

IN THE SUPREME COURT OF FLORIDA

Case No. SC17-954

2ND DCA Case No. 2D15-5198

Trial Court Case No.: 41 2014CA002512AX

**THE BANK OF NEW YORK MELLON
FKA THE BANK OF NEW YORK, as
successor trustee to JPMorgan Chase
Bank, N.A., as Trustee on behalf of the
Certificateholders of the CWHEQ, Inc.,
CWHEQ Revolving Home Equity Loan
Trust, Series 2006-D,**

Petitioner,

v.

**DIANNE D. GLENVILLE A/K/A DIANE
D. GLENVILLE A/K/A DIANE
GLENVILLE and MARK S. GLENVILLE,**

Respondents.

**PETITION FOR DISCRETIONARY REVIEW OF A DECISION
OF THE DISTRICT COURT OF APPEAL OF FLORIDA, 2ND CIRCUIT**

PETITIONER'S BRIEF IN SUPPORT OF JURISDICTION

Anthony R. Smith (#0157147)
Shaun K. Ramey (#0117906)
Kendra J. Taylor (#108896)
Attorneys for Petitioner
SIROTE & PERMUTT, P.C.
1201 S. ORLANDO AVE., SUITE 430
WINTER PARK, FL 32790-908

TABLE OF CONTENTS

TABLE OF CITATIONS3

JURISDICTIONAL STATEMENT4

STATEMENT OF THE CASE AND FACTS4

SUMMARY OF THE ARGUMENT5

ARGUMENT.....6

I. THIS COURT HAS JURISDICTION BECAUSE THE 2ND DCA EXPRESSLY HELD THAT ITS DECISION WAS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL.6

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO RESOLVE CONFLICT AND RESULTING UNCERTAINTY IN THE LAW......8

CONCLUSION.....9

CERTIFICATE OF SERVICE10

CERTIFICATE OF COMPLIANCE12

TABLE OF CITATIONS

	Page(s)
CASES	
<u>Bank of New York Mellon v. Glenville</u> , 2017 WL 1493788 (Fla. 2d DCA April 26, 2017).	4,5,6,7
<u>Straub v. Wells Fargo Bank, N.A.</u> , 182 So.3d 878 (Fla. 4th DCA 2016)	5
<u>Floridians for a Level Playing Field v. Floridians Against Expanded Gambling</u> , 967 So.d 832 (Fla. 2007)	6
<u>Williams v. Duggan</u> , 153 So.2d 726 (Fla. 1963)	7
STATUTES AND OTHER LEGAL AUTHORITIES	
Art. V, § 3(b)(4), Fla. Const.....	4,5,6
Florida Statutes § 45.031(7)(b).....	5,7
Fla. R. App. P. 9.030(a)(2)(A)(iv) & (vi)	4,5,6,7
Fla. R. App. P. 9.120.....	4

JURISDICTIONAL STATEMENT¹

Petitioner The Bank of New York Mellon f/k/a the Bank of New York, as successor Trustee to JPMorgan Chase Bank, N.A., as Trustee on Behalf of the Certificateholders of the CWHEQ Inc., CWHEQ Revolving Home Equity Loan Trust, Series 2006-D (“Petitioner”), seeks review of a final order of the Florida District Court of Appeal for Florida’s Second District (“2nd DCA”) issued on April 26, 2017, denying Petitioner’s Motion for Rehearing, Motion for Rehearing *En Banc*, and Request for Certification. This Court has jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A)(iv) & (vi) because the decision of the 2nd DCA has been certified by that court to be in direct conflict with decisions of other district courts of appeal, namely the Florida District Court of Appeal for Florida’s Fourth District (“4th DCA”).

