IN THE SUPREME COURT OF FLORIDA

NICHOLAS ARSALI,

Petitioner/Appellant,

vs.

CASE NO.: SC12-600
L.T. No.: 4Dll-2348

CHASE HOME FINANCE, LLC,
AMY WILSON and
CHRISTOPHER D. MANNING,

Respondents/Appellees.
_____/

ANSWER BRIEF FILED ON BEHALF OF RESPONDENTS, AMY B. WILSON AND CHRISTOPHER D. MANNING

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PREFACE

Respondents, AMY B. WILSON and CHRISTOPHER D. MANNING will use the following abbreviations in the Answer Brief:

(App. ____) Respondents' Appendix

(Pet. App. ___) Petitioner's Appendix

STATEMENT OF THE CASE AND FACTS

This appeal arises out of a question certified by the Fourth District Comi of Appeal as one of great public impotiance as reported below in *Arsali v. Chase Home Finance, LLC,* 79 So. 3d 845 (Fla. 4[111] DCA 2012) *("Arsali"),* and phrased by the Court as follows:

> DOES THE TEST SET FORTH IN *ARLT V. BUCHANAN,* 190 SO. 2D 575, 577 (FLA. 1966), FOR VACATING A FORECLOSURE SALE APPLY WHEN THE ADEQUACY OF THE BID PRICE IS NOT AT ISSUE?

The underlying appeal arose out of an Order Granting Motion to Vacate Foreclosure Sale and Ce1iificate of Sale ("Vacate Order") entered by the trial court on May 26, 2011. (App. 5) The Vacate Order was entered in favor of the mortgagors AMY B. WILSON and CHRISTOPHER D. MANNING (collectively "Homeowners") without stated opposition by the mortgagee, CHASE HOME FINANCE, LLC ("Bank"), which Vacate Order vacated a foreclosure sale, certificate of sale and the Final Judgment ("Final Judgment") previously entered by the trial comi on September 8, 2010. Petitioner's (App. 2) Appellant, NICOLAS ARSALI ("Arsali"), as the "Assignee" of Iron National Trust, LLC (the purported purchaser at the foreclosure sale), sought to reverse the Vacate Order which was entered after a duly noticed hearing.

As noted above, on September 8, 2010, the trial court entered a Final Judgment of foreclosure in favor of the Bank and against the Homeowners, which Final Judgment provided for a foreclosure sale date of May 9, 2011. (Pet. App.2) On April 15, 2011, approximately three (3) weeks before the scheduled foreclosure sale, the Bank contacted the Homeowners and provided them an opportunity to ***reinstate*** the loan upon payment of a lump sum of $12,018.98, as long as said sum was received by the Bank's counsel no later than May 6, 2011. (App. 2, Exhibit "B"). The offer to reinstate ***also specifically provided that upon payment, the foreclosure action would be dismissed.*** On May 3, 2011, the Homeowners forwarded a cashier's check to the Bank's counsel in the amount of $12,018.98, via overnight mail, which check was received by the Bank's counsel on May 4, 2011, two (2) days in advance of the deadline set by the Bank. (App.2, Exhibit "B") Despite receiving the agreed upon sums for reinstatement, the Bank failed to dismiss the case and cancel the sale resulting in the foreclosure sale taking place on May 9, 2011.

At the sale, Iron National Tmst, LLC was the successful bidder. Upon learning that the foreclosure sale had taken place despite the reinstatement, the Homeowners immediately filed their Motion to Vacate on May 13, 2011, attaching all the proof showing compliance with the reinstatement parameters established by the Bank. (App. 2, Exhibits "A- C") The Notice of Hearing on the Homeowners

Motion to Vacate was duly served on all parties including Iron National Trust, LLC, setting same for May 26, 2011. (App. 3)

On or about May 17, 2011, Arsali filed a Motion to Intervene alleging he was the assignee oflron National Trust, LLC, and set same for hearing for May 24, 2011. The trial court granted Arsali's Motion to Intervene as an interested party (but failed to grant his request for an order recognizing him as the assignee of the bid and certificate of sale and his request that he be substituted for Iron National Trust, LLC as the third party purchaser). (App. 4)

Arsali was aware of the pending hearing scheduled for May 26, 2011, which went forward as scheduled with counsel for the Bank and the Homeowners both present. Arsali failed to appear despite having acknowledged the notice of the hearing.

