IN THE SUPREME COURT OF APPEAL

GWENDOLYN SINGLETON,
Et. Vir.,

Petitioners,

-vs-

GREYMAR ASSOCIATES,

Respondent./

CASE NO. SC03-936

Lower Tribunal No. 4D02-667

APPEAL FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT

PETITIONERS' AMENDED INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

The Petitioners, GWENDOLYN SINGLETON and WILLIAM BRETT SINGLETON, seek to have reviewed a decision of the District Court of Appeal, Fourth District, dated and filed on March 5, 2003.

The Petitioners were the original Defendants in the trial court and the Appellants before the District Court of Appeal. The Respondent, GREYMAR ASSOCIATES, was correspondingly the Plaintiff and Appellee. This was an appeal by the Petitioners from a summary final judgment of foreclosure. The District Court of Appeal, Fourth District, affirmed the summary final judgment of foreclosure.

In this brief the parties will be referred to by their names and by the positions they occupy before this Court. The following symbols will be used for reference: "R" for "Record" and "A" for "Appendix To Petitioner' Brief."

The Petitioners, GWENDOLYN SINGLETON and WILLIAM SINGLETON, own the real property located in Hallandale, Broward County, Florida. At one time the Respondent, GREYMAR ASSOCIATES, held a

mortgage on the said real property. On July 19, 2001 the Respondent filed a foreclosure action against the Petitioners for their alleged failure to make mortgage payments as they became due and owing (R 1,2). The Petitioners responded by filing a Motion To Dismiss, alleging, among other things, res judicata in that there was a prior foreclosure action between the same parties involving the same real property that had been involuntarily dismissed without the Respondent seeking a rehearing, appealing or otherwise contesting the order of involuntary dismissal (R 16, 17). The Respondent's first foreclosure action against the Petitioners was filed on February 10, 2000 (R 60) and was involuntarily dismissed on July 14, 2000 for the Respondent's failure to comply with an order of court (R 28, 29). The two (2) foreclosure actions were essentially identical except that the default of payment due in September, 1999 was alleged in the first foreclosure and the default alleged in the second foreclosure was April, 2000 (R 1-2, 60-62). The Respondent claimed receipt of payment from the Petitioners for the period between September, 1999 and April, 2000 (R 31, 33) and Petitioners denied the same (R 25). Both foreclosure actions elected to accelerate the entire indebtedness against the Petitioners (R 58-63, 1-6).

The Petitioners' Motion To Dismiss was denied on September 25, 2001 (R 19) and their Motion For Reconsideration was denied on January 16, 2002 (R 57). The Respondent's Motion for Summary Final Judgment was heard and granted

on January 10, 2002 (R 41-44) and the Petitioners' Motion for Rehearing was denied on February 4, 2002. The Petitioners' appeal followed on February 15, 2002 (R 66). That appeal to the District Court of Appeal, Fourth District, was denied by opinion rendered on March 5, 2003 (A 1) and Petitioners' Motion For Rehearing was denied on April 16, 2003. The Petitioners' Notice To Invoke Discretionary Jurisdiction was filed with this Court on May 16, 2003 and jurisdiction was accepted on October 1, 2003.

SUMMARY OF ARGUMENT

Whether the District Court of Appeal, Fourth District, erred, as a matter of fact and law, in affirming the lower court's summary final judgment of foreclosure for the Respondent where the Respondent's prior foreclosure action was involuntarily dismissed for its failure to comply with an order of court; where the Respondent failed to seek rehearing, appeal or otherwise contest the involuntary dismissal; and where the Respondent, more than one (1) year later, filed the same foreclosure action against the Petitioners, who contend that the second foreclosure action was res judicata because the first foreclosure action operated as an adjudication on the merits under Rule 1.420(b) of the Florida Rules of Civil Procedure?

