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.

ON DISCRETIONARY REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA
CASE NO. 2D15-5198

PETITIONER'S REPLY TO ANSWER BRIEF OF RESPONDENT

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PREFACE

In this reply brief, 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, will be referred to as "Petitioner;" and Dianne D. Glenville and Mark S. Glenville will be referred to as the "Respondents." Along with this Reply Brief, the Petitioner files a Supplemental Appendix as prescribed by Fla. R. App. P. 9.130(e) and 9.220. When applicable, references to matters of record contained in the Petitioner's Supplemental Appendix will be made by the Letter "SA" and the appropriate appendix number.

ARGUMENT

I. THE LANGUAGE OF FLA. STAT. SECTION 45.031 IS NOT CLEAR AND UNAMBIGUOUS WHEN READ IN CONJUNCTION WITH SECTION 45.032 AND THE RULES OF STATUTORY CONSTRUCTION REQUIRE STATUTES THAT RELATE TO THE SAME SUBJECT MATTER BE READ *IN PARI MATERIA* AND THUS ALSO REQUIRE THE COURT AFFIRM THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL AND CONSTRUE SECTION 45.031 AND 45.032 SO THAT A SUBORDINATE LIENHOLDER MUST FILE A CLAIM WITHIN SIXTY (60) DAYS OF THE ISSUANCE OF THE CERTIFICATE OF TITLE.

The rules of statutory construction are the means by which courts seek to determine legislative intent only when that intent is not plan and obvious enough to be conclusive. See Knowles v. Beverly Enterprises-Florida., Inc., 898 So.2d 1 (2004) Normally, "[w]hen the language of the statute is clear and unambiguous and

conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." See Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984). Fla. Stat. § 45.032(3) requires the clerk of the court to hold the surplus funds for sixty days after the Certificate of Disbursement date to allow for other claims to be filed. In this case, the Certificate of Disbursement was entered on July 31, 2015. Thus, the sixty (60) days would expire on September 29, 2017. Therefore, the Petitioner's claim filed on September 2, 2015 against the surplus funds was filed within sixty (60) days of the issuance of the Certificate of Disbursements.

In fact, the sale was not confirmed as completed by the Clerk of Court until July 6, 2015, resulting in the Certificate of Title being issued ten (10) days later on July 15, 2015.

> Since the foreclosure sale is not complete until it is conformed, and carries no presumption of regularity, it should not take as strong a showing to justify a chancellor's exercise of his discretion to refuse confirmation as it does to set aside a confirmed sale. His discretion is broader in the one case than in the other.

See S. Realty & Utilities Corp. v. Belmont Mortg. Corp., 186 So. 2d 24, 25 (Fla. 1966).

In Straub v. Wells Fargo Bank, N.A., 182 So.3d 878 (Fla. 4th DCA 2016), the subject foreclosure sale occurred on October 31, 2013. The Certificate of Sale was issued on the same day. An objection to the sale was filed and after the

objection had been overruled the Certificate of Title was finally issued and the condominium association's assignee filed its claim within sixty (60) days of the issuance of the Certificate of Title. The court analyzed the applicable statutes and held the sixty (60) days began from the date the Certificate of Title was issued. The Court held that under Fla. Stat. § 45.031(1)(a), (2)(f), and (7)(b), a foreclosure sale takes place when ownership of property is transferred upon the filing of the Certificate of Title. Id. at 881. "Issuance of the Certificate of Title confirms the sale, curing all irregularities, misconduct, and unfairness in the making of the sale" Id.

The Straub court relied on this Court's opinion in Allstate Mortgage Corp. of Florida v. Strasser, 286 So.2d 201 (Fla. 1973). In Strasser, the property owner had exercised the right of redemption after the public sale and the issuance of the Certificate of Sale, but before the issuance of the Certificate of Title. See id. The Court found:

> "[A] judicial sale has been held not to be final and complete until, confirmed by the trial court. Macfarlane v. Macfarlane, 50 Fla. 570 [39 So.995 (Fla. 1905)]. In as much as the Legislature is presumed to know the meanings of words and rules of grammar (State ex. rel. Hanbury v. Tunnicliffe, 98 Fla. 731 [124 So.279 (Fla. 1929)]), we hereby find that the Legislature intended to adopt the recognized meaning of the word 'sale' and that the sale did not take place until ownership of the property was transferred. Said transfer takes place according to s. 45.031(3), Fla. Stat., ten days after the day of the sale, upon no objections being filed thereto and issuance of the Certificate of Title."