STATEMENT OF THE CASE AND FACTS²

Petitioner filed a claim for surplus funds as a result of a foreclosure sale, which was denied by the trial court and subsequently affirmed by the 2nd DCA. Bank of

¹ Given that discretionary jurisdiction was invoked pursuant to Fla. R. App. P. 9.030(a)(2)(A)(vi), briefs on jurisdiction are purportedly not to be filed per the Committee Notes to the 1980 Amendment to Fla. R. App. P. 9.120, which explicitly provide that “No jurisdictional briefs are permitted if jurisdiction is based on certification of a question of great public importance or certification that the decision is in direct conflict with a decision of another district court.” Nevertheless, Petitioner files this jurisdictional brief in light of the Clerk’s order dated June 13, 2017.

² These facts are taken from the decision on appeal, attached as **Appendix A**.

New York Mellon v. Glenville, 2017 WL 1493788, *1 (Fla. 2d DCA Apr. 26, 2017). Under § 45.031(7)(b), Florida Statutes (2015), any person claiming a right to surplus funds must file a claim with the clerk of court within sixty days of the foreclosure sale. Id. The underlying property was sold as public auction on July 2, 2015, and the Petitioner, as a junior lienholder, filed a claim to the surplus on September 2, 2016, sixty-two days after the auction. Id. Petitioner claims that the foreclosure sale is not complete until the clerk issues the certificate of sale, which was not issued until July 6, 2015, which was less than sixty days from when the Petitioner filed its claim with the clerk. Id. The 2nd DCA disagreed with Petitioner finding that the sixty days accrued from the date of the auction, but the 2nd DCA also recognized that its holding conflicts with the 4th DCA, which has held that the sixty days does not begin to accrue until the date of the issuance of the certificate of title, which post-dates the certificate of sale. Id. at *2; see Straub v. Wells Fargo Bank, N.A., 182 So.3d 878, 881 (Fla. 4th DCA 2016). Accordingly, the 2nd DCA held that “we must certify conflict.” Glenville at *2. The opinion was a unanimous opinion of all three justices with no limit in the concurrences. Id.

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction under article V, section 3(b)(4) of the Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A)(iv) & (vi) because the

2nd DCA expressly certified that its decision was in direct conflict with decisions of other district courts of appeal.

ARGUMENT

I. THIS COURT HAS JURISDICTION BECAUSE THE 2ND DCA EXPRESSLY HELD THAT ITS DECISION WAS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL.

This Court has discretionary jurisdiction to review a district court of appeal decision that is “certified [by the district court of appeal] to be in direct conflict with a decision of another district court of appeal.” Art. V, § 3(b)(4), Fla. Const.; see also Fla. R. App. P. 9.030(A)(iv) & (vi) (“The discretionary jurisdiction of the supreme court may be sought to review (A) decision of district court of appeal that (iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law...(vi) are certified to be in direct conflict with decisions of other district courts of appeal”). Under Art. V, § 3(b)(4), Fla. Const., this Court has jurisdiction when (1) a disposition by a district court qualifies as a decision, (2) a majority supports the decision to certify the question, and (3) the decision under review passes upon the certified question. See Floridians for a Level Playing Field v. Floridians Against Expanded Gambling, 967 So.d 832, 833 (Fla. 2007).

Here, first, a decision was clearly reached as the 2nd DCA’s prior opinion of January 20, 2017 was withdrawn and the April 26, 2017 opinion was substituted in

its place, the motion for rehearing *en banc* was denied, and the court held that no motion for rehearing would be entertained. Glenville at *1. Thus, clearly there was no further action or recourse to be had at the DCA level as it had reached a final decision and would permit no re-hearing or re-argument. Second, the decision was unanimous, with all three judges (Sleet, LaRose, and Badalamenti) concurring in the opinion and not limiting their concurrences in any way whatsoever. Id. at *3. Third, the 2nd DCA explicitly certified the conflict and once again, no judge limited his concurrence to only the judgment and not also to the certification. Id.