The Petitioners answer that question in the affirmative. The Respondent, following the entry of the order of involuntary dismissal, could and should have sought a rehearing, an appeal or otherwise contested said order, but did not. The Respondent could and should have sought relief from the judgment (order of involuntary dismissal) under FRCP 1.540 (b), but did not. The Respondent could and should have voluntarily dismissed that first foreclosure action under FRCP 1.420(a), in that the Respondent alleged receipt of a subsequent mortgage payment (Petitioners denied making such a payment) prior to the entry of the order of involuntary dismissal, but did not. Instead, the Respondent waited more than one (1) year later to file the second foreclosure action from which it seeks to avoid the consequences of FRCP 1.420(b) where it did absolutely nothing, but had an obligation to do something, to avoid the consequences of the (final) order of involuntary dismissal. The Respondent should not be rewarded for utterly, intentionally or negligently, ignoring the applicable rules of civil and appellate

procedure where proper utilization thereof would have obviated our presence before this Honorable Court today.

The petitioners contend that as a matter of fact and law, there was not a new and different default so as to support a second foreclosure action and avoid the res judicata consequences of the subject order of involuntary dismissal. There are approximately four (4) months between the alleged receipt of subsequent mortgage payments and the entry of the said order of involuntary dismissal. The receipt of partial payments is not a proper way to voluntary dismiss a case and the subsequent entry of the order of involuntary dismissal "locked in" those approximate four (4) months of unpaid mortgage payments, thereby making the initial default necessarily not cured and also making it not legally possible to cure because the order of involuntary dismissal constituted an adjudication on the merits. To allow the Respondent to claim a new and different default would be to improperly permit it to collaterally attack the (final) order of involuntary dismissal that constituted an adjudication on the merits; the Respondent is seeking to indirectly undermine the said (final) order where, due to its negligent conduct, it should be estopped from doing so.

Finally, this cause involves the application and interpretation on FRCP 1.420(b) and is controlled by said rule and Stadler v. Cherry Hill Developers, Inc., a case that is directly on point with the case at bar. On the other hand, the cases

cited by the 4th DCA in support of its opinion for the Respondent involve the application and interpretation of FRCP 1.420(a). These two (2) cases, Capital Bank v. Needle and Olympia Mortgage Corp. v. Pugh, are strikingly different from Singleton v. Greymar Associates, the case at bar. If you accept the construction of the law as given in these two (2) cases regarding mortgage foreclosure actions and the doctrine of res judicata, that doctrine would never or almost never apply because the mortgagee would always or almost always "claim" a new and different default date in an effort to avoid the effect of FRCP 1.420 (b), as is the case in the instant cause; new and different default dates are too easily manufactured and parties might be inclined to do so in order to avoid being thrown out of court due to the application of the doctrine of res judicata.

ARGUMENT

THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, ERRED, AS A MATTER OF LAW, IN AFFIRMING THE LOWER COURT'S SUMMARY FINAL JUDGMENT (OF FORECLOSURE) FOR THE RESPONDENT WHERE THE RESPONDENT'S PRIOR FORECLOSURE ACTION WAS INVOLUNTARILY DISMISSED FOR ITS FAILURE TO COMPLY WITH AN ORDER OF COURT; WHERE THE RESPONDENT FAILED TO SEEK REHEARING, APPEAL OR OTHERWISE CONTEST THE INVOLUNTARY DISMISSAL; AND WHERE THE RESPONDENT, MORE THAN ONE (1) YEAR LATER, FILED THE SAME FORECLOSURE ACTION AGAINST THE PETITIONERS, WHO CONTENTED THAT THE SECOND FORECLOSURE ACTION WAS RES JUDICATA BECAUSE THE FIRST FORECLOSURE ACTION OPERATED AS AN ADJUDICATION ON THE MERITS UNDER RULE 1.420(b) OF THE FLORIDA RULES OF CIVIL PROCEDURE.

The Petitioners, GWENDOLYN SINGLETON and WILLIAM SINGLETON, ask that this Honorable Court reverse the ruling of the District Court of Appeal, Fourth District, affirming the summary final judgment of foreclosure entered for the Respondent and denying the Petitioners' application for a rehearing. Neither the record nor the law support the Respondent's position and the District Court's ruling.

This case is controlled by Rule 1.420(b) – **Involuntary Dismissal –** of the Florida Rules of Civil Procedure and the case of Stadler v. Cherry Hill Developers, Inc., 150 So. 2d 468 (Fla. 2nd DCA 1963). The facts herein show that the Respondent, GREYMAR ASSOCIATES, held a mortgage on real property owned by the Petitioners, GWENDOLYN SINGLETON and WILLIAM SINGLETON, and located in Hallandale, Broward County, Florida (R 1, 2, 60-62).

