Filing # 21033174 Electronically Filed 11/26/2014 03:00:40 PM

In the Supreme Court of Florida

CASE NO. SC14-1049
LT. CASE NO. 4D13-17
LT. CASE NO. 10-31646 (08)

THE BANK OF NEW YORK MELLON CORPORATION a/k/a THE BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK AS TRUSTEE FOR THE BENEFIT OF ALTERNATIVE LOAN TRUST 2007-0A2 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-0A2

RECEIVED, 11/26/2014 15:03:37, John A

Petitioner,

v.

CONDOMINIUM ASSOCIATION OF LA MER ESTATES, INC.,

Respondent.

______________________________/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Review from an *en banc* decision of the District Court of Appeal, Fourth District

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STATEMENT OF REFERENCE

"Association" refers to Respondent, Condominium Association of La Mer Estates, Inc.

"Bank" refers to Petitioner, The Bank of New York Mellon Corporation a/k/a The Bank of New York Mellon f/k/a The Bank of New York as Trustee for the Benefit of Alternative Loan Trust 2007-0A2 Mortgage Pass-Through Certificates, Series 2007-0A2.

"Property" refers to Condominium Unit PH1, LA MER CONDOMINIUM ESTATES SOUTH, according to the Declaration of Condominium thereof, recorded in Official Records Book 4297, Page 51 of the Public Records of Broward County, Florida, with an address of 1904 South Ocean Drive, PH1, Hallandale Beach, Florida 33009.

"IB" refers to Association's Initial Brief filed in the Fourth District Court of Appeal.

"AB" refers to Bank's Answer Brief filed in the Fourth District Court of Appeal.

"RB" refers to Association's Reply Brief filed in the Fourth District Court of Appeal.

"A" refers to Association's Appendix to Initial Brief filed in the Fourth District Court of Appeal.

"PB" refers to Bank's Initial Brief on the Merits.

"Declaration of Condominium" refers to the Declaration of Condominium for La Mer Condominium recorded at Official Records Book 4297, Page 51 of the Public Records of Broward County, Florida.

"Lower Court Action" refers to *Condominium Association of La Mer Estates, Inc. vs. The Bank of New York Mellon f/k/a The Bank of New York as Trustee for the Benefit of Alternative Loan Trust 2007-0A2 Mortgage Pass-Through Certificates Series 2007-0A2, Broward Circuit Case No.: 10-31646 CACE (08),* from which the Order on Appeal emanates.

"Fourth District Appeal" refers to *Condominium Association of La Mer Estates, Inc. vs. The Bank of New York Mellon f/k/a The Bank of New York as Trustee for the Benefit of Alternative Loan Trust 2007-0A2 Mortgage Pass-Through Certificates Series 2007-0A2, Third District Court of Appeal Case No.: 4D13-17, 137 So.3d 396 (Fla. 4th DCA 2014),* from which the Decision reversing the Order on Appeal emanates.

"Quiet Title Judgment" refers to that certain Final Judgment Quieting Title entered February 3, 2011, in favor of Appellant in the Lower Court Action.

"Order on Appeal" refers to that certain Order on Plaintiff's Motion to Vacate Void Judgment entered December 3, 2012, in the Lower Court Action.

"Decision" refers to the decision of the Fourth District Court of Appeal in *Condominium Association of La Mer Estates, Inc. vs. The Bank of New York Mellon, et*

al 137 So.3d 396 (Fla. 4th DCA 2014).

Reference to the Record on Appeal will be made by citing to the document as it appears by name in the record before this Court and in this Statement of Reference and then to the specific page of the document.

INTRODUCTION

Until the Fourth District's attempt to reconcile the case law in an *en banc* decision, Florida cases conflicted with respect to the right to vacate judgments based on a complaint's failure to state a cause of action; one line of cases held that the failure to state a cause of action rendered a judgment void, the other held that failure to state a cause of action merely rendered a judgment voidable. The Fourth District's Decision is consistent with historical precedent and consistent with federal courts' interpretation of a similar rule, which determined that a judgment's finality should not be attacked except in the rarest of circumstances, i.e. when a court lacks jurisdiction, and held that the failure to state a cause of action merely rendered the Quiet Title Judgment voidable and not subject to collateral attack by Bank one and a half years after entry.

STATEMENT OF FACTS

The Statement of Facts provided by Bank is incomplete, and argumentative. Association relies, in its stead, on the facts accurately presented in the Decision:

> Owners of a condominium in La Mer Estates executed a mortgage to BSM Financial in 2006. That mortgage went into default in 2008, and the mortgagors also defaulted on their condominium maintenance

payments. Appellant, the Condominium Association of La Mer Estates, recorded a claim of lien for the unpaid assessments, filed an action to foreclose its lien, and obtained a final judgment of foreclosure in July 2009. After the foreclosure judgment but before the foreclosure sale, appellee, Bank of New York Mellon, was assigned the mortgage securing the condominium unit. The association was the only bidder at the sale and received a certificate of title to the condominium unit.