This Court also has conflict jurisdiction under Fla.R.App.P. 9.030(a)(2)(A)(iv), due to the conflict among the Districts in determining whether the date of the foreclosure auction or a later date such as the date of the issuance of the certificate of sale or certificate of title is to be considered the act which triggers the sixty (60) day time period to file a claim for surplus funds under Fla. Stat. § 45.031(7)(b). Given the merits of the 2nd DCA's decision conflict and are completely irreconcilable with that of the 4th DCA's, this Court has and should exercise jurisdiction to review this decision. See Williams v. Duggan, 153 So. 2d 726 (1963) (Supreme Court has jurisdiction to resolve conflict resulting when one district court of appeal renders a decision wholly irreconcilable with that of another district). This Court should hear the petition given that otherwise there will be

confusion and inconsistency of the application of the legal issues that are the subject of this petition across the State of Florida.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO RESOLVE CONFLICT AND RESULTING UNCERTAINTY IN THE LAW.

Exercise of jurisdiction will clarify uncertain and conflicting case law. The decisional conflict created by the 2nd District's opinion is one that will have a widespread effect throughout the state. At a minimum, two different legal standards for asserting timely claims to foreclosure surplus proceeds will exist in the State of Florida; either sixty (60) days from the date of the auction in the 2nd DCA or sixty (60) days from the later date of issuance of the certificate of title in the 4th DCA. This would thus lead to a disparity in the way the court system is treating litigants in identical circumstances. Consequently, this is precisely the type of legal issue which warrants the exercise of this Court's discretionary jurisdiction so one legal standard can be established that is uniform across the State of Florida.

CONCLUSION

For the reasons stated, this Court has discretionary jurisdiction and should decide the case on the merits.

/s/ Shaun K. Ramey

Anthony R. Smith (#0157147)

Shaun K. Ramey (#0117906)

Kendra J. Taylor (#108896)

Attorneys for Petitioner

The Bank of New York Mellon fka

The Bank of New York, as Successor

Trustee to JPMorgan Chase Bank,

N.A., as Trustee on behalf of the

Certificateholders of the CWHEQ,

Inc., CWHEQ Revolving Home

Equity Loan Trust, Series 2006-D

OF COUNSEL

SIROTE & PERMUTT, P.C.

1201 S. ORLANDO AVE., SUITE 430

WINTER PARK, FL 32790-908

Tel.: (407) 712-9200

Fax: (407) 313-0678

E-mail addresses:

tsmith@sirote.com

sramey@sirote.com

ktaylor@sirote.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail, postage prepaid and E-Mail, to the following on this 19th day of June, 2017:

Sheryl A. Edwards, Esq.
The Edwards Law Firm, PL
500 S. Washington Boulevard, Suite 400
Sarasota, FL 34236
Counsel for Defendant Dianne D. Glenville a/k/a Diane D. Glenville
a/k/a Dianne Glenville
eservice@edwards-lawfirm.com
sedwards@edwards-lawfirm.com

Mark S. Glenville a/k/a Mark Glenville
4521 Dover St Cir. E
Bradenton, FL 34203

Matthew Sirmans, Esq.
Assistant General Counsel
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301
Counsel for Defendant, Florida Housing Finance Corporation
efiling@floridahousing.org

Fairfax Home Owners Association, Inc.
c/o Scott K. Petersen, Esq.
Becker & Poliakoff, P.A.
6230 University Parkway, Suite 204
Sarasota, Florida 34240
spetersen@becker-poliakoff.com
sarservicemail@bplegal.com

Megan Roach, Esq.
Albertelli Law
PO Box 23028
Tampa, FL 23028
servealaw@albertellilaw.com

/s/ Shaun K. Ramey
Shaun K. Ramey, Esq.
Fla. Bar No.: (#0117906)
sramey@sirote.com

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this motion complies with Florida Rule of Appellate Procedure 9.100(1) and has been formatted in Times New Roman 14 point font.

/s/ Shaun K. Ramey
Shaun K. Ramey, Esq.
Fla. Bar No.: (#0117906)
sramey@sirote.com