Id. at 202-03 (quoting Allstate Mortgage Corp. of Florida v. Strasser, 286 So.2d 201 (Fla. 1973)).

Significantly, Fla. Stat. § 45.032 expressly declares that the deadline for the filing of a claim for surplus funds falls sixty (60) days after the issuance of the certificate of disbursements. See Fla. Stat. § 45.032(3)(b). Section 45.031 does not define when the date of the "sale" should be deemed to fall. Rather, that definition is found in Section 45.032. Furthermore, Section 45.032 (specifically entitled "Disbursements of Surplus Funds after Judicial Sale") overrides any statement in Section 45.031 (generally entitled "Judicial Sales Procedure") with regards to ascertaining the deadline to file a claim for disbursement of surplus funds. See, e.g. Vargas v. Deutsche Bank Nat. Tr. Co., 104 So. 3d 1156, 1166 (Fla. 3d DCA 2012). Finally, Section 45.031(7)(d) states:

> (d) If there are funds remaining after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements, the surplus shall be distributed as provided in this section and ss. 45.0315-45.035.

Distributing funds pursuant to Section 45.032 is consistent with Section 45.031 as Section 45.031 specifically authorizes distribution pursuant to section 45.032. Section 45.031(3) requires the Certificate of Sale to indicate: "The proceeds of the sale are retained for distribution in accordance with the order or final judgment or law." Therefore, the law that governs distribution of surplus is Section 45.032.

To the extent that the term "60 days from the sale" is ambiguous, the two statutes would be read *in para materia*, thereby giving meaning to the sixty days in §45.032. Any alternative construction would eviscerate the meaning in §45.032.

> General rules of statutory construction require statutes that relate to the same subject matter be read *in pari materia* and construed in such a manner as to give meaning and effect to each provision. Statutes relating to closely related subjects should also be read *in pari materia*. Application of the *in pari materia* doctrine is appropriate only if the statute to be construed is ambiguous. Moreover, the doctrine applies only when two different statutory provisions deal with the same specific subject or with subjects so connected that the meaning of the one informs the other.
>
> If a part of a statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with other parts of the same statute or others *in pari materia,* the court will examine the entire act and those *in pari materia* in order to ascertain the overall legislative intent. In the event of a conflict between provisions of two statutes being read *in pari materia*, the provisions of the act being construed will govern. The act being construed may modify and conflict with the statute with which it is read as needed. However, a statutory provision will not be construed in such way that it renders meaningless any other statutory provision.

48A Fla. Jur 2d Statutes § 166.

> Where the statutory "language is unclear or ambiguous," we apply rules of statutory construction to determine legislative intent. Polite, 973 So.2d at 1111. One such rule is "[t]he doctrine of *in pari materia* ... [which] requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent." Larimore v. State, 2 So.3d 101, 106 (Fla. 2008) (quoting Fla. Dep't of State v. Martin, 916 So.2d 763, 768 (Fla. 2005)). In following this rule, we endeavor to give each clause of the statute effect and to accord harmony among all the statute's parts. Jones v. ETS of New Orleans, Inc., 793 So.2d 912, 914–15 (Fla. 2001) (quoting Acosta v. Richter, 671 So.2d 149, 153–54 (Fla. 1996)).

See Patrick v. Hess, 212 So. 3d 1039, 1042 (Fla. 2017), reh'g denied, SC15-1147, 2017 WL 1046532 (Fla. Mar. 20, 2017).

Thus, the Petitioner's claims for surplus funds were timely filed since it was filed well within sixty (60) days of the certificate of disbursements and within sixty (60) days of the Certificate of Title. In this case, the Certificate of Title was issued by the Clerk on July 14, 2015, therefore, the Petitioner would have had at least until September 14, 2015 to timely file its claim against the surplus. Further, if the sixty (60) day time frame begins from the issuance of the certificate of disbursements as defined by Section 45.032 the Petitioner would have had until September 29, 2015 to file timely claims upon the surplus funds. Further, Fla. Stat. § 45.032(3)(b) requires the court conduct an evidentiary hearing to determine entitlement to the surplus. Notably, the certificate of disbursement cannot be issued until **after** the sale has been confirmed, which would have followed the issuance of the Certificate of Title, which follows the Certificate of Sale; thus, further reinforcing that the actual "sale" of the property is not completed until the Clerk issues the Certificate of Title because it is only at that point that the ownership interest in the property is transferred.

