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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 a/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

Petitioner,

v.

CONDOMINIUM ASSOCIATION OF LA MER ESTATES, INC.,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

On Review from the District Court of Appeal, Fourth District State of Florida

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PRELIMINARY STATEMENT

This is discretionary review proceeding to review the opinion of the Fourth District Court of Appeal in *Condominium Association of La Mer Estates, Inc. v. Bank of New York Mellon Corp.*, 137 So. 3d 396 (Fla. 4th DCA 2014). This Court has discretionary jurisdiction pursuant to Article V, §3(b)(4) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi), providing for review of decisions certified by a district court to be in express and direct conflict with a decision of another district court of appeal.

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, Defendant/Appellee below, will be referred to as "Bank." Respondent, Condominium Association of La Mer Estates, Inc., Plaintiff/Appellant below, will be referred to as "Association." Other terms will are where they first appear in the brief.

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

Opinion:__- Opinion from the District Court of Appeal

I.B.:__ - Initial Brief : page number

A.A.:__- Association's Appendix: page number

A.B.: __ - Answer Brief: page number

R.B.: __- Reply Brief: page number

STATEMENT OF CASE AND FACTS

I. The Association Forecloses its Lien on the Borrower's Property And Files a Quiet Title Action Against the Bank

The Condominium Association of La Mer Estates, Inc. (the "Association") took title to the property commonly known as 1904 South Ocean Dr. PH-1, Hallandale Beach, Florida, 33009 ("Subject Property"), after foreclosing its lien for unpaid condominium assessments. A.A.:3, 55. The Association's title was subject to the first mortgage ("Mortgage") assigned to the Bank, which the Bank had not yet sought to foreclose. A.A.:2–3.

On or about August 3, 2010, the Association filed an action against the Bank seeking to quiet title in the Subject Property. A.A.:1–31. The Complaint alleged that the Bank had not instituted foreclosure proceedings despite the fact that mortgage payments were not being made. A.A.:3–4. The Association also alleged that the Bank's mortgage created a cloud on title and that the Association had offered to convey the property to the Bank, but the Bank did not accept the Association's offer. A.A.:3–4. The Association concluded "it appears that the Bank has no real interest or bona fide claim to the property." A.A.:4.

When the Bank did not respond to the Complaint, the Association filed a Motion for Default, and a Clerk's Default was entered on September 3, 2010. A.A.:71. On September 20, 2010, the Association moved for a Final Default

Judgment Quieting Title. A.A.:72. A Final Judgment Quieting Title was entered on October 12, 2010. A.A.:76–77. However, the Association realized that service of process may not have been valid and moved to vacate its default judgment. A.A.:78–79. The trial court subsequently vacated the default judgment and directed the clerk to issue an alias summons. A.A.:80.

On November 16, 2010, the Association served the Alias Summons and Complaint upon the Bank by serving The Corporation Trust Company, as registered agent for the Bank. A.A.:81. The Trustee did not respond to the Complaint, and a clerk's default was entered on December 7, 2010. A.A.:52. The Association moved for final default judgment, and the Final Judgment Quieting Title was entered on February 3, 2011 ("Default Final Judgment"). A.A.:83, 32–33.

II. The Bank Moves to Vacate the Final Judgment

On September 12, 2012, the Bank Moved to vacate the Default Final Judgment as Void ("Motion to Vacate"). A.A.:36–51. The Bank alleged, in the Motion to Vacate, that the Complaint failed to state a cause of action to quiet title, and thus, the Default Final Judgment entered upon the legally insufficient Complaint is void and may be collaterally attacked at any time. A.A.:36–42. Specifically, the Bank argued:

> A complaint to quiet title must allege not only the plaintiff's title to the property in controversy – as well as how the plaintiff obtained title and the chain of title – but must also show why the defendant's claim of an interest in the property is invalid and not well founded. . . . That, Plaintiff could not do.

A.A.:37 ¶ 7 (citations omitted).

On December 3, 2012, after hearing argument of counsel, the trial court found that the Complaint failed to state a cause of action to quiet title, and thus, the Default Final Judgment was void. A.A.:87, 99, 105–06. The trial court then entered an order vacating the Default Final Judgment ("Order Vacating Judgment"). A.A.:34. The Association appealed the Order Vacating Judgment to the Fourth District Court of Appeal.