On February 10, 2000 the Respondent initiated its first foreclosure action against the Petitioners in Case No. 00-2317 12 in the Circuit Court of the 17th Judicial Circuit, in and for Broward County, Florida (R 60-62). On June 7, 2000 an Order Setting Case Management Conference was entered requiring the appearance of the parties in person or by their attorneys at the case management conference scheduled for July 14, 2000 (R 23, 24, 28, 29, 63-65). The Petitioners and their attorney appeared at the scheduled conference, however, the Respondent nor its attorney appeared. As a direct result thereof, an Order Of Dismissal for the Respondent's failure to comply with an order of court was entered (R 28, 29).

Following the entry of the involuntary dismissal of the Respondent's foreclosure action, the Respondent failed to seek rehearing, appeal or otherwise contest the involuntary dismissal (R 20-24). Rule 1.540 (b) - **Relief from Judgment, Decrees or Orders -** of the Florida Rules of Civil Procedure clearly was an avenue of relief available to the Respondent. Section (b) thereof provides that "on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, decree, order or proceeding…." Certainly the alleged receipt of default payments by the Respondent from the Petitioners subsequent to the filing of the first foreclosure action and prior to the involuntary dismissal order of July 14, 2000 could have constituted a basis, if

proven, for the granting of relief to the Respondent, to wit, vacating and setting aside the Order Of Dismissal entered on July 14, 2000. In fact, 1.540 (b)(5) allows for the application for relief on the ground that the judgment or decree has been satisfied. The Respondent could and should have alleged, in a motion "made within a reasonable time" as the rule provides, satisfaction of the judgment (involuntary order of dismissal). And although the Respondent never alleged mistake, inadvertence, surprise or excusable neglect as allowed by 1.540(b)(1), it could have and should have made a motion thereunder within one (1) year of the July 14, 2000 involuntary dismissal order. Instead, the Respondent waited until July 19, 2001, more than a year later, to file the second foreclosure action (R 1, 2).

The rules provide a road map for litigants for the purpose of guiding them through the traffic of litigation without causing accidents and with as much facility as possible under the given circumstances. If the rules are observed this purpose can be carried out and realized. However, in the instant cause this did not happen because the Respondent did not observe or obey the rules. If the Respondent had obeyed the June 7, 2000 Order Setting Case Management Conference, the July 14, 2000 involuntary Order Of Dismissal would not have been entered and we would not be here now. If the Respondent had observed the rules and sought a rehearing under Rule 1.530; sought relief from the involuntary order of dismissal under Rule 1.540; or pursued an appeal under Rule 9.110 of the rules of appellate

procedure, perhaps we would not be here now. This legal accident was caused by the Respondent and the Respondent should accordingly be charged with it and not the Petitioners.

As for Rule 1.420(b), it provides that "unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication on the merit." Florida Rules of Court, State and Federal, 2002. In the instant cause it is abundantly clear that the Order Of Dismissal of July 14, 2000 is an involuntary dismissal that falls under Rule 1.420(b). It is clear that the reason for the dismissal was the failure of the Respondent to obey the court order of June 7, 2000. Additionally, it is clear that the dismissal was not one for lack of jurisdiction or for improper venue or for lack of an indispensable party. Therefore, the inescapable conclusion is that this involuntary dismissal operates as an adjudication on the merits under Rule 1.420(b). Furthermore, the Order Of Dismissal of July 14, 2000 is final and binding in that the Respondent failed to seek a rehearing, failed to appeal and failed to otherwise contest the said order (R 20-24). **In other words, the Respondent did absolutely nothing to avoid the consequences of the involuntary dismissal.**

