IN THE SUPREME COURT OF FLORIDA
Case No. SC11-697

ROMAN PINO,
Petitioner,

v.

DCA Case No. 4D10-378
L.T. Case No. 50 2008 CA 031691

THE BANK OF NEW YORK MELLON,
Respondent,

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
FOR THE FOURTH DISTRICT OF FLORIDA

BRIEF OF *AMICUS CURIAE* FLORIDA LAND TITLE ASSOCIATION AND AMERICAN LAND TITLE ASSOCIATION

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INTRODUCTION

The Court retained this case so that it could give needed guidance to trial courts and other litigants by its answer to a certified question arising from a mortgage foreclosure action. As the Court wrote:

> The question certified . . . transcends the individual parties to this action because it has the potential to impact the mortgage foreclosure crisis throughout this state and is one on which Florida's trial courts and litigants need guidance. The legal issue also has implications beyond mortgage foreclosure actions.

Pino v. Bank of New York, 36 Fla. L. Weekly S711 (Fla. Dec. 8, 2011).

Florida Land Title Association ("FLTA") and American Land Title Association ("ALTA") file this brief to address the need for this Court to give guidance to trial courts and litigants on the importance of protecting the rights of third parties that have justifiably relied on the finality of a prior court action when buying, extending financing on, or insuring title to real property.

SUMMARY OF ARGUMENT

The Court can expressly limit its decision in this case to the setting aside of a voluntary dismissal in a case where no third party interest in real estate is implicated. Should it choose to do so, FLTA and ALTA have no issues to address. However, if the Court decides to write more broadly, we respectfully ask the Court to emphasize the need to protect the rights of affected third parties when collateral attacks are brought against otherwise final court judgments, orders, decrees or

proceedings.

The residential mortgage foreclosure crisis has caused a host of problems for homeowners, lenders, and Florida's court system. The Court addressed many of these problems by forming the Task Force on Residential Mortgage Foreclosures in 2009 and by adopting its recommended amendments to the Florida Rules of Civil Procedure in 2010. However, unlike some other states, the Court has not adequately addressed the protection of third party interests when otherwise final court proceedings are collaterally attacked, especially the interest of those who have purchased foreclosed real estate.

Respectfully, if the Court is to give guidance to trial courts and litigants regarding collateral attacks against foreclosure actions (whether relief is sought under rule 1.540(b) or the use of inherent judicial powers) beyond the narrow facts of this case, it should give guidance on protecting the interests of third parties that purchase, finance and insure title to foreclosed properties. Recognition and protection of these neglected interests is vital to the integrity of our judicial system and to the ultimate resolution of the mortgage foreclosure crisis.

ARGUMENT

WHEN ANSWERING THE CERTIFIED QUESTION, COURT GUIDANCE TO TRIAL COURTS AND LITIGANTS SHOULD ENCOMPASS PROTECTING PURCHASERS OF FORECLOSED PROPERTIES FROM BEING IMPAIRED BY A COLLATERAL ATTACK SEEKING RELIEF FROM A FINAL JUDGMENT, ORDER, DECREE OR PROCEEDING.

STANDARD OF REVIEW

The standard of review for the pure question of law presented by the certified question is *de novo*. *See Johnson v. State*, 37 Fla. L. Weekly S1 (Fla. Jan. 5, 2012); *see also Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000) ("[T]he standard of review for a pure question of law is de novo.").

A. The mortgage foreclosure crisis and the Court's response to date.

The residential mortgage foreclosure crisis has caused enormous problems for Florida's homeowners, lenders, courts, and economy.[1] This Court addressed

[1]Task Force on Residential Mortg. Foreclosure Cases, Fla. Supreme Court, *Final Report and Recommendations on Residential Mortgage Foreclosure Cases* 15-26 (2009); Assessment Workgroup for the Managed Mediation Program for Residential Mortg. Foreclosure Cases, Fla. Supreme Court, *Final Report* 3 (Oct. 21, 2011); *see also* U.S. Gov't Accountability Office, GAO-12-34, *Vacant Properties: Growing Number Increases Communities' Costs and Challenges* 12-19 (2011); U.S. Gov't Accountability Office, GAO-11-433, *Mortgage Foreclosures: Documentation Problems Reveal Need for Ongoing Regulatory Oversight* 39 fig.4 (2011); U.S. Gov't Accountability Office, GAO-11-93, *Mortgage Foreclosures: Additional Mortgage Servicer Actions Could Help Reduce the Frequency and Impact of Abandoned Foreclosures* 21-25 (2010); U.S. Gov't Accountability Office, GAO-10-531, *Troubled Asset Relief Program: Treasury's Framework for Deciding to Extend TARP Was Sufficient, but Could be Strengthened for Future Decisions* 16-18 (2010).

