IN THE SUPREME COURT
OF FLORIDA.

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
FOUR'IH DISTRICT

PETITIONERS' REPLY BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

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," "A" for "Appendix To Petitioners' Brief" and "RB" for "Respondent's Brief."

The Petitioners hereby adopt their Statement of the Case and of the Facts as set forth in Petitioners' Amended Initial Brief on the Merits. Regarding the Respondent's Statement of the Case and of the Facts, the Petitioners maintain that the representations contained in paragraphs three (3) and four (4) thereof relative to defense(s) asserted by the Petitioners at the trial level are incorrect (RB 1.). The Petitioners denied in their Answer and Affirmative Defenses, in paragraph two (2) thereof, that there was a new and different default date of April 1, 2000 (R 25); and asserted waiver and estoppel as defense(s) in paragraph six (6) thereof (R 26) and in their Motion For Reconsideration, paragraph eight (8) thereof, of the denial of the Petitioners' Motion To Dismiss heard on September 25, 2001 (R 21). In that regard, these defenses are not being raised for the first time on appeal but were in fact raised on the trial level.

SUMMARY OF ARGUMENT

The Petitioners hereby adopt their Summary Of Argument set forth in their Petitioners' Amended Initial Brief on the Merits. In response to the Respondent's Summary Of Argument, the Petitioners contend that the Order Of Dismissal of July 14, 2000 was an involuntary dismissal pursuant to Rule 1.420(b) of the Florida Rules of Civil Procedure; that the said order was a sanction against the Respondent; that the Respondent negligently failed to avoid the said order or the consequences thereof; and that the said order, pursuant to the said Rule 1.420(b), constitutes an adjudication on the merits.

With the Respondent having failed to seek a rehearing or reconsideration, to attempt to vacate and set aside said order for some reason, to obtain relief from the said order, to voluntarily dismiss the first foreclosure action, or to appeal the said Order Of Dismissal, its effects and consequences became conclusively established, that is, an adjudication on the merits and res judicata. The Respondent negligently waited more than one (1) year after the dismissal of the first foreclosure action on July 14, 2000 to file the second foreclosure action on July 19, 2001 (R 1-14). In that regard, the issues of whether there was a mortgage to foreclose, successive mortgage payments to be made, a new and different default date, entitlement to a deficiency, etc., had already been determined. The Respondent, in that light, had waived its right to proceed with a new foreclosure and assert an allegedly new and different default date, was estopped from doing so and was barred by the doctrine of res judicata from filing the said second foreclosure action. Otherwise, the Respondent is rewarded for failing to follow the applicable law and rules of procedure.

As for the two (2) cases cited by the Respondent in support of its second foreclosure filing, the Petitioners contend that they are not on point and involve the

application of Rule 1.420(a)(1) rather than Rule 1.420(b) as in the subject Singleton case. On the other hand, the principal case cited by the Petitioners in support of their position involves the application of Rule 1.420(b), just as the Petitioners' case, is directly on point and is good case law.

ARGUMENT

1. THE ORDER OF DISMISSAL OF JULY 14, 2000 WAS A SANCTION AND AN INVOLUNTARY DISMISSAL AND, AS SUCH, PURSUANT TO RULE 1.420(b), CONSTITUTED AN ADJUDICATION ON THE MERITS THAT BARRED THE FILING OF THE SECOND FORECLOSURE ON JULY 19, 2001 UNDER THE DOCTRINE OF RES JUDICATA.

2. THE RESPONDENT NEGLIGENTLY FAILED TO: SEEK A REHEARING OR RECONSIDERATION; ATTEMPT TO VACATE AND SET ASIDE SAID ORDER FOR ANY REASON; SEEK TO OBTAIN RELIEF FROM SAID ORDER; VOLUNTARILY DISMISS THE FIRST FORECLOSURE ACTION UPON ALLEGED RECEIPT OF MORTGAGE PAYMENTS FROM PETITIONERS PRIOR TO THE INVOLUNTARY DISMISSAL OF JULY 14, 2000; AND APPEAL THE SAID ORDER OF DISMISSAL, AND, IN THAT REGARD, THE DOCTRINE(S) OF WAIVER AND ESTOPPEL APPLY AGAINST THE RESPONDENT.