The District Court of Appeal, Fourth District, concluded that the application of the doctrine of res judicata did not bar the second foreclosure action because the second action allegedly involved a new and different breach (A 1). The Petitioners contend that this is factually and legally incorrect. First, the default in the first foreclosure action was never cured. The Respondent asserted, via an affidavit in support of its summary judgment motion, that the Petitioners made mortgage payments to the Respondent, subsequent to the September, 1999 default, that brought the Petitioners current through March, 2000 (R 30-36), although the Petitioners denied making such payments (R 25). Nevertheless, the involuntary dismissal was not entered until July 14, 2000, leaving approximately four (4) months of unpaid mortgage payments prior to the dismissal and, accepting for the sake of argument that the alleged payments were made, the Respondent should have and had an obligation to file a notice of voluntary dismissal pursuant to Rule 1.420 (a)(1) of the Florida Rules of Civil Procedure. Having not done so and having once again not observed another rule of procedure, the Petitioner contends that the July 14, 2000 involuntarily order of dismissal "locked in" the approximate four (4) months of unpaid mortgage payments and necessarily meant that the initial default was not cured and also

made it not legally possible to cure because the July 14, 2000 involuntary order of dismissal constituted an adjudication on the merits.

As already stated and established, the Respondent in no way, shape or form assailed or attempted to assail that July 14, 2000 involuntary order of dismissal (R 20-24). The said order, constituting an adjudication on the merits, necessarily determined that no payments were made between September 1, 1999 and July 14, 2000 because the Respondent assailed it not. To determine, as the Fourth District did, that the second action involved a new and different breach is factually and legally erroneous because the Respondent never caused the said July 14, 2000 order to be vacated. That said order was conclusive as to all matters prayed for by the Respondent in that foreclosure action and no new breach date was factually or legally possible. And this said order was binding on the Respondent; because of it, the Respondent had no factual or legal basis on which to file a second foreclosure action. To allow the Respondent to claim a new and different default date would be to improperly permit it to collaterally attack the (final) order of involuntary dismissal that constituted an adjudication on the merits; the Respondent is seeking to indirectly undermine the said (final) order where he failed to directly attack it when he had the opportunity under the applicable rule.

Plain and simply put, the Respondent was bound by the (final) order of involuntary dismissal.

Second, Stadler v. Cherry Hill Developers, Inc. holds that insofar as res judicata is involved, a final decree in a prior suit from which no appeal was taken is conclusive as to all matters which were or could have been presented in that suit. "The decree of dismissal was entered "with prejudice." If appellants felt this to have been error, they could have availed themselves of proceedings to amend or appeal. Failing to do this, they will generally not be allowed to question that decree or to relitigate issues concluded by it." Id. at 471. Stadler also holds that a suit for one installment payment does not preclude suit for a later installment on a divisible contract, but that an election to accelerate puts all future installment payments in issue and foreclosures successive suits. Id. at 472. Just as in Stadler the Respondent in the instant cause took no appeal from final decree in a prior suit; consequently, just as in Stadler that final decree (involuntary dismissal order) of July 14, 2000 was conclusive as to all matters which were or could have been presented in that suit; just as in Stadler the order of dismissal was entered with prejudice; just as in Stadler if the Respondent felt this to have been error, it could have availed itself of proceedings for relief or appealed; just as in Stadler, the Respondent herein, having failed to do this, will not be allowed to question

that decree or to relitigate issues concluded by it, however, the Fourth District, by its opinion of March 5, 2003, has erroneously attempted to relitigate issues concluded by the July 14, 2000 involuntary dismissal order; just as in Stadler the subject action involves installment payments on a divisible contract; and just as in Stadler the Respondent elected to accelerate and thus put all future installment payments in issue and foreclosed successive suits.

The District Court of Appeal, Fourth District, in affirming the Respondent's summary final judgment of foreclosure, relied on two (2) cases that are strikingly different from the case at bar – two (2) cases that involve the application and interpretation of FRCP 1.420 (a) rather than the application and interpretation of FRCP 1.420 (b), as in the Singleton case. First, there is Capital Bank v. Needle, 596 So. 2d 1134 (Fla. 4th DCA 1992). In that case a voluntary dismissal with prejudice was executed by the appellant bank. As a condition therefor appellees mortgagors were required by the appellant bank to execute a letter acknowledging that a substantial payment to the bank from the proceeds of the sale of the subject real property was only a partial payment on the debt owed to the appellant bank. Thereafter, the sale took place, the bank received the agreed upon partial payment and the voluntary dismissal executed by the bank was released from escrow and filed. When the mortgagors failed to make any