III. The Appeal of the Order Vacating Judgment

The Association appealed to the Fourth District Court of Appeal seeking review of the Order Vacating Judgment. Opinion at 2. On appeal, the Association argued that the Bank's objections to the Complaint were an attack on standing and not whether the Complaint stated a cause of action. I.B.:12–15. The Association further argued that the Complaint stated a cause of action. I.B.:12–13. Additionally, the Association argued that only lack of personal or subject matter jurisdiction can render a judgment void. I.B.:11–12. The Association never acknowledged that the then-existing law in the Fourth District was that a default

judgment entered on a complaint that failed to state a cause of action was void, and accordingly, never argued for a change to existing law. *See generally*, I.B.

In response, the Bank argued that the Association's Complaint did not state a cause of action to quiet title. A.B.:7–14. The Bank next argued that because the Complaint failed to state a cause of action, the default final judgment is void, and as a result, the Final Judgment can be collaterally attacked at any time. A.B.:14–18.

On February 19, 2014, an *en banc* panel of the district court entered an order reversing the trial court order. *See* Opinion. The district court recognized that the trial court ruled correctly based on the then-existing precedent, but receded from its prior precedent to hold that a default judgment, entered on a complaint that failed to state a cause of action, is voidable rather than void. Opinion at 1. The district court concluded that the line of cases holding that default judgments entered on a complaint that failed to state a cause of action are void departed from this Court's precedent. Opinion at 4–5. As a policy reason for the decision to recede from its precedent, this Court stated its practical concern as follows:

> To rule that a judgment affecting title to property is void if the complaint on which it is based failed to state a cause of action could cloud a title for years and years, rendering it unsellable. What title insurance company would hazard insuring a title containing a default final judgment in its chain if that judgment could be vacated at any time even though the defaulted party had notice of the proceedings?

> The uncertainty generated by declaring such judgments void is magnified when one considers that courts may differ as to what constitutes sufficient allegations to state a cause of action.

Opinion at 5.

Rehearing was denied on April 25, 2014, and the petitioner's notice to invoke the discretionary jurisdiction of this court was timely filed on May 27, 2014.

SUMMARY OF ARGUMENT

This Court should quash the decision of the fourth district and approve the conflict cases and other cases holding that a default judgment entered on a complaint that fails to state a cause of action is void. This Court has long held that a default judgment cannot be entered on a complaint that fails to state a cause of action. Over time, courts have interpreted this requirement to mean that a proper pleading that, at least, arguably shows entitlement to relief is required to invoke a trial court's subject matter jurisdiction. Because the Complaint below could not even present a conceivable entitlement to relief, there was no proper pleading, and the trial court's subject matter jurisdiction was never properly invoked.

Even if this Court disagrees with the general principle that a default judgment entered on a complaint that fails to state a cause of action is merely voidable, the decision below should still be quashed. This Court has held that the

priority of a senior lienholder cannot be adjudicated on default in a foreclosure action brought by a junior lienholder. While the Association styled its case as a quiet title action, it made no allegations that would support a quiet title action and was in essence an attempt to foreclose a senior lien. Thus, even if the judgment is not void, it does not bind the Bank's interest. Thus, this Court should quash the decision of the district court.

In addition, the district court's decision is not based on sound policy and should not be adopted as the rule of law by this Court. First, under the district court's decision it would be nearly impossible for a defendant to vacate a default judgment entered on a complaint that fails to state a cause of action no matter how frivolous, because he would have no notice of the default judgment and a very small window to attempt to set the judgment aside. This rule of law would open the door to abuse of the court system by filing frivolous complaints by plaintiffs hoping to win a default lottery. Second, the policy considerations at the heart of the district court's reasoning are not well founded and the rule of law it announces does nothing to solve these concerns. The concerns that title insurers will be unable to underwrite policies where there is a default judgment in the chain of title, or that good faith purchasers could be divested of their property years later do not present actual problems. The legislature has all but eliminated this concern with its

new foreclosure statute that limits the remedy on a collateral attack of a foreclosure judgment to money damages where the defendant had been properly served. Because it will be harder for a title insurance underwriter to determine the truth of the allegations in a service affidavit than it would be to determine if a complaint stated a cognizable cause of action, the problems envisioned by the fourth district are not solved by its newly-announced rule. Thus, this Court should quash the decision of the fourth district and approve the decisions of the first and third districts in *Southeast Land Developers, Inc. v. All Florida Site and Utilities, Inc.*, 28 So. 3d 166, 168 (Fla. 1st DCA 2010), and *Moynet v. Courtois*, 8 So. 3d 377, 378-79 (Fla. 3d DCA 2009).