3. THE TWO (2) PRINCIPAL CASES RELIED UPON BY THE RESPONDENT INVOLVE THE APPLICATION OF RULE 1.420 (a) (1) AND ARE NOT ON POINT WHEREAS THE PRINCIPAL CASE RELIED UPON BY THE PETITIONERS INVOLVES THE APPLICATION OF RULE 1.420(b), IS DIRECTLY ON POINT AND IS GOOD CASE LAW.

ARGUMENT ONE (1) - The facts herein clearly establish that the Order Of Dismissal of July 14, 2000 that dismissed the first foreclosure action filed by the Respondent was an involuntary dismissal. Said order was the result of the Respondent's failure to abide by an order of court to attend a case management conference on July 14, 2000 and said order informed the parties of the possible consequences of the failure to attend (R 23, 24, 63-65). In that light said Order Of Dismissal constituted a sanction for the Respondent's failure to abide by an order of court. This Order Of Dismissal that was an involuntary dismissal and a sanction is governed by Rule 1.420(b) of the Florida Rules of Civil Procedure that provides in pertinent part, "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 a dismissal for lack of jurisdiction or for improper venue or for lack of an

indispensable party, operates as an adjudication on the merits." The Petitioners would point out that this dismissal took place after the Respondent's alleged receipt of mortgage payments from the Petitioners in or about March, 2000 (R 1-2). The Respondent's first foreclosure action sought installment payments due on September 1, 1999 and all subsequent payments (R58-63). The alleged payment(s) received in or about March, 2000 would have been "subsequent payments." However, the Order Of Dismissal of July 14, 2000 settled all issues regarding the mortgage, subsequent mortgage payments, alleged new and different default dates, deficiency, etc. in that it constituted an adjudication on the the merits and these items were sought in the first foreclosure action (R 58-63). Res judicata is therefore in order. Insofar as res judicata is involved, the final decree in the prior suit is conclusive as to all matters which were or could have been raised in the prior suit." Stadler v. Cherry Hill Developers, Inc., So. 2d 486 (Fla 2d DCA 1963). This case is directly on point and is good case law.

ARGUMENT TWO (2) - The Respondent does not deny receipt of the notice of the case management conference that took place on July 14, 2000. The Respondent does not deny receipt of the Order Of Dismissal of July 14, 2000 that involuntary dismissed the Respondent's first foreclosure action. In the second foreclosure action filed July 19, 200, the Respondent maintained receipt of alleged mortgage payment(s) from the Petitioners subsequent to the filing of the first foreclosure action but prior to the dismissal of that action on July 14, 2000. Nevertheless, Respondent did absolutely nothing about this involuntary order of dismissal. Respondent did not seek a rehearing or reconsideration regarding the dismissal; did not attempt to have said involuntary order vacated and set aside for any reason(s); did not seek to obtain relief from said order pursuant to Rule 1.540;

did not voluntarily dismiss the first foreclosure action in view of the alleged receipt of subsequent mortgage payment(s) from the petitioners prior to the entry of the Order Of Dismissal of July 14, 2000; and did not appeal the involuntary Order Of Dismissal that constituted an adjudication on the merits. Instead, the Respondent waited more than one (1) year following the entry of the said July 14, 2000 Order Of Dismissal to file its second foreclosure action on July 19, 2001, thereby, eliminating any relief possibly available under Rule 1.540.