Concerned about the continuing unpaid monthly assessments, the association wrote to the bank offering to convey to it the title to the condominium, but the bank did not respond. Several months later, the association filed a complaint to quiet title to the property, alleging its own title to the property; how it acquired its title; and that the mortgage assigned to the bank constituted a cloud on the association's title. The association alleged that the bank had no bona fide interest or claim to the property.

The association served the bank and obtained a default. Although it also obtained a default final judgment, it moved to vacate the final judgment because of concerns that the service was not properly made. The court vacated the judgment, and the complaint was served again on the bank. Again the bank did not respond and the clerk entered a new default. The association filed a new motion for entry of final judgment quieting title. The bank was given notice and an opportunity to be heard but failed to appear at the hearing. The court entered a second judgment quieting title against the bank on February 10, 2011.

The bank took no action for over one and a half years. Finally, on August 31, 2012, it moved pursuant to rule 1.540(b) to vacate the quiet title judgment on grounds that it was void because the complaint filed to state a cause of action to quiet title. The bank argued that because it was void, the one year limitation which applied to the other grounds for relief under rule 1.540(b), did not apply. *See M.L. Builders, Inc. v. Reserve Developers, LLP, 769 So. 2d 1079,* 1081 (Fla. 4th DCA 2000) (a motion to vacate a void judgment may be made at any time). The bank argued that a complaint to quiet title must allege not only the association's title to the property and how it obtained title, but must also show why the bank's claim of an interest in the property is invalid and not well founded, citing *Stark v. Frayer,* 67 So. 2d 237, 239 (Fla. 1953). The bank contended that

> it has a title interest superior to that of the association and that the association had not alleged facts which showed the bank's title was invalid.
>
> The trial court conducted a hearing and granted the motion to vacate on grounds that the judgment was void because the complaint filed to state a cause of action. The association now appeals the order which vacated the final judgment quieting title.
>
> The association argues that the trial erred in vacating the final judgment quieting title because the judgment was only voidable, not void. If a judgment is "void" then under rule 1.540(b) it can be attacked at any time, but if it is only "voidable" then it must be attacked within a year of entry of the judgment. Because the bank did not file its motion to vacate for over a year and a half after entry of the final judgment, the association argues that it could seek to vacate the judgment only if the judgment was void. Condo Assn of La Mer Estates, Inc. v. The Bank of New York Mellon Corp., 137 So. 3d 396, 397-98 (Fla. 4th DCA 2014) (*en banc*).

The Fourth District, *sua sponte* decided to reconsider prior decisions and held, as a matter of law, that Association's failure to state a cause of action did not render the Quiet Title Judgment void, but merely voidable. *La Mer, 137 So. 3d at 397.*

Because Bank neither timely appealed the Quiet Title Judgment, nor sought to vacate the Quiet Title Judgment within one year, as required by *Fla.R.Civ.P. 1.540(b)*, the Quiet Title Judgment was not subject to collateral attack. *La Mer, 137 So. 3d at 400.* As a result, the Fourth District ordered reinstatement of the Quiet Title Judgment. *La Mer, 137 So. 3d at 401.*

Bank seeks review of the Decision.[1] This Court has jurisdiction. *Fla. Const. Art.*

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[1] The Fourth District also believed the issue was of statewide importance, but declined

V, §3(b)(4); Fla.R.App.P. 9.030(a)(2)(A)(vi).

SUMMARY OF ARGUMENT

The Fourth District's Decision correctly held that the failure to state a cause of action did not render the Quiet Title Judgment void, but merely voidable. This was consistent with prior rulings of this Court and Federal Courts' interpretation of similar federal *Rule 60(b),* which hold that a judgment is null and void only when the court does not have the power to adjudicate a matter, but that a judgment is merely voidable if it is irregular or erroneous. In addition, the alleged failure of a complaint to state a cause of action does not relate to a court's jurisdiction, but is an issue of procedure, which even if erroneous, does not render a judgment void for lack of jurisdiction.

It was appropriate for the Fourth District to treat the Quiet Title Judgment as voidable since the failure to state a cause of action does not rise to the level of a jurisdictional defect. A jurisdictional defect relates to a court's power to hear and determine an action. Jurisdiction is not dependent upon the ultimate existence of a good cause of action.

Since jurisdiction does not depend upon the sufficiency of a complaint, the failure to state a cause of action relates to the irregularity of proceedings, not the power to enter a judgment, and therefore does not render a judgment void. It was a fair

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certification on this basis because of certified conflicting decisions. *La Mer, 137 So. 3d at 401 & n. 1.*

analysis for the Fourth District to determine that the alleged failure to state a cause of action rendered the Quiet Title Judgment voidable rather than void as it does not affect the power or authority of the Court to adjudicate the matter nor does it relate to personal jurisdiction over Bank.

