IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 03-936
Lower Tribunal No. 4D02-667

GWENDOLYN SINGLETON and WILLIAM SINGLETON

Petitioners,

v.

GREYMAR ASSOCIATES

Respondent.

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal of a summary final judgment of foreclosure in favor of Respondent and against Petitioners. The foreclosure sale was scheduled for February 25, 2002 when an appeal was brought before the Fourth District Court of Appeal.

At the trial level Petitioners asserted no defenses with regard to the validity of the note and mortgage, with regard to Petitioners' default thereunder and with regard to the amounts due and owing.

The only defense asserted by Petitioners at the trial level was that in a prior foreclosure action between the same parties the Court dismissed the action for Respondent's failure to attend a Case Management Hearing.

Similarly, Petitioners filed no affidavits in opposition to Respondent's Motion for Summary Final Judgment but again relied solely on this same defense.

The Fourth District Court of Appeal affirmed the summary final judgment of foreclosure on the basis that the instant foreclosure action involved a new and different breach under the note and mortgage than the first and previously dismissed foreclosure action.

SUMMARY OF ARGUMENT

The dismissal of a prior and separate foreclosure action for Respondent's failure to attend a Case Management Conference was not a dismissal on the merits of the case and not res judicata as to the present foreclosure action.

More importantly, as held by the Fourth District Court of Appeal the instant foreclosure action was based upon a subsequent and separate default and, hence, not barred by the earlier dismissal.

ARGUMENT

THE DISMISSAL OF A PRIOR FORECLOSURE ACTION FOR THE MORTGAGEE'S FAILURE TO ATTEND A CASE STATUS CONFERENCE DOES NOT BAR A SUBSEQUENT FORECLOSURE ACTION WHICH IS BASED UPON A SUBSEQUENT AND NEW BREACH

At the trial level foreclosure action Respondent's foreclosure complaint and its Affidavit of Amounts Due filed in support of its Motion for Summary Judgment established that the earlier foreclosure action, Case Number 00-2317 CACE 12 filed in February 2000 was filed when Petitioners were in default for failing to make the mortgage payment due September 1, 1999.

Subsequent to filing that foreclosure action Petitioners paid Respondent $2,000.00 which Respondent applied to the mortgage account and allowed Petitioners to resume regular monthly mortgage payments.

Respondent's instant foreclosure action was filed in July, 2001 and was based upon Petitioners' failure to make the mortgage payment due April 1, 2000.

At the trial level, Petitioners did not file any pleadings or affidavits, or offer any other proof which contradicted Respondent's affidavit. The Fourth District Court of Appeal rightfully relied upon Capital Bank vs. Needle, 596 So. 2d 1134 (Fla. 4th DCA 1992) in upholding the trial Court's entry of summary final judgment. The holding is further supported and factually on point with Olympia Mortgage Corp. vs. Pugh, 774 So. 2d 863 (Fla. 4th DCA 2000).

Furthermore, as stated in Greene vs. Boyette, 587 So. 2d 629 (Fla. 1st DCA 1991) "it is axiomatic that a suit for one installment payment does not preclude suit for a later installment on a divisible contract."

To the extent that Petitioners ask that this Court rely upon Stadler vs. Cherry Hill Developers rather than the holdings of Capital Bank, Olympia, and Greene then Respondent submits that these latter cases provide for a more sound result.

Under the position taken by Petitioners which they assert is supported by Stadler, a mortgage holder who was prohibited by a court from foreclosing a mortgage on the most technical of grounds (i.e. non-compliance with a notice provision or a mathematical or record keeping error) would forever be barred from foreclosing on the mortgage even if the mortgage holder subsequently breached the mortgage. Such a result would be inequitable and constitute an absurd windfall to borrowers, and as a matter of public policy would place the mortgage lending business in a state of uncertainty and disarray.

CONCLUSION

Petitioners' sole defense to the foreclosure action was not a basis to preclude the entry of judgment in favor of Respondent. Therefore, the ruling of the Fourth District Court of Appeal entering summary final judgment in favor of Respondent should be affirmed.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by regular mail to William Chennault, Esquire, Attorney for Petitioners P.O. Box 1097, Ft. Lauderdale, FL 33302-1097 and to the City of Hallandale, c/o Mayor Arnold Lanner, City Attorney's Office, 400 S. Federal Highway, Hallandale, FL 33009 this _____ day of January, 2004.

MARK EVANS KASS, ESQUIRE

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY pursuant to Rule 9.210 of the Florida Rules of Appellate Procedure that this brief was prepared using Times New Roman 14-point font in compliance with Rule 9.210 (a) (2).

MARK EVANS KASS, ESQUIRE