The trial court reviewed the Motion to Vacate, heard argument of all counsel present and entered the Vacate Order after being advised by the Bank that it had no opposition given the circumstances. Despite failing to appear to protect his interest, Arsali filed a Motion for Rehearing (App. 6), setting forth his position. The trial court after reviewing the Motion for Rehearing rejected Arsali's argument and denied the Motion. (App.7) The appeal to the Fourth District was thereafter filed.

The Fourth District *sua sponte* considered the case *en bane* and affirmed the trial comt ruling. In so doing, the Fomth District examined the Florida Supreme Court rulings of *Arlt,* 190 So. 2d 575 (Fla. 1966) and *Moran-Alleen Co v. Brown,* 123 So. 2d 561 (Fla. 1929) and the test to be applied to vacate a foreclosure sale, especially where inadequacy of bid price is not an issue. The Fomth District in its analysis agreed with the Second District Court of Appeal in *Ingorvaia v. Horton,* 816 So. 2d 1256 (Fla. 2d DCA 2002) in reconciling the two (2) Florida Supreme Court cases to ultimately conclude that where inadequacy of bid price is not an issue, the independent grounds of surprise, accident or mistake may result in the vacating of a foreclosure sale. In so doing, the Fomth District recognized that its opinion is consistent with the wide discretion afforded trial comts in setting aside foreclosure sales as an exercise of equity, especially in cases where to do otherwise would present a clear case of injustice.

Following the affirming of the trial court's ruling, Petitioner, Arsali filed a Motion for Rehearing with the Fourth District (App.8) which was denied, (App. 10) after which he sought review from this Court based on the certified question from the Fourth District. This Couti accepted jurisdiction.

SUMMARY OF THE ARGUMENT

The certified question posed by the Fourth District Court of Appeal should be answered in the negative, and the opinion should be affirmed. The Fourth District's reconciliation of *Brown* and *Arlt* was the proper analysis, in that the two-pronged test of *Arlt* is not applicable where the inadequacy of bid price is not at issue. Accordingly, the application of the *Brown* test to the facts below was conect in that there was no issue regarding the inadequacy of the bid price.

The restated certified question should not be considered as it is a misstatement of *Brown* and to answer as invited by Petitioner would be in contradiction of this Court's mling in *Brown*, and infringe on a trial comi's equitable powers.

With regard to the Petitioner's attempt to have this Court reverse both the Fourth District and the trial court on the merits, it is clear that the trial court did not abuse its discretion in properly entering its Vacate Order after a duly noticed hearing was held where the mortgagors and mortgagee were present, and there was no dispute that the parties to the loan had entered into a binding reinstatement agreement that required the cancelling of the foreclosure sale, the vacating of the final judgment and the dismissal of the suit. In light of the absence of a dispute as

to the reinstatement agreement, and that inadequacy of the bid was not an issue, an evidentimy hearing was not necessary.

Accordingly, the certified question should be answered in the negative and the Fourth District opinion affirmed.

STANDARD OF REVIEW

As to the certified question, the standard of review for this Court is *de novo. See, Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187 (Fla. 2011). As Petitioner seeks review of the trial court's ruling regarding the propriety of setting aside the foreclosure sale, notably in Arguments **II,** III, and IV, the standard of review is abuse of discretion. Whether a complaining party has made the necessary showing to set aside a foreclosure sale is discretionm·y with the trial court and may be reversed ***only*** when the trial court has ***grossly*** abused its discretion. *Arsali v. Deutsche Bank National Trust Company,* 82 So. 3d 833 (Fla 4ℏ DCA 2011), *quoting, Ingorvaia v. Horton,* 816 So. 2d 1256, 1258 (Fla. 2d DCA). Similarly, compliance with procedural rules of court as argued in Argument IV is subject to an abuse of discretion standard. *Pando[Bros. Inc. v. NCNB Nat. Bank of Florida,* 450 So. 2d 592 (Fla. 4ℏ DCA 1984). "When analyzing a trial court's exercise of its discretion, the appellate court is to determine whether 'reasonable persons could differ as to the propriety of the action

taken by the trial court.' If reasonable persons could differ, then the comi's action was not an abuse of discretion. *Ingorvaia;* 816 So. 2d 1256, 1259, quoting, *Canakaris v. Canakaris,* 382 So. 2d 1197, 1203 (Fla 1980).