While there is a line of cases holding that the failure to state a cause of action renders a judgment void, these cases are inconsistent with this Court's previous rulings and are based on the claim that those rulings predate, in part, the modern rules of civil procedure. This Court subsequent to the advent of the modern rules of civil procedure held that procedural errors and irregularities will not render a judgment void. As a result, the Fourth District, in returning to this Court's previous holdings, applied the correct rule of law.

In addition, the line of cases which hold that a defendant can seek the vacation of a default judgment where the complaint fails to state a cause of action sheds no light on this matter as they fail to distinguish between void and voidable judgments and also fail to specify when the defendant sought to vacate the judgment.

Because the Circuit Court had the power to adjudicate the quiet title dispute and had personal jurisdiction over Bank, the alleged failure to state a cause of action could only render the Quiet Title Judgment voidable, and not subject to collateral attack more than one year after its rendition.

Bank has failed to provide any equitable or policy reason justifying: (1) its

failure to timely respond to the Complaint in the Lower Court Action; (2) failure to appear at the hearing on the Motion for Entry of Final Judgment Quieting Title despite proper notice; (3) failure to take a direct appeal of the Quiet Title Judgment; and (4) waiting more than one and a half years after entry of the Quiet Title Judgment to address it. None of the equitable or policy reasons raised by Bank provide a basis to relieve it from its conscious inaction in the Lower Court Action or overturn the Fourth District's decision.

Since the Fourth District's Decision is based on historical precedent of this Court consistent with federal interpretation of a similar federal rule and based on the fact that the failure to state a cause of action does not rise to the level of a jurisdictional defect and since Bank failed to provide any equitable or policy reason for overturning the Quiet Title Judgment due to its failure to act in this matter on a timely basis, this Court should affirm and approve the Fourth District's Decision and disapprove the conflicting decisions.

ARGUMENT I.

THE FOURTH DISTRICT CORRECTLY HELD THAT FAILURE TO STATE A CAUSE OF ACTION RENDERS THE QUIET TITLE JUDGMENT MERELY VOIDABLE, AS OPPOSED TO VOID, BECAUSE FAILURE TO STATE A CAUSE OF ACTION RELATES TO PROCEDURAL IRREGULARITIES RATHER THAN A COURT'S POWER TO ADJUDICATE.

The Fourth District held that the failure to state a cause of action did not render

the Quiet Title Judgment void, but merely voidable, receding *en banc* from prior contrary decisions. Its *en banc* decision is consistent with prior decisions of this Court, and federal courts' interpretation of a similar federal *Rule 60(b)*. Both hold that a judgment is void only if the trial court did not have the power to adjudicate the matter or lacked jurisdiction over the person; in contrast a judgment is merely voidable, if there is a procedural irregularity. *See Malone vs. Meres, 91 Fla. 709, 109 So. 677 (Fla. 1926)* and *Curbelo vs. Ulman, 571 So. 2d 443 (Fla. 1990)*. Because there was no question that the Circuit Court had both: (1) the power to adjudicate this quiet title dispute; and (2) personal jurisdiction over Bank, failure to state a cause of action did not render the Quiet Title Judgment void, but merely voidable. Accordingly, Bank was precluded from obtaining vacatur of the judgment under *Fla.R.Civ.P. 1.540(b)* more than one year after its rendition.

A. The Fourth District's Decision is consistent with historical precedents.

This Court has long held that a judgment is null and void only when a court does not have the power to adjudicate the matter, but that a judgment is merely voidable if it is irregular or erroneous. See *Malone 190 So. at 682.* If a court has acquired jurisdiction of the subject matter and the parties, the judgment or the decree entered is binding even though erroneous because of irregularity of procedure, and such a judgment will not be set aside, reversed or modified except by appropriate direct appellate procedure. *Malone 109 So. at 682; see also Wilds vs. State, 79 Fla. 575, 84*

So. 664 (Fla. 1920).

In *Malone, 109 So. at 680*, which is similar to this case, suit was brought to enforce a lien predicated upon a written instrument. After entry of judgment, defendant claimed the judgment was void because the written instrument did not constitute a lien, and therefore, the complaint failed to state a cause of action. *Id. at 681.* Defendant urged that this failure to state a cause of action rendered the judgment void.

This Court held that the lower court had the power to adjudicate lien foreclosure claims and additionally had jurisdiction over the defendant. In language equally applicable here, it wrote that:

> If the court has acquired jurisdiction of the subject-matter and of the parties, the judgment or decree entered is binding, even though erroneous because of irregularity of procedure, and such judgment or decree will not be set aside, reversed or modified except by appropriate direct appellate procedure.

Id. at 682.