ARGUMENT

I. THE FOURTH DISTRICT COURT OF APPEAL INCORRECTLY RULED THAT A DEFAULT JUDGMENT ENTERED ON A COMPLAINT THAT FAILS TO STATE A CAUSE OF ACTION MERELY VOIDABLE, NOT VOID

A. Standard of Review

In this matter, this Court is being asked "to construe and interpret the Florida Rules of Civil Procedure. This is a pure question of law, subject to *de novo* review." *Pino v. Bank of New York*, 121 So. 3d 23, 30–31 (Fla. 2013).

B. The District Court's Decision Incorrectly Held That the Conflict Cases Are a Departure from This Court's Prior Precedent, Because a Proper Pleading Is Required to Invoke a Trial Court's Subject Matter Jurisdiction

The district court's decision, holding that a default judgment on a complaint that wholly fails to state any cognizable cause of action is voidable rather than void, creates a conflict between the district courts. Because the position from which the fourth district receded is based on sound reasoning and law, this Court should quash the decision of the district court and hold that a default judgment entered on a complaint that does not state a cognizable cause of action is void, and thus, can be collaterally attacked at any time.

In certifying express and direct conflict with *Southeast Land Developers, Inc. v. All Florida Site and Utilities, Inc.*, 28 So. 3d 166, 168 (Fla. 1st DCA 2010),

and *Moynet v. Courtois*, 8 So. 3d 377, 378-79 (Fla. 3d DCA 2009), the district court receded from nearly thirty years of precedent, including its own decisions expressly holding judgments such as the one in this case to be void. The district court also effectively vitiated over 100 years of precedent from this Court holding that a default judgment cannot be entered on a complaint that fails to state a cause of action. For nearly thirty years, the district courts of appeal have applied the principle that a default judgment entered on a complaint that fails to state a cause of action is void and may be challenged at any time. *Se. Land Developers, Inc.*, 28 So. 3d at 168 ("A default judgment is void and should be set aside when the complaint fails to state a cause of action." (citing *Moynet v. Courtois*, 8 So. 3d 377, 378–79 (Fla. 3d DCA 2009) (citing *Becerra v. Equity Imports, Inc.*, 551 So. 2d 486 (Fla. 3d DCA 1989), and *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 493 (Fla. 3d DCA 1994)); *GAC Corp. v. Beach*, 308 So. 2d 550 (Fla. 2d DCA 1975). For example, the *Southeast Land Developers* court held that the "[f]ailure to allege that conditions precedent are met renders a complaint fatally defective in that it fails to state a cause of action." 28 So. 3d at 168. Other courts have also held that "[a] default judgment must be set aside where the complaint fails to state a cause of action because '[f]ailure to state a cause of action, ***unlike formal or technical deficiencies, is a fatal pleading deficiency not curable by a default***

judgment.'" *Mauna Loa Investments, LLC v. Santiago*, 122 So. 3d 520, 522 (Fla. 3d DCA 2013), reh'g granted (Oct. 16, 2013), review granted, SC13-2194, 2014 WL 2446371 (Fla. 2014) (quoting *Becerra*, 551 So.2d at 488) (emphasis added).