Although the Court did not rule specifically on the Straub issue, similar to the Fourth DCA, the Fifth DCA begins the sixty day count from the clerk's issuance of the Certificate of Disbursements:

> Less than sixty days after the clerk issued the certificate of disbursements, the Rodriguezes and their assignee, National Equity Recovery Services, Inc. ("NERS"), filed a claim for the surplus funds. More than sixty days after the clerk issued the certificate of disbursements, Luzupozo asked the court to release the surplus funds to pay off liens on the foreclosed property that were alleged to be inferior to FNMA's mortgage.

Rodriguez v. Fed. Nat'l Mortgage Ass'n, 220 So. 3d 577 (Fla. 5th DCA 2017).

The opinion issued by the Second District dated April 26, 2017 and argued by the Respondents defines the foreclosure "sale" as the actual date of the foreclosure auction. Therefore, the actual date of the foreclosure auction sale is the alleged point in which a subordinate lienholder would need to begin its calculation of the sixty (60) day time period to file a claim against any remaining surplus before being completely barred. However, the Second District's opinion and the Respondent's reading of the law completely overlooks several practical issues that arise if the definition of "sale" is defined as the date of the actual foreclosure auction. The first issue is that several counties do not require payment by the Winning Bidder of the balance due on the actual date of the foreclosure auction; therefore, a "sale" being the actual auction date does not make any logical sense as a sale cannot be deemed completed until funds are received by the Clerk. The Clerk's issuance of the Certificate of Sale is to show that the foreclosure auction was completed and to cut off the right of redemption of any Defendants to **prevent** a foreclosure sale. At the very least the Petitioner argues that the definition of the "sale" should be upon the issuance of the Certificate of Sale as opposed to the date

of the auction. This is because up until that point the holder of any subordinate interest can still "cure the mortgagor's indebtedness and ***prevent*** a foreclosure sale." Fla. Stat. § 45.0315 (emphasis added). Therefore, if the foreclosure auction occurred on July 2, 2015, but the Certificate of Sale was not issued until the morning of July 6, 2015, there was a sufficient enough gap in time for any of the Defendants to redeem the property and **prevent** the foreclosure sale from being completed. Therefore, logically you cannot prevent a foreclosure sale if that very same sale has already been completed as defined by the Second District and the Respondent. Further, it is not until after the Certificate of Sale issues that the mortgagor's equity right of redemption is divested and the time period to object to the sale and to object to the value established by the sale begins. See id.; Fla. Stat. § 45.031; In re Jaar, 186 B.R. 148, 154 (Bankr. M.D. Fla. 1995). Moreover, it is not until the clerk issues the Certificate of Sale that the purchaser in the foreclosure sale begins to have inchoate rights to the property during the ten (10) day objection period and must be put on notice as to any objections to the sale. See Shlishey v. CitiFinancial 14 So.3d 1271, 1275 (Fla. 2d DCA 2009). However, even using the Certificate of Sale as the operative date in which a "sale" has been completed can cause issues when calculating the date by which one must file a claim against the surplus as objections to sales are frequently filed within the ten day time period after the issuance of the Certificate of Sale.

Furthermore, it is quite common for foreclosure auctions to be held where the Winning Bidder does not return with the balance of their bid within the time frame required by the clerk, which requires that the clerk issue a certificate of no sale and the sale to be forfeited. Therefore, logically a sixty (60) day time period in which to claim the surplus cannot begin to run until at the very least the Clerk confirms they have held the auction and have received the remaining funds.

Moreover, a Plaintiff may inadvertently fail to publish a Notice of Sale as required by Fla. Stat. § 45.031(2), which by law renders the foreclosure sale invalid and requires that another foreclosure sale be held. See Castelo Development, LLC v. Aurora Loan Services, LLC, 85 So.3d 515 (Fla. 4th DCA 2012). Based upon issues that multiple sales can occur and the Second District's definition of "sale" as the date the actual foreclosure auction is held, it would leave the law unclear if a claim is required to be filed within the sixty (60) days of the first held auction date, where the sale might have been completed but was deemed invalid or an objection was filed and upheld, as opposed to a later occurring foreclosure auction when the sale is finally deemed completed and valid upon the issuance of the Certificate of Title. Thus, if a subordinate lienholder is required to file a claim at the first foreclosure auction that occurs and for some reason this auction is deemed to be invalid, the subordinate lienholder would have to file a speculative claim within sixty days of the first auction without knowing whether

there is an actual surplus, much less whether the amount is sufficient to pay off a third or fourth place lienholder.