While courts of general jurisdiction have the power to adjudicate lien foreclosure actions, questions of whether or not the plaintiff had a lien which was subject to foreclosure was not a matter of the power or authority of the court to adjudicate the matter, but whether or not the complaint stated a cause of action. *Id. at 682.* This Court held that the issue raised was one of procedure and even if erroneous, it did not render the judgment void for lack of jurisdiction. Instead the judgment was

merely voidable, and not subject to collateral attack. *Id. at 682.*

This Court noted that:

> 'Jurisdiction', in the strict meaning of the term, as applied to judicial officers and tribunals, means no more than the power lawfully existing to hear and determine a cause. It is the power lawfully conferred to deal with the general subject involved in the action. *Bouv. Law Dict. 1760; And. Law Dict.* It does **not** (emphasis supplied) depend upon the ultimate existence of a good cause of action in the plaintiff, in the particular case before the court. It is the power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case. *Hunt vs. Hunt, 72 N.Y. 217, 28 Am. Rep. 129.* Again, 'jurisdiction' does not relate to the right of the parties as between each other, but the power of the court.

Malone, 109 So. at 683, quoting *Curtis v. Brown, 29 Ill. 201.*

Here, there is no question that the Circuit Court had the power to adjudicate an action to quiet title. *See §26.012(2)(g), Fla.Stat.(2013).* The Circuit Court also acquired personal jurisdiction over Bank. *(A. 81).* As in *Malone*, the question of whether or not the Association's complaint failed to state a cause of action relates solely to a procedural irregularity, and not to the power of the Circuit Court to adjudicate the action. The judgment was voidable, not void, and subject to vacatur only on a *Rule 1.540* motion to vacate filed within one year.

Bank's attempts to distinguish *Malone* are unavailing. First, Bank claims that *Malone* did not involve a default judgment or an ex parte hearing without the defendant present. This is of no import. The question in *Malone* was not whether or not a default judgment is void or voidable in the abstract, but whether a judgment is

void or voidable because of the alleged failure to state a cause of action. Here, Bank attempted to collaterally attack the Quiet Title Judgment, claiming it was void because the Complaint failed to state a cause of action, just like the defendant in *Malone.*

The Bank chose not to participate in the Lower Court Action, even after it had been served twice, and twice received notice of the hearing on the Motion for Entry of Final Judgment Quieting Title. (A. 70, 73, 81 and 84). Bank chose not to take a direct appeal of the Quiet Title Judgment. It cannot distinguish *Malone* based on its own conscious refusal to participate in court proceedings.

Bank also urges that it may have been possible for the plaintiff in *Malone* to state a cause of action, while the Association's complaint could never state a cause of action. There is no legal basis for this distinction, for which Bank cites zero law. Moreover, in *Malone*, defendant claimed that plaintiff had no right to foreclose a lien because no lien existed, and therefore, the complaint failed to state a cause of action. *Malone, 190 So. at 681.* Here, Bank claims Association had no right to quiet title in the Property as Association knew that its own interest in the Property was inferior to that of Bank. While Association disputes this assertion, it goes to the issue of whether or not the complaint stated a cause of action, the same issue as in *Malone*, not the court's power to adjudicate the case.[2] Because this Court in *Malone* found that the

[2] The elements of a cause of action to quiet title are: (1) validity of Association's title and the invalidity of Bank's title; (2) a cloud that needs to be removed; (3) more than a

failure to state a cause of action does not go to the power or authority of a court to adjudicate the matter, but only to irregularity of procedure, the failure to state a cause of action in this case only renders the Quiet Title Judgment voidable, not void.

Bank correctly observes that *Malone* and *Coleman vs. Williams, 147 Fla. 514, 3 So.2d 152 (Fla. 1941)* were decided before the advent of the modern Florida Rules of Civil Procedure. However, their analysis is still good today, as reflected by *Curbelo v. Ullman, 571 So. 2d 443 (Fla. 1990)* decided in 1990, well after the Florida Rules of Civil Procedure were in place. *Curbelo* reiterated that where a Court is legally organized and has jurisdiction of the subject matter, and the adverse parties are given an opportunity to be heard, then errors, irregularities or wrongdoings in the proceedings will not render a judgment void, and thus errors and irregularities in the judgment could not be remedied under *Fla.R.Civ.P. 1.540(b)(4).* While *Curbelo* did not involve failure to state a cause of action, like *Malone*, it stands for the principle that a judgment is "void" under limited circumstances relating to a court's power to adjudicate.

In *Krueger v. Ponton*, 6 So. 3d 1258 (Fla. 5th DCA 2009), the Fifth District found that a judgment based on a non-cognizable cause of action was not void, but

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mere interest in the Property; and (4) a deraignment of title. See *§65.061 Fla.Stat.* A cloud on title is an outstanding instrument, record, claim or encumbrance that is invalid or inoperative, but which may nevertheless impair title to property. See *20 Fla. Jur. 2d Ejectment and Related Remedies §79.* All of these elements appear in the complaint.

voidable. Bank seems to be arguing that there is some difference between the failure to state a cause of action and the complete lack of a cause of action. While Association disagrees that any distinction exists, assuming arguendo, that there was a distinction between the failure to state a cause of action and the lack of a cause of action, *Krueger* indicates that the lack of a cause of action (i.e. a non-cognizable cause of action) renders a judgment voidable not void. As a result, *Krueger* supports the position that the Quiet Title Judgment was voidable and not subject to attack by Bank one and a half years after entry.