In light of the foregoing, the Petitioners contend that the doctrine(s) of waiver and estoppel apply here. Waiver is the intentional relinquishment of a known right, or the voluntary relinquishment of a known right, or conduct which warrants an inference of the relinquishment of a known right. It may be express or implied; and when a party waives a right under a contract he cannot, without the consent of his adversary, reclaim it. Fla. Jur. 2d Estoppel and Waiver, §86. Estoppel is a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, has been established as the truth, either by the acts of judicial or legislative officers or by his own deed or representations, either express or implied, or the preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part, or on the part of those under whom be claims. Fla. Jur. 2d Estoppel and Waiver, §2,

ARGUMENT THREE (3) - The Respondent relies on Capital Bank v. Needle, 596 So2d 1134 (Fla. 4th DCA 1992) and Qlympia Mortqaqe Corp. v. Puqh, 774 So2d 853 (Fla. 4th DCA 2000) in support of its position. Neither of these cases are on point, in addition to being in direct conflict with Stadler. Both of these cases are strikingly different from Singleton, the case at bar. Both of these cases involve the application of Rule 1.420(a)(l) of the Florida Rules of Civil Procedure. On the other

hand, Singleton involves the application of Rule 1.420(b), that is, an involuntary dismissal as a sanction resulting in an adjudication on the merits. In that regard, the Petitioners rely on Stadler v. Cherry Hill Developers, Inc., 150 So2d 486 (Fla. 2d DCA 1963), a case that is directly on point, in all relevant aspects, and is good case law.

The Respondent also cites Greene v. Boyette, 587 So2d 629 (Fla. 1st DCA 1991) in support of its position that the July 19, 2001 foreclosure action is not barred, that is, that a suit for one installment payment does not preclude suit for a later installment on a divisible contract. However, the Petitioners contend that this case actually supports their position in that Greene cites Stadler as its source for that legal proposition. Stadler goes on to say, however, that an election to accelerate puts all future payments in issue and forecloses successive suits. "In so far as res judicata is involved, the final decree in the prior suit is conclusive as to all matters which were or could have been raised in the prior suit. Accordingly, the decree in the first foreclosure proceeding, from which no appeal was taken, would generally conclude all of the issues presented in the suit. The decree of dismissal was entered "without 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 not be allowed to question that decree or to relitigate issues concluded by it." Id. 471, 472.

One further distinction between Greene v. Boyette and the subject Singleton case is that the mortgagee, Boyette, in the first foreclosure action, did not sue for "all successive payments" but sued for payments covering a specific period of time (from September, 1988 through January, 1990). In that regard, upon receipt of the judgment for payments over that period of time, the mortgagee, Boyette, sued for payments from February, 1990 through September, 1990. The mortgagee was not

barred from filing the successive foreclosure action in that instance. However, this is an utterly different scenario from that in the Singleton case where the Respondent did not file its second foreclosure action until after the involuntary dismissal order, a sanction, had been entered and after more than one (1) year had passed since the entry of the involuntary dismissal order. At this point res judicata had taken a firm foothold. And in light of the fact that the involuntary dismissal was a sanction from which the Respondent sought absolutely no relief, the Respondent waived its right to refile and was estopped to deny that this involuntary dismissal was an adjudication on the merits.

CONCLUSION

Rule 1.420(b) is the rule relied upon by the Petitioners and controls the Singleton case. The principal cases cites by the Respondent involve the application of Rule 1.420(a)(1) and, in that regard, are not on point. The Stadler case relied upon by the Petitioners involves the application of Rule 1.420(b) and is directly on point on all relevant issues with the Petitioners' case. Furthermore, the doctrines of waiver and estoppel apply against the Respondent herein. The Respondent had any number of opportunities and avenues by which to seek relief from the involuntary dismissal against it and pursued none of them. The Respondent slept on its rights. Moreover, the involuntary dismissal was a sanction. In that regard, why should the Respondent be rewarded for violating a court order and then doing absolutely nothing to relieve itself of the burden of that order? The answer is that the Respondent should not be so rewarded. The Respondent could have obtained relief from the burden of this involuntary dismissal that constituted an adjudication on the merits but chose not to and is now bound by its res judicata effect.

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 23rd day of February, 2004.

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CERTIFICATE OF COMPLIANCE

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.