further payments to the bank, the bank sued for the balance on the note. The mortgagors sought and obtained a summary judgment on the grounds that the dismissal with prejudice of the mortgage foreclosure action constituted a bar to the new suit. On these facts the appellate court indicated, "Our reading of the case law set out above leads us to conclude that a final adjudication in a foreclosure action that also prays for a deficiency judgment on the underlying debt may, but does not necessarily, bar a subsequent action on the debt." Id. at 1138. Clearly, the appellate court recognized that the appellees mortgagors had essentially agreed that the bank could proceed to collect the deficiency when they executed the letter acknowledging a partial payment to the bank, Rule 1.420(a) - **Voluntary Dismissal** – notwithstanding. In that regard Petitioners contends that the appellate court stretched its construction of the rules and cases to do perceived justice to the appellant bank. In this instance 'hard cases made bad law'.

Second, there is Olympia Mortgage Corp., v. Pugh, 774 So. 2d 863 (Fla. 4th DCA 2000), review denied, 791 So. 2d 1100 (Fla. 2001). In this case the appellant mortgage company voluntarily dismissed two (2) foreclosure actions and initiated a third one against the appellees mortgagors. Both mortgage foreclosure actions were based on the same promissory note in each and the mortgage

company elected to accelerate payment of the entire sum due on the note and mortgage. The mortgage asserted the two dismissal rule, Florida Rules of Civil Procedure 1.420(a), as an affirmative defense. The trial court found, among other things, that the instant foreclosure action presented the same claim as the two prior foreclosure actions, irrespective of the different defaults alleged therein. The mortgage company appealed. The appellant court disagreed that the election to accelerate placed future installments at issue and cited Capital Bank in support thereof. "Applying the reasoning in Capital Bank to this case,…..by voluntarily dismissing the suit, Olympia in effect decided not to accelerate payment on the note and mortgage at that time. Accordingly, whether the mortgagor will make future installment payments is not at issue in a foreclosure action. The issue is whether there has already been a default which if decided in favor of the mortgagee, would entitle the mortgagee to elect to accelerate and foreclose in accordance with the note and mortgage." Id. at 865, 866. Under this construction of the law there could never be a res judicata case, where that doctrine is applicable, in a mortgage foreclosure action. The default dates, if the Fourth District's construction of the law in accepted, would always be different and therefore a res judicata case always precluded. The facts of Capital Bank and Olympia Mortgage Corp. clearly show that they have very little in common with

those of the Singleton case, the case at bar. Strained construction appears to have been utilized in those two (2) cases to arrive at the desired result. On the other hand, the Stadler case is practically identical to the Singleton case. Of the three (3) cases cited, the Petitioners contend that Stadler case is the more enlightened one and the one that should be applied by this Honorable Court.

CONCLUSION

Rule 1.420(b) of the Florida Rules of Civil Procedure controls the case at bar. That rule is succinctly and unequivocably written and was properly applied in the Stadler v. Cherry Hill Developers, Inc. case. The Petitioners contend that it should be likewise applied in the case at bar. Clearly the Respondent herein has failed to obey and observe applicable rules and orders of court and the same has resulted in our presence before this Honorable Court at this time. There are negative consequences for ones failure to abide by the rules of procedure designed to govern litigants and litigations. The Respondent failed to seek rehearing, failed to seek relief from the order in question, failed to appeal and failed to voluntarily dismiss its first foreclosure action, when it had a responsibility to do so, after allegedly receiving mortgage payments from the Petitioners prior to

the entry of the involuntary dismissal order on July 14, 2000. The Petitioners have abided by the rules. They read Rule 1.420(b); applied its plain meaning to the facts of their case; and proceeded with litigation based on its plain meaning, that is, an involuntary dismissal operates as an adjudication on the merits. Mortgage foreclosures, divisible contracts, elections to accelerate, deficiency relief, etc. are not set forth therein as exceptions to this rule.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by regular mail to MARK EVANS KASS, ESQUIRE, Mark Evans Kass, P.A., Attorney for Respondent, 1497 N.W. 7th Street, Miami, FL 33125 and to the City of Hallandale, c/o Mayor Arnold Lanner, City Attorney's Office, 400 S. Federal Highway, Hallandale, FL 33009 this 19th day of December, 2003.

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I HEREBY CERTIFY that the foregoing computer-generated brief is submitted in compliance with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

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William Chennault, Esq.