Association concedes the existence of a line of cases holding that the failure to state a cause of action renders a judgment void. *See e.g., Moynet vs. Courtois, 8 So.3d 377 (Fla. 3d DCA 2009).* It submits that these cases are inconsistent with *Malone, Coleman* and *Curbelo* which distinguish between void and voidable judgments. Divergence from this Courts' decisions apparently began with *Becerra vs. Equity Imports, Inc., 541 So.2d 846 (Fla. 3d DCA 1989)* where, in a footnote, the Third District stated that since *Coleman* predated the Florida Rules of Civil Procedure, it was inapplicable to the determination of whether the failure to state a cause of action rendered a judgment void as opposed to voidable. *Becerra* forms the basis for subsequent decisions holding that the failure to state a cause of action renders a judgment void as opposed to voidable. *See, e.g. Big Bang Entertainment, LLC vs.*

(A. 1-4).

Moumina, 137 So.3d 117 (Fla. 3d DCA 2014) and *Southeast Land Developers, Inc. vs. All Florida Site and Utilities, Inc., 28 So.3d 166 (Fla. 1st DCA 2010).*

Acknowledging the conflict between the various districts, the Fourth District returned to *Malone, Coleman* and *Curbelo,* in determining the correct and applicable rule of law.

B. The Fourth District's Decision is consistent with federal court interpretation of comparable Rule 60(b), Fed.R.Civ.P

The Fourth District's Decision is also consistent with Federal Courts interpretation of *Federal Rules of Civil Procedure Rule 60(b)(4)* which provides that a court may relieve a party from a final judgment which is void. Because Florida Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, federal decisions are highly persuasive in ascertaining the intent and operative effect of various provisions of the rules. *See e.g. Wilson vs. Clark, 414 So. 2d 526 (Fla. 1st DCA 1982).* In interpreting *Federal Rule of Civil Procedure Rule 60(b)(4),* the United States Supreme Court held that a judgment is not void simply because it is or may have been erroneous, rather it is void only in those rare instances where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or opportunity to be heard. *See United States Aid Funds, Inc. vs. Espinosa, 559 US 260, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010).* In *Espinosa*, the Supreme Court stated that a void judgment is a legal nullity, based on the premise

that a judgment entered by a court without jurisdiction never comes into existence as the court lacks the power to enter it.

Consistent with *Malone*, federal courts have also found that a judgment is not void merely because it may be erroneous. *See V.T.A., Inc. vs. Airco, Inc., 597 F. 2d 220 (10th Cir. 1979)* (and cases cited therein which held that where a party has not been denied the opportunity to dispute the validity of another party's claims and the court has subject matter jurisdiction over the claim and the parties, then there is no deprivation of due process of law and a judgment is not void). *V.T.A.* noted that "the concept of setting aside a judgment on voidness grounds is narrowly restricted" in the interest of finality. *Id. at 225. Accord United States v. Boch Oldsmobile, Inc., 909 F. 2d 657, 661 (1st Cir. 1990)*(in the interest of finality, the concept of void judgments is "narrowly construed").

C. The Fourth District correctly held that failure to state a cause of action rendered the Quiet Title Judgment voidable, requiring the filing of a motion to vacate within one year, as failure to state a cause of action does not rise to the level of a jurisdictional defect.

Not only is the Fourth District Decision supported by historical precedent and consistent with the federal interpretation of *Federal Rules of Civil Procedure, Rule 60(b)(4)*, but since the failure to state a cause of action does not rise to the level of a jurisdictional defect, it was appropriate for the Fourth District to treat the Quiet Title Judgment as voidable.

This Court previously found that failure to allege an element of an action did not rise to the level of a jurisdictional defect and, therefore, could be waived by the parties. See *Cunningham vs. Standard Guaranty Insurance Company, 630 So.2d 179 (Fla. 1994).* In rendering its decision, this Court in *Cunningham,* cited M*alone* with approval, and found that jurisdiction did not depend on the ultimate existence of a cause of action in favor of plaintiff. *See Cunningham 630 So.2d at 181.*

Cunningham also cited *Florida Power & Light Company vs. Canal Authority, 423 So.2d 421 (Fla. 5th DCA 1982),* in which Florida Power & Light filed a motion to vacate judgments of condemnation claiming that the court lacked subject matter jurisdiction to enter them because the complaints (upon which the judgments were based) did not attach authorizing resolutions of the condemning authority. This Court held in *Florida Power & Light* that:

> Even if at the time the petitions for condemnation in this case were filed, the failure of the condemning authority to attach resolutions to their petitions for condemnation made those petitions subject to motions to dismiss, such deficiencies in the pleadings invoking the jurisdiction of the trial court did not deprive the court of jurisdiction. Clearly the trial court in the instant cases, being the Circuit Court, had subject matter jurisdiction over the class of cases known as condemnation suits.