many of these problems by forming the Task Force on Residential Mortgage Foreclosures in 2009[2] and adopting its recommended amendments to Florida's Rules of Civil Procedure in 2010. *See In re Amendments to the Fla. Rules of Civil Procedure*, 44 So. 3d 555 (Fla. 2010); *see also In re Amendments to the Fla. Rules of Civil Procedure-Form 1.996 (Final Judgment of Foreclosure)*, 51 So. 3d 1140 (Fla. 2010).

The mortgage foreclosure crisis is far from over, especially given the "robo-signing" problems and questions about plaintiffs proving loan ownership. In the fall of 2010, large mortgage lenders such as GMAC Mortgage, JPMorgan Chase, and Bank of America halted most of their foreclosures in response to the robo-signing concerns, other allegations surrounding loan ownership, and new state laws or rules of procedures. A negative consequence of this stoppage has been a logjam in the housing market.

States have handled the loan ownership question in various ways. This Court addressed the ownership concern in early 2010 by amending Florida Rule of Civil Procedure 1.110(b) to require that mortgage foreclosure complaints be verified and by giving trial courts greater authority "to sanction [mortgagees] who make false allegations." *In re Amendments*, 44 So. 3d at 556.

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[2] *In re Task Force on Residential Mortg. Foreclosure Cases*, Fla. Admin. Order No. AOSC09-8 (Mar. 27, 2009).

B. The need to give guidance on protecting third party interests in foreclosed properties

1. The importance of finality in foreclosures

In his October 8, 2010 *New York Times* article, "After Foreclosure, A Focus on Title Insurance", Ron Lieber posed a prescient question about what would happen in the wake of the "robo-signing" scandal. He asked:

> What would happen if scores of people who lost their homes to foreclosure somehow persuaded a judge to overturn the proceedings? Could they somehow win back rights to their home, free and clear of any mortgage? But they may not be able to simply move back into their home at that point. Banks, after all, have turned around and sold some of those foreclosed homes to nice young families reaching out for a bit of the American dream. Would they simply be put out in the street? And then what?

Ron Lieber, *After Foreclosure, A Focus on Title Insurance*, N.Y. Times, Oct. 8, 2010, *available at* http://www.nytimes.com/2010/10/09/your-money/mortgages/09money.html.

After discussing this concern, Lieber concluded by advising his readers, ". . . if you can possibly help it, stay away from foreclosed homes until the scene shakes out a little bit." *Id.*[3]

That same day Bob Lawless posted a comment on Lieber's article. *See* Bob Lawless, *The Finality of Foreclosure Sales*, Credit Slips (Oct. 9, 2010, 1:21 PM),

[3] In his article, Lieber notes that "[o]n October 1, Old Republic National Title Insurance Company released a notice forbidding any agent or employees to issue new policies on homes that had been recently foreclosed by GMAC Mortgage or Chase." *Id.*

http://www.creditslips.org/creditslips/2010/10/the-finality-of-foreclosure-sales.html. In the comment, Lawless opines that Lieber's concerns are not so serious because "[t]he law . . . strongly protects the finality of past foreclosure sales." He then explains to his readers how "a court system could not operate where every old judgment was open to attack" and how the "law imposes a very heavy burden on those seeking to attack final court judgments."

Lawless then applies the finality principle to mortgage foreclosures, writing:

> The same ideas strongly protect the finality of a court's foreclosure judgment. The foreclosure judgment, however, is only an interim step in the ultimate disposition of the property at the foreclosure sale and the transfer of the deed. Now, third party rights will come in to play, and the need for finality becomes even stronger. If foreclosure deeds were subject to attack, at worse we might have no bidders at the sale, and at best we would have drastically lower prices. Even if the successful purchaser at the foreclosure sale is the lender, it will be selling later to a third party, and we will still have the same need for finality.