The district court found that the line of cases holding that a default judgment entered on a complaint that failed to state a cause of action is void departed from this Court's established precedent. Opinion at 5. However, decisions from this Court dating back to the early twentieth century support the proposition that a default judgment cannot be entered on a default judgment that fails to state a cause of action. *E.g.*, *Brumby v. City of Clearwater*, 149 So. 203, 204 (Fla. 1933) ("It was quite proper for the court to vacate the decree pro confesso because the bill of complaint on its face does not state a cause of action against the municipality."); *N. Am. Acc. Ins. Co. v. Moreland*, 53 So. 635, 637 (Fla. 1910) ("A judgment by default properly entered against parties sui juris operates as an admission by the defendants of the truth of the definite and certain allegations and the fair inferences and conclusions of fact to be drawn from the allegations of the declaration. Conclusions of law, and facts not well pleaded, and forced inferences are not admitted by a default judgment."). This principle has developed into the line of cases receded from by the district court in this case. *E.g.*, *S.e. Land Developers, Inc.*, 28 So. 3d at 168; *Moynet v. Courtois*, 8 So. 3d 377, 378-79 (Fla. 3d DCA

2009); *Becerra*, 551 So. 2d at 488; *Sunshine Sec. & Detective Agency v. Wells Fargo Armored Servs. Corp.*, 496 So. 2d 246, 246 (Fla. 3d DCA 1986) (‘“[T]he law is well-settled that a default judgment may not be entered against a defendant on a complaint which wholly fails to state a cause of action against the said defendant.’” (citing *North American Accident Insurance Co. v. Moreland*, 53 So. 635 (1910); *Fernandez-Aguirre v. Gall*, 484 So. 2d 1286 (Fla. 3d DCA 1986); *Bay Products Corp. v. Winters*, 341 So.2d 240 (Fla. 3d DCA 1976); *GAC Corp. v. Beach*, 308 So. 2d 550 (Fla. 2d DCA 1975))).

The district court cited *Krueger v. Ponton*, 6 So. 3d 1258, 1261 (Fla. 5th DCA 2009), for the proposition that “the Fifth District recognized that a judgment based upon a ‘non-cognizable cause of action’ was voidable and not void.” Opinion at 4. However, the *Krueger* decision relies upon another case from within its own court that shows that this position is not absolute, but rather only applies when it is questionable whether a complaint states a cause of action. The fifth district has explained that “[i]n general, there are two aspects of subject matter jurisdiction. The first “concerns the power of the trial court to deal with the class of cases to which a particular case belongs.” *Phenion Dev. Group, Inc. v. Love*, 940 So. 2d 1179, 1182 (Fla. 5th DCA 2006) (quoting *Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 801 n. 3 (Fla. 2003)). However, “[t]he second ‘requires

that a ***court's jurisdiction be lawfully invoked by the filing of a proper pleading.'*** *Phenion Dev. Group, Inc. v. Love*, 940 So. 2d at 1182 (emphasis added) (quoting *Garcia v. Stewart*, 906 So.2d 1117, 1122 (Fla. 4th DCA 2005)). With respect to jurisdiction in the Phenion case, the court stated, ***"Appellees' complaint stated a viable cause of action, and therefore lawfully invoked the court's jurisdiction."*** *Phenion Dev. Group, Inc.*, 940 So. 2d at 1182 (emphasis added).

Here, the complaint below could never state a cognizable cause of action. The Complaint was frivolous. Recognizing a default judgment should never have been entered, the trial court vacated it a year and a half after entry. The issue here is not that the Association neglected to plead a single element in its otherwise viable cause of action, but that the entire premise of its cause of action was so utterly fraudulent it was not a proper pleading sufficient to vest the trial court with subject matter jurisdiction. *See Groover v. Groover*, 383 So. 2d 280, 282 (Fla. 5th DCA 1980) (holding that divorce decree was void when putative wife hid the fact that marriage was bigamous, thus there was no valid marriage between the parties, preventing the court from acquiring jurisdiction over the subject matter of the purported divorce (citing *Roberts v. Seaboard Surety Co.*, 29 So. 2d 743 (Fla. 1947))); *Cf. Phenion Dev. Group, Inc.*, 940 So. 2d at 1182.