Id. at 425.

Likewise, in this case, the Circuit Court had subject matter jurisdiction over quiet title actions. Failure to state a cause of action was a pleading deficiency. As a

result, the quiet title judgment was not void, but merely voidable.

The reason that failure to state a cause of action does not rise to the level of a jurisdictional defect goes back to the premise, enunciated in *Malone,* that jurisdiction is the power lawfully existing in a court to hear and determine an action and does not depend upon the ultimate existence of a good cause of action. If a court never had the power to adjudicate an action, it could never enter a judgment. Therefore, where there is a lack of jurisdiction, a judgment is void. *See also Espinosa.*

Jurisdiction does not depend upon the sufficiency of a complaint. *See Malone 109 So. at 685.* The failure to state a cause of action relates to irregularities in the proceedings, not the power to enter a judgment and, therefore, does not render a judgment void when the Court has jurisdiction and the parties had an opportunity to be heard. See *Curbelo.*[3]

The Bank conflates failure to state a cause of action with lack of jurisdiction when it engages in the intellectually dishonest exercise of arguing that the Association's letter (A. 31) and the complaint filed in the Lower Court Action are similar to the letter and complaint filed in *Schwades vs. America's Wholesale Lender,*

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3 To the extent that Bank argues that for a Court's jurisdiction to be lawfully invoked requires the filing of a proper pleading, see *Phenion Development Group, Inc. vs. Love, 940 So.2d 1182 (Fla. 5th DCA 2006),* such argument is dispelled by *Cunningham* which clearly holds that failure to state a cause of action is not the same as a jurisdictional defect. See also *In the Matter of Adoption of D.P.P., __ So.3d__, (2014) WL 2109130 (Fla. 3d DCA 2014).*

39 FLW D1906 (Fla. 5th DCA September 5, 2014). In *Schwades,* the lender failed to respond to a letter from the debtor demanding that the lender "prove" the debt owed to it. No such proof was required. Lender's failure to respond did not create a cause of action in favor of the debtor, and the attempt to bring such a claim was fraudulent.

Here, Association sent a letter to Bank offering to convey title at no cost or expense to the Bank, free and clear of all liens and encumbrances. (A. 31). The letter does not require Bank to verify anything, and provided Bank with the opportunity to own the Property without the expense of a foreclosure action. Association has a fiduciary duty to its members, pursuant to Florida condominium law and the Declaration of Condominium, to attempt to maximize the collection of assessments to pay for common expenses. Acceptance of this offer by the Bank would have benefited the Association with a unit owner who would timely pay assessments. There is simply nothing frivolous, devious, fraudulent or malicious about this, as Bank suggests.

Bank claims that the sending of this letter, and the Lower Court Action based on the letter, are akin to the actions of the debtor and its attorney in *Schwades*. Nothing could be further from the truth. In *Schwades*, the debtor tried to defraud the bank. Here, Association legitimately attempted to transfer the Property to Bank in recognition (not avoidance) of its mortgage. Any response by Bank to Association's letter would have obviated the Quiet Title Action. Had Bank accepted Association's offer, Association would have conveyed title to Bank. If Bank had responded to

Association's letter by stating that it was not interested in the offer, and would foreclose its mortgage on its own timetable, Association would not have filed the Lower Court Action.

But Bank did neither. Bank acted as it has, consistently throughout this matter, by failing to respond. Bank finds itself in its present position because it failed to timely respond to the complaint; failed to appear at the hearing on the Motion for Entry of Quiet Title Judgment, despite indisputably receiving notice of same; and failed to do anything in the Lower Court Action until more than two years after it was initially served with the complaint and more than 1½ years after entry of the Quiet Title Judgment.

Association filed the Lower Court Action because of the lack of a response by Bank to a legitimate offer to transfer title to the Property. The Association had legitimate doubt, based on the Bank's nonresponse as to whether or not it was waiving its mortgage interest in the Property. If Bank had waived its interest in the mortgage, then Association legitimately filed the Lower Court Action to remove an impediment to title which was no longer effective. While Bank claims the complaint is "facially frivolous," given Bank's lack of a response to the Association's letter, Association justifiably believed that Bank had no interest in pursuing its mortgage, which constituted a cloud that had to be removed.

The issue before this court is not whether a defendant can vacate a judgment

based on a complaint that fails to state a cause of action, but whether there are strict time limits governing such motions, because failure to state a cause of action renders a judgment voidable not void. Bank's citation to cases such as *North American Accident Insurance Co. vs. Moreland, 60 Fla. 153, 53 So. 635 (Fla. 1910),* which provide that a defendant is authorized to vacate a judgment when it is based on a complaint that fails to state a cause of action (without reference to when that defendant attempted to vacate the judgment or whether the judgment was voidable or voidable) shed no light on this issue.