Lawless is absolutely correct when describing a foundational principle of the rule of law in this state and nation. The integrity of a judicial system rests upon the certainty that its actions have finality. Exceptions to finality such as when a litigant commits a fraud on the court to obtain judicial relief are necessary to assure justice between litigants. Florida Rule of Civil Procedure 1.540(b) allows for such exceptions. However, protecting innocent third parties that have relied on the finality of a court action must be given serious consideration when determining the appropriate relief to be granted.

Both Florida and Federal courts have recognized that protecting innocent third party purchasers stabilizes the markets for foreclosure and bankruptcy assets that in turn benefit debtors and lenders. *See, e.g.*, *In re Stadium Mgmt. Corp.*, 895 F.2d 845, 847 (1st Cir. 1990) (noting "the importance of encouraging finality in bankruptcy sales by protecting good faith purchasers and thereby increasing the value of the assets that are for sale"); *Long Beach Mortg. Corp. v. Bebble*, 985 So. 2d 611, 613 (Fla. 4th DCA 2008) (noting that the standard to set aside foreclosure sales is narrow "to ensure a competitive market in the foreclosure sale process" and discouraging precedent "that encourages the easy setting aside of foreclosure sales"); *Demars v. Vill. of Sandalwood Lakes Homeowners Ass'n*, 625 So. 2d 1219 (Fla. 4th DCA 1993) (concluding that voidable service by publication should not defeat the interest of a bona fide purchaser because "[t]o declare otherwise seriously impairs the marketability of title to real property).

Lawless correctly echoes this case law when he observes that "the need for finality becomes even stronger" in the foreclosure sale and purchase context. Lawless, *supra*. As he notes, the lack of confidence in the finality of court actions has serious economic consequences, particularly in real estate markets. Buyers uncertain about the finality of a court action involving a parcel of property will do one of three things. They will avoid the purchase, postpone the purchase, or demand a reduction in the purchase price to cover the risk. Lenders and title

insurers will have corresponding reactions. All of these reactions to uncertainty about the finality of foreclosure titles impair resolution of the housing logjam fueled by the mortgage foreclosure crisis.

2. Protecting the purchaser.

Though absolutely correct when writing about the foundational principle of finality and why that principle is so important in the foreclosure context, Lawless is unduly confident in the degree of protection that courts actually provide to third parties. Lawless writes that Lieber overstates the concern about the risk of buying foreclosed property in the "robo-signing" world because "most every . . . state provides the strongest possible finality protections for deeds obtained through foreclosures." Lawless, *supra*. This may be true in some states; but, it is not necessarily true in Florida. And it is this lack of finality in Florida that this Court needs to address.

As Lawless notes, the State of Illinois (a judicial foreclosure state) does provide that the transfer of a deed of foreclosure (the equivalent of Florida's Certificate of Title) bars any claim a party (or one with notice) may have to the foreclosed property. Even if relief from the foreclosure judgment is granted, the borrower's claim is limited to the proceeds from the sale of the property. The

borrower has no right to re-possess the property.[4] California has similar protections for purchasers of foreclosed property in a judicial foreclosure, except California does not protect the judgment creditor if it is the purchaser. Under its Cal. Civ. Proc. Code § 701.680 (West 2011), a judicial foreclosure sale in California to a party other than the judgment creditor is "absolute," subject only to the debtor's right of redemption, and the sale "may not be set aside for any reason." *See Arrow Sand & Gravel, Inc. v. Superior Court*, 700 P.2d 1290 (Cal.

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[4] 735 Ill. Comp. Stat. 5 / 15-1509 (West 2010).