The district court relied upon a case from this Court that predates the modern

rules of civil procedure for an explanation of the difference between a void and voidable judgment. Opinion at 4 (citing *Malone v. Meres*, 109 So. 677 (Fla. 1926)). While the discussion of void versus voidable in *Malone* provides a basis for the general understanding of the principle, it does not mandate a different result here. First, as explained above, a proper pleading is required to invoke a trial court's jurisdiction; this was not an issue in *Malone*. Second, *Malone* is distinguishable on its facts for two principal reasons. First, *Malone* did not involve an *ex parte* hearing with a defaulted defendant. In *Malone*,

> The defendant, an adult man, appeared, and by answer merely demanded 'full and strict proof' of the allegations of the bill of complaint and made no defense. ***This was*** a voluntary submission to the jurisdiction of the court and ***a waiver of any and all objections***, if any, to the forum of the proceeding, ***to the sufficiency of the pleading, and to the authority of the court to proceed to a determination of the equitable rights and remedies set up in the bill of complaint.***

Malone v. Meres, 109 So. 677, 687 (Fla. 1926) (emphasis added). In addition, the *Malone* court found that "[t]he allegations of the bill of complaint, ***at least, raise a question of an equitable right or an equitable remedy***; and ***an erroneous decision thereon does not affect the power or jurisdiction of the court*** to proceed in the cause, ***the defendant having appeared therein."*** *Id.*

In contrast to this case, the *Malone* court found it to be significant that the complaint arguably stated a cause of action, and that the defendant waived any

claims to the failure to state a cause of action by his appearance. Here, however, the Bank did not appear, and the Association's Complaint did not arguably state a cause of action. In fact, various courts around this state have found that a quiet title action based on a mortgagee's failure to respond to a letter, to which it had no duty to respond, are frivolous. The fifth district has even reported one attorney to the Florida Bar for repeatedly bringing such claims. *Schwades v. Am.'s Wholesale Lender*, 39 Fla. L. Weekly D1906 (Fla. 5th DCA 2014). As a result, the line of cases holding that a default judgment entered on a complaint that failed to state a cause of action is void, does not conflict with this Court's precedent, at least with respect to complaints that are so facially frivolous that they are not a proper pleading to invoke the trial court's subject matter jurisdiction. Thus, this Court should quash the district court's decision below, and approve the decisions from the first and third districts.

C. Assuming, arguendo, a Default Judgment Entered Upon a Complaint That Fails to State a Cause of Action Is Only Voidable, This Court Should Still Reverse Because a Junior Lienholder Cannot "Foreclose Up" Under Any Circumstances

Even if this Court agrees with the district court that a default judgment entered on a complaint that fails to state a cause of action is merely voidable, this Court should still reverse here because it is well-settled law that junior lienholder cannot foreclose a senior lienholder and a default judgment entered in favor of a

junior lienholder will not bind the interest of a senior lienholder. *Cone Bros. Const. Co. v. Moore*, 193 So. 288 (Fla. 1940).

In *Cone Brothers*, a junior mortgagee brought a foreclosure action naming a senior mortgagee as a defendant and obtained a default judgment. *Id*. at 289. When the senior mortgagee brought a foreclosure suit naming the junior mortgagee as a defendant, the junior mortgagee asserted the judgment in the prior suit as a defense. *Id*. The senior lienholder moved to vacate the prior judgment as void because service was improper and that he was not a proper party to the suit. *Id*. at 290–91. The court found service of process valid, but held that a default judgment against a senior mortgagee would not bind his interest. *Id*.

> A prior mortgagee may elect for himself the time and manner of enforcing his security. He cannot be compelled to be a party to a suit by a junior encumbrancer foreclosing his lien. It is not proper in foreclosure proceedings to try a claim of title superior or paramount to that of the mortgagor and even if a party having title is made a party and judgment entered after a hearing, ***it will not bind his interest***; but if such claim is set up by a defendant, and this be litigated, then both parties will be bound by the decree.

193 So. at 290–91. Citing *Cone Brothers*, the Second District also held that a default judgment extinguishing the lien of a superior interest in favor of a junior lienholder is not binding on the senior lienholder unless the priority of liens is actually litigated and determined by the court. *Citimortgage, Inc. v. Henry*, 24 So. 3d 641, 644 (Fla. 2d DCA 2009).

While the instant case was styled as a quiet title complaint rather than a foreclosure, the suit was nothing more than an indirect attempt to foreclose a senior lien. The fact that the Association brought one foreclosure action extinguishing all the junior lines before it brought what was for all intents and purposes a foreclosure action against the Bank, should not allow the Association to circumvent *Cone Brothers*. Because it is not permissible to use the law to do indirectly what one cannot do directly, the Association should not be permitted to use a meritless quiet title suit used as an end-around to an impermissible foreclosure that would not have bound the Bank's interests. *See Barragan v. City of Miami*, 545 So. 2d 252, 255 (Fla. 1989); *Cone Bros.*, 193 So. at 290–91; *Henry*, 24 So. 3d at 644. Thus, even if this Court agrees that as a general principle a default judgment entered on a complaint that states a cause of action is voidable, *Cone Brothers* is controlling here, and the Bank should not be bound by the default judgment wiping out its senior lien. Thus, this Court should quash the decision of the district court.