In addition, the Lower Court Action was not an attempt to "foreclose up," consequently *Cone Brothers Construction vs. Moore, 193 So.288 (Fla. 1940)* is not applicable. A careful analysis of *Cone Brothers* reveals that the default judgment, which was obtained by the alleged junior mortgagee, was not the subject of the appellate proceedings. The appellate proceedings dealt with whether or not the prior judgment obtained by the junior mortgagee had a res judicata effect on the proceedings brought by the alleged senior mortgagee in an action to foreclose its mortgage. While this Court stated that it was not proper in foreclosure proceedings to try a claim of title superior or paramount to that of the mortgagee plaintiff, it never held that the judgment obtained by the junior mortgagee was void. In fact, the term "void" was only used in relation to invalid service. Because the junior mortgagee's default judgment was not the subject of the appeal, this Court did not decide whether the alleged junior

mortgagee's foreclosure judgment was void for failure to state a cause of action.

In the Lower Court Action, Association sought only to remove a cloud on title which resulted from the Bank's failure to respond to Association's legitimate offer to convey title to the Property to Bank free and clear of liens. Assuming arguendo, that the Lower Court Action was an attempt to "foreclose up," it again merely relates to a failure to state a cause of action, which does not go to the power or authority of the Circuit Court to adjudicate the action, and therefore, does not render the Quiet Title Judgment void. See *Malone.*

Bank's citation to *Citimortgage, Inc. v. Henry*, 34 So. 3d 641, (Fla. 2d DCA 2009) likewise does not support its position. *Citimortgage* is based solely on *Cone Bros.*, which does not distinguish between void and voidable judgments. Therefore, it is unclear whether or not the void vs. voidable issue was presented to the Second District. The same is true for this Court's decision in *Brumby vs. City of Clearwater, 108 Fla. 633, 149 So. 633 (Fla. 1933)* Voidable judgments can be attacked via timely motion for rehearing, or direct appeal, and neither *Brumby* nor *Citimortgage* modifies that principle.

The analysis of whether failure to state a cause of action renders a judgment voidable as opposed to void is similar to those governing standing cases. *See, e.g., Phadael vs. Deutsche Bank Trust Company Americas, 83 So.3d 893 (Fla. 4th DCA 2012).* Where a party attacks standing, a judgment can only be challenged by a timely

filed motion for rehearing or a timely filed appeal, as the judgment is voidable not void. *See also Krueger.*

The Fourth District's *en banc* Decision sought to bring in line opinions of its district with precedents of this Court finding that the failure to state a cause of action did not render a judgment void, but merely voidable.

It was a fair analysis of precedent for the Fourth District to determine that the alleged failure to state a cause of action rendered the Quiet Title Judgment voidable, rather than void. In fact, the Fourth District previously held that a void judgment is one entered in the absence of the court's jurisdiction over the subject matter or the person. See *Miller v. Preefer*, 1 So. 3d 1278 (Fla. 4th DCA 2009). *Miller* further held that a voidable judgment is one that is erroneous as to law or fact, but not without jurisdiction. This holding, which is in accord with *Malone* and *Cunningham,* provided a basis for the Fourth District to hold that the alleged failure to state a cause of action did not deprive a court of jurisdiction, but is a judgment that may be erroneous as to law or fact. As such, the alleged failure to state a cause of action would only render a judgment voidable.

The alleged failure to state a cause of action does not affect the power or the authority of a court to adjudicate a matter, nor does it relate to the personal jurisdiction over Bank. It is solely a procedural irregularity which did not rise to the level of a jurisdictional defect and only rendered the Quiet Title Judgment voidable. The Fourth

District's decision is consistent with historical precedent, and federal court interpretation of a similar federal rule. Its decision should be affirmed and approved, and the conflicting decisions of other district courts disapproved.

ARGUMENT II.

NO EQUITABLE OR POLICY ARGUMENTS EXCUSE THE BANK'S FAILURE TO RESPOND TO THE COMPLAINT, TO TIMELY APPEAL OR FILE A TIMELY RULE 1.540 MOTION TO VACATE.

Bank suggests a number of equitable and policy reasons to overturn the Quiet Title Judgment, despite the fact that it is merely voidable. Bank raises these issues because it failed to timely respond to the complaint in the Lower Court Action; failed to appear for the hearing on the Motion for Entry of Final Judgment Quieting Title despite proper notice; did not take a direct appeal of the Quiet Title Judgment; and waited more than two years after it was initially served, and 1½ years after entry of the Quiet Title Judgment, to address it. None of the equitable or policy reasons raised by Bank provides a basis to relieve it from its conscious inaction in the Lower Court Action or overturn the Fourth District's Decision.