ARGUMENT

I. THE FOURTH DISTRICT COURT OF APPEAL'S CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE

The certified question as phrased by the Fomih District is Court as follows:

> DOES THE TEST SET FORTH IN *ARLT V. BUCHANAN,* 190 SO. 2D 575, 577 (FLA. 1966), FOR VACATING A FORECLOSURE SALE APPLY WHEN THE ADEQUACY OF THE BID PRICE IS NOT AT ISSUE?

Within its opinion, the Fourth District analyzed the "test" set forth in *Arlt,* and discussed whether such a test is consistent with this Court's earlier opinion in *Brown.* The distinction between the opinions and their reconciliation made by the Fourth District was appropriate and conect, and properly resulted in the Court receding from its own opinion in *Blue Star Investments, Inc. v. Johnson,* 801 So. 2d 218 (Fla. 4ℏ DCA 2001) (to the extent that *Blue Star* indicates that inadequacy of price must always be pmi of the legal analysis in considering a motion to set aside a foreclosure sale).

Respondents, Homeowners, agree with Petitioner when he assetis that the *Brown* and *Arlt* decisions do not conflict, and that *"Brown* said that grounds for

setting aside judicial sales include grossly inadequate bids, surprise, accident or mistake, and irregularity in the conduct of the sale." (Initial Brief, p. 9). Petitioner goes on to argue that all *Arlt* did was to assert that in cases "of a grossly inadequate bid, a sale can be set aside only if the inadequacy resulted from a mistake, accident, surprise, or other irregularity in the sale." (Initial Brief, pp 9-10). Petitioner's argument is the same analysis performed by the Fourth District in the subject matter, wherein the Couti stated, "[t]he italicized language [in *Brown]* indicates that 'surprise, accident, or mistake imposed on [a] complainant' and 'irregularity in the conduct of the sale' are four independent grounds that would support the setting aside of a foreclosure sale, even where there is not a grossly inadequate sale price." *Arsali,* 79 So. 3d 845, 848.

This interpretation by the Fourth District is consistent with the Second District in *Ingorvaia,* 816 So. 2d 1256, which when previously certifying the same question to this Comi, concluded that the so-called *Arlt* test applies only when the inadequacy of bid price is at issue. *Ingorvaia,* 816 So. 2d 1256, 1258. Otherwise, courts are free to use their discretion and equitable powers in utilizing the factors set forth in *Brown.*

This view is also consistent with the Third District Court of Appeal's interpretation *(see, U-M Publishing, Inc. v. Home News Publishing Co., Inc.,* 279 So. 2d 379 (Fla. 3d DCA 1973) (where Comi noted that "a judicial sale may be set

aside on the grounds of gross inadequacy of consideration, surpnse, accident, mistake *or* inegularity in the conduct of the sale") (emphasis added), and as discussed in *Phoenix Holding, LLC v. Martinez,* 27 So. 3d 791 (Fla. 3d DCA 2010) (quoting and relying on language quoted above from *U-M Publishing);* as well as the Fifth District Court of Appeal as exhibited in the recent case of *Josecite v. Wachovia Mortgage Corporation,* 2012WL3758648 (Fla. 5[111] DCA August 31, 2012) (where the Court on similar facts as in the subject action [although dealing with a forbearance agreement as opposed to reinstatement], found that the trial court should have applied the *Brown* test rather than the *Arlt* test? a stating that inadequacy of bid amount was not an issue, and under the facts of the case, the foreclosure sale should be set aside).