II. THE FOURTH DISTRICT'S DECISION IS NOT BASED ON SOUND POLICY CONSIDERATIONS

In addition to the fact that the decisions of the first and third districts are well founded in the law, they are also sound policy. First, under the district court's decision it would be nearly impossible for a defendant to vacate a default judgment

entered on a complaint that fails to state a cause of action no matter how frivolous. Second, the policy considerations at the heart of the district court's reasoning are not well founded and the rule of law it announces does nothing to solve these concerns.

A. *Under the Fourth District's Decision, the Window to Challenge a Default Judgment Entered on a Frivolous Complaint Would Be Limited to the Time for Bringing a Direct Appeal, Effectively Eliminating the Possibility of Relief Under Rule 1.540*

Contrary to the district court's dicta, that a party may vacate a voidable judgment within one year, its decision actually precludes such relief. The district court's decision leaves no avenue for relief under rule 1.540(b) in the absence of mistake, excusable neglect, newly discovered evidence, fraud, or that the judgment is void for another reason. It is well-settled that a default judgment cannot be entered on a default judgment that fails to state a cause of action. *E.g.*, *Brumby*, 149 So. at 204; *Moreland*, 53 So. at 637; *accord Mauna Loa Investments, LLC v. Santiago*, 122 So. 3d 520, 522 (Fla. 3d DCA 2013), reh'g granted (Oct. 16, 2013), *review granted*, SC13-2194, 2014 WL 2446371 (Fla. 2014); *Mullne*, 84 So. 3d at 1248–49. Additionally, the law is also well-settled that "[t]he party seeking affirmative relief may not be granted relief that is not supported by the pleadings or by substantive law applicable to the pleadings. ***A party in default may rely on these limitations".*** *Bd. of Regents v. Stinson-Head, Inc.*, 504 So. 2d 1374, 1375

(Fla. 4th DCA 1987) (quoting H. Trawick, Trawick's Florida Practice and Procedure § 25-4 (1986 ed.)). However, the district court's decision eliminates the remedy for a violation of these principles, when a motion is not brought in conjunction with one of the other factors listed in rule 1.540(b), effectively eliminating the possibility of relief except by direct appeal. Because a defaulted defendant may not be immediately aware that a final judgment is entered against him, this narrow avenue of relief will be meaningless in most cases.

Despite these well settled legal principles, the practical application of the fourth district's decision may result in the unintended consequence that a defendant will have, at most, thirty days to challenge a default judgment no matter how repugnant the allegations in the complaint. The fourth district's decision effectively vitiates a defendant's ability to use rule 1.540(b) to vacate a default judgment on the grounds that the complaint fails to state a cause of action, forcing defendants to take a plenary appeal to set aside such a judgment. Because a party may not even be aware that a judgment has been entered against them, they may not know that the thirty-day clock has started ticking. *Sarasota Estate & Jewelry Buyers, Inc. v. Joseph Gad, Inc.*, 25 So. 3d 619, 621 (Fla. 2d DCA 2009) (holding that a trial court may enter a judgment on liability and award liquidated damages without notice, but defaulted defendant must be given notice of trial on

unliquidated damages only). This thirty-day window assumes that appellate courts would even consider an argument that a default judgment was improperly entered without it being preserved before the trial court. Because a post-judgment motion for rehearing is generally required to preserve an issue appearing for the first time on the face of a judgment, the reality is that a defaulted defendant may only have fifteen days to seek review of a default judgment entered against him on a frivolous complaint. *Pensacola Beach Pier, Inc. v. King*, 66 So. 3d 321, 324 (Fla. 1st DCA 2011).