Initially, Bank claims that it did not have enough time to attack the Quiet Title Judgment if it is merely voidable as opposed to void. The absurdity of this argument is revealed where Bank claims "Because a party may not even be aware that a judgment has been entered against them, they may not know that the 30-day clock has started

ticking." (See PB. 20). For Bank to suggest that it did not know that the 30-day clock was ticking, contradicts the record where Bank was served *twice* with the original complaint and *twice* received a notice of hearing of the Motion for Entry of Final Judgment Quieting Title via certified mail. (A. 70, 73, 81 and 83). Bank did not know that the "30-day clock was ticking" because it opted to not participate in the proceedings. This is hardly a case involving a vigilant defendant being taken unaware through a default procedure that takes away its rights. Bank voluntarily chose not to participate, and now wants this Court to excuse its inaction.[4]

As the off-cited equitable doctrine states, he who seeks equity must stand before the Court with "clean hands" and he who seeks equity must do equity. See *Diaz vs. Diaz, 418 So.2d 1064 (Fla. 3d DCA 1982).* Bank was served twice, and twice received notices of hearing, yet failed to defend or participate in any manner whatsoever until 1½ years after entry of the Quiet Title Judgment, and has never suggested that service was ineffective or improper, or that the notices of hearing were never received. Vigilance on Bank's part is nonexistent here. Therefore, there is no equitable basis to excuse or reward Bank for its inactions.

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[4] After it was served with the Complaint, Bank had 20 days to file a motion to dismiss, a motion for judgment on the pleadings, a motion for summary judgment or an answer in which it could have raised the defense that the complaint filed to state a cause of action. This 20 day period is the same for every defendant in every action in Florida.

Bank's cite to *§702.036 Fla.Stat.* is equally unavailing as it is inapplicable to the facts here. That recently-enacted statute only applies to mortgage foreclosure actions in which the foreclosure sale occurred and the property has been sold to a third party unaffiliated with the mortgagee. Bank's position here actually contradicts the purpose of the statute as it would allow parties, such as Bank, to attack judgments for failure to state a cause of action years after the entry of the judgment. Even if applicable, said statute was not designed to allow title issues to fester for indeterminate periods of time.

Bank's policy arguments are equally unavailing. One of the reasons behind the Fourth District's decision is to add an element of finality to matters which would allow free alienation of property based on judgments. The fact that judgments remain void because of lack of subject matter or personal jurisdiction does not contradict the Fourth District's rationale. First, where a court does not have jurisdiction, it does not have the power to enter a judgment. Without the power to enter a judgment, a judgment must be void.

Second, it would be relatively easy for a title examiner to review a court file to determine whether or not jurisdiction has been acquired over a party by reviewing the return of service or the publication notices, or to determine whether or not a court had subject matter jurisdiction, depending upon the type of action filed. Failure to state a

cause of action is not so readily susceptible to review.[5]

Bank argues that the Fourth District's Decision would encourage frivolous lawsuits. The contrary is true. There is not one rule of law for banks and another for everyone else. The Fourth District's decision encourages parties to appear in court and defend when they have been properly served. If a party believes that the complaint in any particular case is deficient in any respect, it has 20 days to file a motion to dismiss, motion for judgment on the pleadings, motion for summary judgment or an answer, all attacking the failure to state a cause of action. Here, Bank consciously chose to ignore service, not once but twice, and chose not to appear to defend its interests. These actions should and do have consequences.

If Bank desires to stop what it considers to be frivolous lawsuits, it has options such as *§57.105, Fla. Stat.* but it requires taking action, instead of doing nothing for years, and then asking courts to come to its rescue. There is no legal equitable or policy reason against this Court determining that failure to state a cause of action renders a judgment voidable, as opposed to void. It requires parties to act promptly (instead of sleeping on their rights) and encourages finality. As such, this Court should affirm and approve the Fourth District's well-considered *en banc* Decision.

CONCLUSION

For the foregoing reasons, this Court should affirm and approve the Fourth

[5] It should also be remembered that not all title agents are attorneys.

District's Decision and, disapprove contrary decisions such as *Southeast Land Developers, Moynet,* and *Big Bang Miami Entertainment, LLC* among others.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I CERTIFY that an image hereof was electronically transmitted to: Dennis D. Bailey, Esq. (eservice@clegalgroup.com), Choice Legal Group, P.A., 1800 NW 49th Street, Suite 120, Fort Lauderdale, FL 33309; and to J. Randolph Lieber, Esq. and Tricia J. Duthiers, Esq. (tjd@lgplaw.com) and service@lgplaw.com; Liebler, Gonzalez & Portuondo, P.A., 44 West Flagler Street, 25th Floor, Miami, FL 33130; and that a copy of Respondent's Jurisdictional Response Brief was emailed to the Clerk on

November 26, 2014, in accordance with Florida Rule of Judicial Administration 2.516.

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CERTIFICATE OF TYPE SIZE AND STYLE

Respondent hereby certifies that the type size and style of the Jurisdictional Response Brief is Times New Roman 14 pt.

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