All parties agree that the Florida Supreme Comi does not ovenule itself *sub silentio, (See, Puryear v. State,* 810 So. 2d 901, 905-906 (Fla. 2002)). The continued viability of *Brown* has never been challenged and has been recognized to co-exist with *Arlt. See, e.g., Ingorvaia v. Horton,* 816 So. 2d 1256, 1258 (Fla. 2d DCA 2002), citing, *Ohio Realty Inv. Corp. v. S. Bank of West Palm Beach,* 300 So. 2d 679 (Fla. 1974).

Therefore, the only conclusion that can be reached to reconcile the two cases, the cases that preceded them, and their progeny is to conclude ultimately as the Second, Fourth and Fifth Districts have expressly done: in instances where

inadequacy of bid is an issue, the *Arlt* test applies; and, where inadequacy of bid is not an issue *Brown* applies, and any of the grounds, including "mistake" set forth therein, become the test. At that point, the trial court must then exercise its equitable powers and review the facts and circumstances of the case, and rule accordingly.

II. PETITIONER'S REQUEST TO REPHRASE THE CERTIFIED QUESTION IS UNNECESSARY

Petitioner argues that the ce1tified question should be rephrased to essentially ask whether a foreclosure sale be set aside based solely on the Bank's "unilateral mistake" in not cancelling the sale. By asserting such a question, Petitioner is asking this Comi to ignore the language it used in *Brown* with regard to surprise, accident or mistake imposed on the complainant and the ineguality in conduct of sale prongs; take away the wide discretion trial courts have in setting aside sales *(Long Beach Mortgage Co. v. Bebble*, 985 So. 2d 611 (Fla. 4[1h] DCA 2008)); and ignore the equities as it relates to homeowners losing their home through no fault of their own; versus a third party investor purchaser being the successful bidder at a sale that should have never taken place.

With deliberateness, this Comi in *Brown* referenced that grounds for which a sale could be set aside including surprise, accident or mistake imposed on the

complainant, and inegularity in the conduct of the sale. As noted by the Fourth District below, these prongs are separate. In the subject action, the Homeowners were offered the opportunity to reinstate their loan with the Bank, and were specifically advised that if they complied with the terms of the offer, that is to pay the reinstatement amount by a date cetiain, "the subject action will be dismissed." (App.2, Exhibit "B") There is no dispute that the Homeowners dutifully paid as required, but due to a mistake by the Bank, the suit was not dismissed, nor was the foreclosure sale cancelled. The foreclosure sale commenced without the knowledge of the Homeowners. Despite the inequity of anything to the contraty, Petitioner would asseti that this type of tragic mistake cannot form the basis of setting aside a foreclosure sale. Courts have long recognized that the presence of a unilateral mistake may fmm the basis of setting aside a foreclosure sale. Petitioner cites a number of such cases while noting that where such unilateral mistakes occur, the trial court has discretion to set aside a sale. *(See, e.g., Van Delinder v. Albion Realty & Mtg., Inc.,* 287 So. 2d 352 (Fla. 3d DCA 1973); *Fernandez v. Suburban Coastal Corp.*, 489 So. 2d 70 (Fla. 4[111] DCA1986); *United Companies Lending Corp. v. Abercrombie,* 713 So. 2d 1017 (Fla. 2d DCA 1998). These cases exemplify "the breadth of the courts' discretion to weigh the equities of individual cases when deciding whether to set aside judicial sales." *Abercrombie,* 713 So. 2d 1017, 1019. The fact that these patiicular cases also dealt with an inadequate bid is

of no moment. As the court in Ingorvaia noted, "there is nothing in *Arlt* to suggest that the test set forth therein applies where adequacy of price is not at issue." *Ingorvaia,* 816 So. 2d 1256,1258. The court goes on to state fmiher that in its prior case of *Sulkowsld v. Sulkowsld,* 561 So. 2d 416,418 (Fla. 2d DCA 1990), where discussing the pertinent passages of *Arlt* and *Brown,* it stated [c]omis have held that the grounds or causes for equitable relief from a judicial sale include matters ***distinct*** from the inadequacy of price, as well as matters ***conjunctive*** with the inadequacy of price... "(Emphasis added).