"There is an ancient equity maxim to the effect that equity aids the vigilant and not those who slumber on their rights." *Matousek v. Cooper*, 111 So. 2d 65, 68 (Fla. 2d DCA 1959). However, "[a]n actor in a court of equity comes into a court of conscience, and will not be allowed unconscionable relief, nor relief otherwise than under conditions that he does equity upon his part." *Taylor v. Rawlins*, 97 So. 714, 715 (Fla. 1923). Applied to this case, these principles of the law show that while a court should favor the vigilant over the neglectful, a line should be drawn and the equities should support the neglectful defendant rather than the malicious plaintiff. Although, a party should not be able to sleep on their rights, this Court should not create a rule of law that rewards those who use the courts in bad faith.

B. The Policy Considerations Cited by the Fourth District Are Not Well-Founded

As a policy reason for receding from prior precedent, the fourth district's stated in its decision, its practical concern as follows:

> To rule that a judgment affecting title to property is void if the complaint on which it is based failed to state a cause of action could cloud a title for years and years, rendering it unsellable. What title insurance company would hazard insuring a title containing a default final judgment in its chain if that judgment could be vacated at any time even though the defaulted party had notice of the proceedings? The uncertainty generated by declaring such judgments void is magnified when one considers that courts may differ as to what constitutes sufficient allegations to state a cause of action.

Opinion at 5. The district court's policy decision is does not support the decision for two main reasons; first, this newly-announced rule does nothing to protect subsequent purchasers and title insurers for judgments found to be void for lack of subject-matter or personal jurisdiction; and second, Florida's new foreclosure statute forecloses the possibility of rampant displacement of subsequent purchasers and claims against title insurance policies that the district court found so concerning, as elaborated upon below.

Under the district court's decision, a default judgment remains void if it was entered absent subject-matter or personal jurisdiction. The Bank takes no issue with this principle, as it is fundamentally unfair to deprive a person of property without proper notice, and the principle that a judgment entered in the absence of

subject matter jurisdiction is void is fundamental to our legal system. However, practically, it would be easier for a title insurance underwriter to determine the likelihood of a subsequent claim when there is a default judgment in the chain of title by examining a complaint to determine whether it states a cause of action, than by examining a service affidavit. Although it is true that courts vary on what constitute sufficient allegations to state a cause of action, this is not a case where the Association merely omitted to make an allegation that would have supported its cause of action. Rather, the Association brought an entirely non-cognizable cause of action seeking relief to which it did not conceivably have a right, and was fortunate enough that the Bank defaulted. *Cf. Se. Land Developers, Inc. v. All Florida Site & Utilities, Inc.*, 28 So. 3d 166, 168 (Fla. 1st DCA 2010) ("Failure to allege that conditions precedent are met renders a complaint fatally defective in that it fails to state a cause of action."). "A default judgment: operates as an admission of the truth of the *well pleaded allegations of the pleading*." *Mullne v. Sea-Tech Const. Inc.*, 84 So. 3d 1247, 1248–49 (Fla. 4th DCA 2012) (emphasis in original). When determining whether a default judgment was supported by the complaint, a title insurer or subsequent purchaser need not concern itself with the truth of the complaint's allegations, but only whether if true, those allegations were sufficient.

In contrast, a subsequent purchaser or title insurer must satisfy themselves of the truth of the statements in a return of service. Although a return of service may appear regular on its face, a defaulted defendant may still challenge service. *Bank of Am., N.A. v. Bornstein*, 39 So. 3d 500, 503 (Fla. 4th DCA 2010) ("If the return is regular on its face, then the service of process is presumed to be valid and the party challenging service has the burden of overcoming that presumption by clear and convincing evidence."). Untrue statements in a return of service cannot be discovered from the face of a return. While concern for due process might outweigh the concern for a party with notice, the proper remedy is not to reward the fortunate filer of a frivolous complaint who has the good fortune of a defendant who defaults, but to protect a subsequent good-faith purchaser by limiting the remedy to money damages as Florida's new foreclosure statute does. § 702.036, Fla. Stat.

Florida HB 87 was designed, in part, to protect subsequent purchasers of property at foreclosure sales from claims to invalidate the final judgment or reestablish a lien in abrogation of the final judgment, by limiting the available relief to monetary damages.