Further, as a practical matter, objections to the sale can frequently take over sixty (60) days to be heard by the Circuit Court due to the availability of the Court. Therefore, if one were to calculate the time period to claim the surplus based upon the Second District's definition of sale, the subordinate lienholder would be required to file a claim for surplus before the court ruled on the outstanding objection, therefore, the subordinate lienholder's interest in the surplus is only speculative and non-justiciable since the issue of entitlement does not exist until after the objection is resolved. Therefore, it is only upon the Clerk's issuance of the Certificate of Title or the latter issuance of the certificate of disbursements that causes a justiciable issue to arise for a subordinate lienholder regarding filing a claim to any surplus proceeds. In essence the issue of an award of surplus funds is not ripe for consideration by the Court until after there is a determination that title has validly passed, which only occurs based upon the Clerk's issuance of the Certificate of Title. In all these scenarios, more than one foreclosure auction or "sale" as defined by the Second District can be held in a single case, therefore, it calls into question and remains unclear which is the operative foreclosure auction within which a subordinate lienholder must file its claim to retain its rights under Fla. Stat. § 45.031 and § 45.032.

Finally, Fla. Stat. § 45.032 provides a form in which the owners of records as defined by the statute may make a timely filed claim against the surplus. (SA-1, Fla. Stat. 45.032). This form requires that the owners certify they were the owner of the property, "they do **not** owe any money on any mortgage on the property that was foreclosed other than the one that was paid off by the foreclosure," amongst various other certifications. The Respondent's claim solely states "[t]o the best of our knowledge and belief, the only subordinate lienholder to file a claim to the surplus funds is Florida Housing Finance Corporation … we admit that Florida Housing Finance Corporation is entitled to the payment of the claimed amount." (SA-2, Owner's Verified Claim for Mortgage Foreclosure Surplus). The Respondent's claim intentionally fails to mention any other potential subordinate lienholders even though they had actual and constructive notice as to the existence of the Petitioner's Mortgage since it was recorded within the Official Records of Manatee County and had been included in the Complaint. Therefore, the Respondent's were specifically attempting to circumvent the Petitioner's rights as a subordinate lienholder to the surplus. "It has long been the law in Florida that any surplus remaining after a foreclosure sale should be paid to the junior lienholders in accordance with the priority of their liens on the property and that only after the liens have been satisfied may any surplus be disbursed to the owner of the equity of redemption." See General Bank, F.S.B., v. Westbrooke Points, Inc., 548 So.2d

736 (Fla. 3d DCA 1989).

This Court should uphold its prior decision in Strasser and the Fourth District's opinion in Straub and disapprove the Second District's decision, and hold that it is only upon the issuance of the Certificate of Title or the latter issuance of the certificate of disbursements that the sixty (60) day time period to file a claim against the surplus begins to run. In this case, the Petitioner filed its claim on September 2, 2015, which was within the sixty (60) day time frame from the date of the issuance of the Certificate of Title which was issued on July 15, 2015. As such, the Circuit Court incorrectly concluded that the foreclosure "sale" meant the actual date of the foreclosure auction and not the date upon which the Certificate of Title was issued by the Clerk. Therefore, the Petitioner timely filed its claim to the surplus funds **before** the expiration of the sixty (60) day time limit pursuant to Fla. Stat. § 45.031(7)(b), § 45.0315 and § 45.032. See Straub v. Wells Fargo Bank, N.A. at 881. For all of these reasons, the Second District's decision in this case must be reversed and remanded to the Trial Court.

II. IF THIS COURT APPROVES THE FOURTH DISTRICT'S OPINION IN THIS CASE, IT MUST REMAND THE CASE TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS BECAUSE NEITHER THE SECOND DISTRICT NOR CIRCUIT COURT REVIEWED THE SUFFICIENCY OF THE CLAIM FILED BY THE PETITIONER DUE TO RULING THE CLAIM HAD NOT BEEN FILED TIMELY.

