending in any state or federal courts in this state...” *See Fla. Stat.* 48.23(3) and (4),

¹ Some litigants previously argued that an award of fees was only authorized where that party filing the lis pendens posted a surety bond, and that the recover of fees was limited to the amount of the bond. The *Abner* court makes clear that the property owner is entitled to attorney fees regardless of whether a bond was posted.

respectively. If successful in this appeal, the *lis pendens* Appellee filed in this action will be automatically dissolved and this action will no longer affect the subject property. *See* Fla. R. Civ. P. § 1.420(f) (“If a notice of *lis pendens* has been filed in connection with a claim for affirmative relief that is dismissed under this rule, the notice of *lis pendens* connected with the dismissed claim is automatically dissolved at the same time.”). Pursuant to Fla. Stat. § 48.23 (3) and (4), Appellant is entitled to recover attorney’s fees and costs incurred in dissolving the *lis pendens*. Appellee received the benefits of section 48.23 when it filed its *lis pendens*. Appellee must now bear its obligations under the statute, including payment of Appellant’s reasonable attorney fees in having the *lis pendens* dissolved and this case dismissed.²

B. Appellant is entitled to recover attorney fees pursuant to the Mortgage. Distinguishing *Bank of N.Y. Mellon Trust Co., N.A. v. Fitzgerald*, No. 3D16-981, 2017 WL 815352 (Fla. 3d DCA 2017).

Undersigned is aware of recent case law stating that, where the plaintiff is found not to be a party to a mortgage, the defendant is not entitled to recover attorney fees under that mortgage. *See Bank of N.Y. Mellon Trust Co., N.A. v.*

² Appellant was not required to specifically plead Fla. Stat. 48.23 in its answer to be entitled to recover under the statute. It was enough that Appellant’s answer put the Appellee on notice that Appellant would be seeking to recover fees and costs. *See Caufield v. Cantele*, 837 So. 2d 371, 377-78 (Fla. 2002) (“We hold that the specific statutory or contractual basis for a claim for attorney's fees need not be specifically pled, and that failure to plead the basis of such a claim will not result in waiver of the claim.”).