> (1)(a) In any action or proceeding in which a party seeks to set aside, invalidate, or challenge the validity of a final judgment of foreclosure of a mortgage or to establish or reestablish a lien or encumbrance on the property in abrogation of the final judgment of foreclosure of a

> mortgage, the court shall treat such request solely as a claim for monetary damages and may not grant relief that adversely affects the quality or character of the title to the property, if:
>
> > 1. The party seeking relief from the final judgment of foreclosure of the mortgage was properly served in the foreclosure lawsuit as provided in chapter 48 or chapter 49.
> > 2. The final judgment of foreclosure of the mortgage was entered as to the property.
> > 3. All applicable appeals periods have run as to the final judgment of foreclosure of the mortgage with no appeals having been taken or any appeals having been finally resolved.
> > 4. The property has been acquired for value, by a person not affiliated with the foreclosing lender or the foreclosed owner, at a time in which no lis pendens regarding the suit to set aside, invalidate, or challenge the foreclosure appears in the official records of the county where the property was located.
>
> (b) This subsection does not limit the right to pursue any other relief to which a person may be entitled, including, but not limited to, compensatory damages, punitive damages, statutory damages, consequential damages, injunctive relief, or fees and costs, which does not adversely affect the ownership of the title to the property as vested in the unaffiliated purchaser for value.

§ 702.036, Fla. Stat. In passing this law, the Legislature balanced the due process rights of property owners being dispossessed of their property against the rights of third party purchasers who purchase property at judicial sales after all appeals are exhausted.

By fashioning a remedy such as is found in section 702.036, this Court can protect any *bonafide* purchasers of real property from a defaulted defendant seeking to collaterally attack a foreclosure judgment or reestablish a lien wiped-out

by a default judgment because the defaulted defendant would be limited to seeking monetary damages if "[t]he party seeking relief from the final judgment of foreclosure of the mortgage ***was properly served in the foreclosure lawsuit*** as provided in chapter 48 or chapter 49." § 702.036(1)(a)1., Fla. Stat. The district court's concern that innocent purchasers will be disposed of their property years later, and that title insurers cannot safely write policies is more likely to come to fruition on claims that a judgment is void for lack of service of process, than that a judgment is void because the complaint failed to state a cause of action. Under section 702.036(1)(a)1, a *bonafide* third party purchaser could be divested of its ownership interests years later if a defaulted defendant can prove that he was not properly served with process. Thus, the district court's policy concerns fail to cure the ill it sought to avoid with its decision. To the contrary, the district court's decision increases the likelihood that borrowers, homeowners' associations, and other junior lienholders will flood the courts with frivolous quiet title suits hoping they will win the default lottery and reap the undeserved windfall of a free property. Adhering to the precedent established by the various district courts, including the fourth district before this case, but limiting the remedy to a money judgment when a defaulted defendant had notice of the proceedings against him and the property has been sold to a third-party, would solve the district court's

concerns without rewarding malfeasance. The district court's decision also does not take into account default money judgments entered on frivolous complaints, and would allow a money judgment to stand that should have not been entered under any circumstances. A policy affecting the application of the rules of civil procedure in all cases should not be made based on how they affect a certain class of cases. The district court's policy reasoning only applied to cases involving real property rights, but it announced a rule that affects all types of judgments. The policy that a default judgment is void if it is entered on a complaint that fails to state a cause of action discourages frivolous lawsuits while protecting parties whose only mistake was failing to respond to a frivolous lawsuit. The change in policy if the district court's decision is adopted will encourage frivolous lawsuits in the name of protecting property owners from a risk the Florida Legislature has already eliminated by statute.

CONCLUSION

For the foregoing reasons, this Court should quash the district court's decision below and approve the decisions of the first and third districts in *Southeast Land Developers, Inc. v. All Florida Site and Utilities, Inc.*, 28 So. 3d 166, 168 (Fla. 1st DCA 2010); *Moynet v. Courtois*, 8 So. 3d 377, 378-79 (Fla. 3d DCA 2009); *Big Bang Miami Entm't, LLC. v. Moumina*, 137 So. 3d 1117 (Fla. 3d DCA 2014), among others.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished via Email Transmission on October 2, 2014, to all parties on the Service List below.

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CERTIFICATE OF TYPE SIZE & STYLE

Appellee hereby certifies that the type size and style of the Answer Brief is Times New Roman 14pt.

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