Petitioner's attempt to recast the cetiified question would have draconian results and strip away a trial court's equitable powers with regard to the "mistake" factor. Petitioner's concems that courts will stmggle as to what circumstances justify setting aside a sale where bid price is not an issue is without merit. Courts exercise their equitable powers all the time, and invariably they review the totality of the circumstances *(see, e.g., U-M Publishing,* 279 So. 2d 379, 381 where the comi stated "a judicial sale will not be set aside due to 'slight defects', or for 'merely technical, formal, and unimpmiant regularities', we must view the proceedings in their totality"). By analogy, courts use such an analysis all the time in detennining whether there is "excusable neglect" in setting aside a default or default judgment.

Equity should act to prevent the wrong result and to remedy clear cases of injustice. *Long Beach,* 985 So. 2d 611, 614, citing, *Arlt.* To argue that equities lie with an investor over the Homeowners who have lost their home through the actions and/or inactions of the Bank, is misplaced and turns the concept of equity on its head. The trial court's mling below, affirmed by the Fourth District, was well within its equitable power and its duty to preserve the integrity of the judicial sale process, and in so doing, made evetyone whole. The Homeowners rightfully kept their home; the clerk was ordered to retum the proceeds to the third party purchaser; and, though the reinstatement, the Bank once again had a performing loan. The Fourth District in recognizing the wide discretion of the trial couti quoted Long Beach, "[a]n equity judge considering whether to set aside a foreclosure sale 'has a large discretion which will only be interfered with by the appellate court in a clear case of injustice." *Arsali,* 79 So. 2d 845, 848.

In addition, the result obtained in this case serves evetyone's best interest overall. The Florida Supreme Couti Task Force on Residential Mortgage Foreclosure Cases cited by Petitioner, notes that "[t]he largest losses are incurred in cases where the property is foreclosed and then marketed for re-sale. Plaintiffs [lenders] and bonowers have a compelling interest in having as many defaulted mortgage contracts resolved as perfmming loans within the ability of the bonower and the cunent market conditions." *Final Report and Recommendations on·*

Residential Mortgage Foreclosure Cases, at p.l 0 (2009). The reinstatement of the loan agreed upon by the Bank and Homeowners in the subject action did exactly that. In the subject matter, the equities are clear, and to do otherwise, would indeed be an injustice.

III. THE COURT PROPERLY SET ASIDE THE FORECLOSURE SALE AND FINAL JUDGMENT

Petitioner asserts that the Court improperly set aside the foreclosure sale and vacated the final judgment based on the merger doctrine, and now for the first time in any Court claims vacating the final judgment was never specifically sought by the moving parties. In the first instance, Petitioner asserts the Homeowners lost the right to reinstate after the entty of judgment. This is an erroneous and overstatement of the law. In support of his claim that the right to reinstate was lost through the merger of the promissory note and mortgage into the judgment, Petitioner relies on the general statement of the law and cases such as *Matter of Boromei,* 83 B.R. 47 (Bankr. M.D. Fla. 1988) and *Old Republic Ins. Co. v. Lee,* 507 So. 2d 753 (Fla. 4th DCA). These cases, however, only stand for the proposition that a mortgagee ***cannot be compelled*** to accept a reinstatement after acceleration or the entty of final judgment. In the subject action, the mortgagor and mortgagee ***agreed*** upon reinstatement after entty of final judgment. This is acceptable under Florida law, and such reinstatement actually requires that the final

judgment be vacated and the lawsuit dismissed. See, *One 7Yh Street Estates, Inc. v. American Jnv. Services,* 47 So. 3d 886, 889 (Fla. 3d DCA 2010) ("The 'reinstatement' of a mortgage after entty of a foreclosure judgment is considerably more significant than merely rescheduling a foreclosure sale date. Reinstatement signifies that the mortgage is returned to its pre-default status as an effective instrument, ***by definition anticipating that any foreclosure judgment is vacated and the lawsuit dismissed.")*** (Emphasis added.) In fact, as futiher noted in *One 79th Street,* "[a]" reinstatement of a mortgage after acceleration and foreclosure can accomplish the intended result only if the foreclosure judgment is vacated." *One 79th Street Estates,* 47 So. 3d 886, 889 n.4.