> (a) Deed. After (i) confirmation of the sale, and (ii) payment of the purchase price and any other amounts required to be paid by the purchaser at sale, the court (or, if the court shall so order, the person who conducted the sale or such person's successor or some persons specifically appointed by the court for that purpose), shall upon the request of the holder of the certificate of sale (or the purchaser if no certificate of sale was issued), promptly execute a deed to the holder or purchaser sufficient to convey title.
> . . .
> (b) Effect Upon Delivery of Deed. Delivery of the deed executed on the sale of the real estate, even if the purchaser or holder of the certificate of sale is a party to the foreclosure, shall be sufficient to pass the title thereto.
> (c) Claims Barred. Any vesting of title by a consent foreclosure pursuant to Section 15-1402 or by deed pursuant to subsection (b) of Section 15-1509, unless otherwise specified in the judgment of foreclosure, shall be an entire bar of (i) all claims of parties to the foreclosure and (ii) all claims of any nonrecord claimant who is given notice of the foreclosure in accordance with paragraph (2) of subsection (c) of Section 15-1502, notwithstanding the provisions of subsection (g) of Section 2-1301 to the contrary. Any person seeking relief from any judgment or order entered in the foreclosure in accordance with subsection (g) of Section 2-1301 of the Code of Civil Procedure may claim only an interest in the proceeds of sale.

1985); *but see Lang v. Roché*, 133 Cal. Rptr. 3d 675 (Cal. Ct. App. 2011) (setting aside sale where purchaser was party that had secured judgment and sale through fraud).

This need to strongly protect the finality of foreclosure sales and third-party purchasers has also been recognized and affirmed by federal courts. *Chrysler Cap. Realty, Inc. v. Grella*, 942 F.2d 160 (2d Cir. 1991); *In re Brittwood Creek, LLC*, 450 B.R. 769 (N.D. Ill. June 2, 2011).

Unfortunately, Florida law on this point is not as clear as Lawless suggests and Lieber's concerns are not overstated for prospective purchasers of Florida real estate. Florida's procedural rules are certainly not as protective of foreclosure purchasers as are Illinois' and California's. Florida's case law also has not developed to the point that it clearly "provides the strongest possible finality protections for deeds obtained through foreclosures" that Lawless suggests is appropriate for purposes of finality. Lawless, *supra.*

In Florida, efforts to set aside foreclosure sales under rule 1.540(b) have been rejected. Similarly, the rights of non-party purchasers have been recognized in dictum where a decree was reversed on appeal. *Sundie v. Haren*, 253 So. 2d 857 (Fla. 1971) ("As to non-party persons, a purchase at an execution sale pursuant to a judgment afterwards reversed is final" and citing *Simms v. City of Tampa*, 42 So. 884 (Fla. 1906), for an analysis of the rights of third parties); *see also Phoenix*

Holding, LLC v. Martinez, 27 So. 3d 791 (Fla. 3d DCA 2010) (Mortgagor's failure to receive default judgment was a minor defect given knowledge of proceedings and sale overall); *Lyon v. Sanford*, 911 So. 2d 806 (Fla. 1st DCA 2005).

However, Florida appellate decisions also have granted mortgagors relief under rule 1.540(b) and either set aside a sale or given the trial court that option on remand. *E.g.*, *Wolff v. Star Realty Trust No. 12549, Corp.*, 36 Fla. L. Weekly D2475 (Fla. 3d DCA Nov. 16, 2011) (remanding for evidentiary hearing even where the defendant alleged that the third party purchaser was part of the plaintiff's "foreclosure relief" scam); *Novastar Mortg., Inc. v. Bucknor*, 69 So. 3d 959 (Fla. 2d DCA 2011) (remanding for evidentiary hearing on disputed allegations of extrinsic fraud); *LPP Mortg. Ltd. v. Bank of Am., N.A.*, 826 So. 2d 462 (Fla. 3d DCA 2002).

Other Florida appellate courts have been able to avoid answering the finality question in the collateral attack context. *E.g.*, *Paul v. Wells Fargo Bank, N.A.*, 68 So. 3d 979, 981 n.1 (Fla. 2d DCA 2011) ("Because the matter has not been framed for us, we offer no opinion as to the impact, if any, that this assignment [from Wells Fargo to Freddie Mac post-sale] may have upon remand."); *Dawson v. Wachovia Bank, N.A.*, 61 So. 3d 1218 (Fla. 3d DCA 2011) (declining to review arguments from intervening owner based on BFP status where the underlying Rule 1.540 motion was not based on fraud but was in reality a second appeal).