Before the Second District's opinion in this case and since 1973, the law in this state was clear that it was only upon the issuance of the Certificate of Title that

a "sale" was deemed completed. See Strasser at 203. The Circuit Court ruled that the Petitioner filed an untimely claim for its alleged failure to file a claim within sixty (60) days of the foreclosure auction held on July 2, 2015. However, the Petitioner's claim would have been filed within the sixty (60) day time period if the time period was calculated either by the issuance of the Certificate of Sale, the latter date of the issuance of the Certificate of Title, or even the latter date of the issuance of the certificate of disbursements under Fla. Stat. § 45.032. The Circuit Court made no findings of fact regarding the sufficiency of the evidence provided by the Petitioner in its claim, the Petitioner specifically notes that its claim is in substantially the same form as Florida Housing's claim which was deemed sufficient by the Circuit Court and the Respondents' in that they "admit that Florida Housing Finance Corporation is entitled to payment of the claimed amount." (SA-2, Owner's Verified Claim for Mortgage Foreclosure Surplus). The sole issue of the Respondent's with the Petitioner's claim was its alleged untimely filed. (SA-3, Owner's Response to BONY'S Motion to Distribute Excess Funds). Further, the hearing held on November 2, 2015 was not noticed as an evidentiary hearing as required under Florida Law. See Herranz v. Siam, 2 So.3d 1105, 1107 (Fla. 3d DCA 2009) ("[T]he required evidentiary hearing was not properly noticed … the record establishes that Siam's original notice of hearing and re-notice of hearing simply notified Herranz that the hearing was set … [t]he notice gave no

indication that the matter was scheduled as an evidentiary hearing … [b]ecause we find that Herranz did not receive proper notice that the motion … was scheduled as an evidentiary hearing, we are compelled to reverse … and remand for the trial court to conduct a properly noticed evidentiary hearing on Siam's motion.") Therefore, the evidence presented by the Petitioner was not sufficiently noticed to be reviewed by the Court at an evidentiary hearing as alleged by the Respondent's Answer Brief. (SA-4, Notice of Hearing on Owner's Verified Claim for Mortgage Foreclosure Surplus). In fact, Petitioner's understanding that this was not an evidentiary hearing is further evidenced in the fact that it did not request a court reporter to transcribe the proceedings at the hearing scheduled for November 2, 2015 and by the Cross-Notice of Hearing it filed in which the undersigned counsel certified to the Court "that the issues before the court may be hearing and resolved by the Court within five (5) minutes." See (SA-5, Cross-Notice of Hearing).

Based upon this Court's prior ruling in Strasser and the Fourth District's ruling in Straub, the Second District's conclusion that the foreclosure sale is the actual date of the auction on July 2, 2015 is clearly incorrect and the petitioner had sixty (60) days from the date of the issuance of the Certificate of Title on July 14, 2015 or until Monday, September 14, 2015 to timely file its claim against the surplus. See Strasser at 203; see also Straub v. Wells Fargo Bank, N.A. at 881. Since no ruling was made on the sufficiency of the evidence provided by the

Petitioner which included a Motion to Distribute Excess Funds with accompanying Affidavit of Indebtedness this Court should remand to the Circuit Court with directions to conduct an evidentiary hearing to review the sufficiency of the Petitioner's claim.

CONCLUSION

As explained more fully above, this Court should reverse the Second District and Circuit Court's denial of the Petitioner's Motion to Distribute Excess Funds pursuant to Fla. Stat. § 45.031(7)(b), § 45.0315, and § 45.032 based upon its alleged untimely filing of its claim because the Petitioner timely filed its claim on September 2, 2015 for surplus as this date is within sixty (60) days of the completion of the foreclosure sale, upon the issuance of the Clerk's Certificate of Title on July 14, 2015. Therefore, September 14, 2015 was the deadline to timely file claims for the surplus of funds based upon Straub and Strasser. See id. This Court should uphold its prior ruling in Strasser which defined the sale to be completed only upon issuance of the Certificate of Title when the sale is confirmed, curing any irregularities or misconduct in the sale. See id. Further, as the sufficiency of the evidence presented by the Petitioner was not ruled upon at a properly notice evidentiary hearing, this Court should remand the case to the Trial Court to schedule a properly noticed evidentiary hearing.

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 20th day of November, 2017:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with Florida Rule of Appellate Procedure 9.210(a)(2) and has been formatted in Times New Roman, 14 point font.

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