Thus, reinstatement by agreement of the patiies after final judgment is absolutely pennissible, and as pati of such reinstatement the final judgment has to be vacated and the case dismissed as occurred in the subject action.

Fmiher, Petitioner now argues for the first time anywhere that the Homeowners never sought the specific relief of vacating the judgment. Any such argument has been waived. The issue was never raised in the lower court, nor on appeal to the Fomih District. It was never raised in the trial comi in response to any motion filed by the Homeowners, nor in the motion for rehearing. It was never raised as an issue on appeal in the Fourth District either in the Initial or Reply Briefs, nor in the motion for rehearing. The first time this issue has been raised is

now, in the Florida Supreme Court. As such, the matter should not be considered by this Court, as the issue has been waived. See, *Campbell v. State,* 9 So. 3d 59, 61 (Fla. 2009), citing *Fla. Dep't of Transportation v. Juliano,* 801 So. 2d 101, 107 (Fla. 2001); see also, *Parlier v. Eagle-Picher Industries, Inc.,* 622 So. 2d 479, 481 (Fla. 5th DCA 1993) ("[t]here is a general rule of appellate review based on practical necessity and fairness to opposing counsel and the trial judge, that issues not timely raised below will not be considered on appeal.")

Even if the argument is to be considered, the relief granted by the trial court is in conformity with Florida law. *See, One 79'" Street Estates,* 47 So. 3d 886. In addition, the Homeowners stated within their Motion that they were requesting any such further relief the court deemed equitable and just. This would include the relief granted.

Thus, the vacating of the final judgment, was proper, authorized and necessary, and there was no showing of abuse of discretion by the trial comi in so ordering.

IV. NO EVIDENTIARY HEARING WAS REQUIRED

As noted in the Statement of the Case and Facts above, the Homeowners timely filed their Motion to Vacate on May 13, 2011, and set same for hearing for May 26, 2011, by serving a Notice of Hearing on all parties. (App. II A, B). As noted by the Fourth Disttict, the Motion was "properly noticed for a hearing on

May 20. Arsali's later intervention was 'in subordination to, and in recognition of, the propriety of the main proceeding.'" *Arsali,* 79 So. 3d 845, 847 n.l. As further noted by the Fourth District, this Court has stated that the intervenor is bound by the record made a the time he intervenes, and must take the suit as he finds it, and cannot contest the claims against defendant, and is limited to an assertion of his right to the res. Further, the intervenor cannot challenge the sufficiency of the pleadings or the propriety of the procedure. *Arsali,* 79 So. 3d 845, 847 n.l., citing, *Krousev. Palmer,* 179 So. 762,763 (Fla 1938).

As was properly stated by the Fourth District, at the hearing there was no dispute between the Bank and the Homeowners that the case had been settled and that the sale should have been cancelled. Because inadequate bid price was not an issue, nor a required element for proof under *Brown,* no evidentiary hearing was required. *Arsali,* 79 So. 3d 845, 849.

Finally, once again, Petitioner argues the vacating of the Final Judgement. However, as argued in Argument III hereinabove, such argument fails as a matter oflaw, and has been waived by Petitioner.

CONCLUSION

Based upon the foregoing, the certified question should be answered in the negative, and the Fourth District Comt of Appeal's opinion affirming the Trial Court's Order vacating the foreclosure sale, certificate of sale and Final Judgment should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a tme and correct copy of the foregoing has been served via U.S. Mail on Beth M. Coleman, Esq., Beth M. Coleman, P.A., Post Office Box 7280, St. Petersburg, Florida 33734 and Ryan Watstein, Esq., Wargo & French, LLP, 999 Peachtree Street NE, 26th Floor, Atlanta, Georgia 30309 this 19th day of September, 2012.

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RULE 9.210(a)(2) CERTIFICATE OF FONT SIZE COMPLIANCE

Counsel for Respondents, AMY B. WILSON and CHRISTOPHER D. MANNING certifies that the Answer Brief is computer generated, black print Times New Roman style type size 14 point, double-spaced, with margins no less than 1 inch and othetwise in confonnity with Fla. R. App. Pro. 9.210(a)(2).

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