Finally, some of Florida's appellate courts have set aside foreclosure sales and certificates of title where there were due process deficiencies. *Ingoravaia v. Horton*, 816 So. 2d 1256 (Fla. 2d DCA 2002) (failure to provide notice to the mortgagee warranted vacating sale). The decision in *Cicoria v. Gazi* is indicative of the balancing approach Florida courts typically apply:

> But [objections to a foreclosure sale] must be founded on matters which prompt a court of equity, as noted above, to act to protect the mortgagor from over-bearing conduct by others involved in the sale process, or an irregularity in the notice process which prevented the mortgagor from exercising the right of redemption in a timely fashion. If no such circumstances are clearly established, then the rights of the successful bidders at the foreclosure sale should be upheld.

901 So. 2d 282, 288 (Fla. 5th DCA 2005). It is vitally important to note that this balancing approach is silent regarding the interests of third parties and the need for finality. The inadequacy of the public sale price also has been a basis to set aside a sale. *See, e.g.*, *Long Beach Mortg. Corp. v. Bebble*, 985 So. 2d 611 (Fla. 4th DCA 2008). The narrowness of the exception in *Bebble* was recently discussed in the Fourth District's *en banc* decision in *Arsali v. Chase Home Finance, LLC*, No. 4D11-2348, 2012 WL 204480 (Fla. 4th DCA Jan. 25, 2012). Though distinguishable because *Arsali* involves a motion to vacate, not a collateral attack to an otherwise final court proceeding, the complete absence of any consideration of third party interests when considering a motion to vacate is significant.

3. Certainty about finality will help break the housing logjam.

The Court can address the deficit in Florida law's protection of third party interests in foreclosed property in its answer to the certified question. Admittedly, such guidance is beyond the narrow question as certified. Nonetheless, the importance of finality to the integrity of the judicial system is indisputable. It is equally indisputable that protecting third parties, such as Lieber's "nice young families reaching out for a bit of the American dream," by ensuring the validity of their titles will help break the logjam in the housing market.

C. Void versus voidable judgments, orders and decrees.

The distinction between void and voidable judgments, orders and decrees is important, and Judge Altenbernd well-explained this distinction in *Sterling Factors Corp. v. U.S. Bank N.A.*, 968 So. 2d 658 (Fla. 2d DCA 2007). As Judge Altenbernd noted, the case law drawing the distinction "could draw clearer lines." *Id.* at 666. But there is a clear need for courts to avoid declaring a sale and judgment void too easily at the expense of finality and the interests of third parties. The court in *Demar*s, for example, understood the need for finality and properly declined to declare the judgment void because "to declare otherwise seriously impairs the marketability of title to real property which has become the subject of judgments rendered on the basis of constructive service." *Demars*, 625 So. 2d at 1221; *accord Se. & Assocs. v. Fox Run Homeowners Ass'n*, 704 So. 2d 694, 696

(Fla. 4th DCA 1997) (contrasting *Demars* and *Gans v. Heathgate-Sunflower Homeowners Ass'n*, 593 So. 2d 549 (Fla. 4th DCA 1992)). Where final judgments of foreclosure have been entered, the right of redemption has not been exercised, a public sale has occurred, the clerk has certified title to another and no timely appeal is taken, the interests of third party purchasers must be duly considered when balancing interests and determining the available relief.

CONCLUSION

Respectfully, if the Court is to give guidance to trial courts and litigants regarding collateral attacks in foreclosure actions (whether relief is sought under rule 1.540(b) or the use of inherent judicial powers) beyond the narrow facts of this case, it should make it clear that the interests of third parties who have purchased, financed, and insured title to foreclosed properties in reliance on the finality of a court action must be considered and properly protected. Recognition and protection of these neglected interests is vital to the integrity of our judicial system and to the ultimate resolution of the mortgage foreclosure crisis.

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Respectfully submitted this 3rd February 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been filed via e-file@flcourts.org, with the original and eight copies hand-delivered to the Clerk, Florida Supreme Court, 500 South Duval St., Tallahassee, Florida, 32399, and copies furnished via U.S. Mail on the 3rd day of February 2012, to the Offices of:

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