

SUPREME COURT OF FLORIDA

DYCK-O'NEAL, INC.,

Petitioner,
v.

HEATHER LANHAM,

Respondent.

Case No.: SC17-975
DCA Case No.: 1D16-1624
L.T. Case No. 2014-CA-000438

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT OF JURISDICTION

The Florida Constitution provides this Court with discretionary jurisdiction to review district court of appeal decisions that expressly and directly conflict with a decision of another district court on the same question of law and decisions certified to be in direct conflict among district courts of appeal. Art. V, § 3(b)(3) & (4), Fla. Const. Pursuant to that grant, Dyck-O’Neal, Inc. (herein “DONI”) petitions this Court for discretionary review of a decision of the First District that directly and expressly conflicts with decisions of the Second, Third, Fourth and Fifth district courts of appeal on the question of law presented in this cause. Fla. R. App. P. 9.030(a)(2)(A)(iv). The conflict also has been certified by the First, Second, Fourth and Fifth district courts of appeal. Fla. R. App. P. 9.030(a)(2)(A)(vi). A conformed copy of the First District decision certifying conflict in this cause will be simultaneously filed as the Appendix to this brief and shall be cited as “A. ___.” Fla. R. App. P. 9.120(d).

STATEMENT OF THE CASE AND FACTS

On appeal from the Circuit Court for Gadsden County, the First District Court of Appeal quashed a trial court decision appealed by DONI. A.1. Citing its decision in *Higgins v. Dyck-O’Neal, Inc.*, 201 So. 3d 157 (Fla. 1st DCA 2016), the district court held the circuit court’s order was void because the lower court lacked subject matter jurisdiction to consider DONI’s independent action at law for a

deficiency decree in a post-foreclosure proceeding. A.1. In so doing, the First District certified conflict with *Garcia v. Dyck–O’Neal, Inc.*, 178 So. 3d 433 (Fla. 3d DCA 2015); *Dyck-O’Neal, Inc. v. Hendrick*, 200 So. 3d 181 (Fla. 5th DCA 2016); *Gdovin v. Dyck-O’Neal, Inc.*, 198 So. 3d 986 (Fla. 2d DCA 2016); *Dyck–O’Neal, Inc. v. McKenna*, 198 So. 3d 1038 (Fla. 4th DCA 2016). A.2.

SUMMARY OF ARGUMENT

This Honorable Court should exercise its discretionary jurisdiction to resolve the certified, express and direct conflict between decisions of the First and the Second, Third, Fourth and Fifth district courts of appeal presented here.

In its Forms for Use with Rule of Civil Procedure, this Court recommends that mortgage foreclosure plaintiffs seek a deficiency judgment in a foreclosure complaint, Fla. R. Civ. P. Form 1.944(b), and that judges reserve jurisdiction to enter same. Fla. R. Civ. P. Form 1.996(a). If those forms are used by litigant and court, then the First District Court of Appeal forever bars that plaintiff from bringing an independent action at law to obtain a deficiency judgment. The remaining four district courts of appeal hold that the Florida Legislature, in its 2013 amendments to § 702.06, Fla. Stat., provided that an independent deficiency action may proceed “unless the court in the foreclosure action has granted or denied a claim for a deficiency judgment.”

This conflict must not stand. The Court should recognize and resolve it.

ARGUMENT

I. THE CONFLICT IS SIGNIFICANT AND THE COURT SHOULD EXERCISE ITS DISCRETION TO RESOLVE IT.

All district courts of appeal have ruled directly on the impact of the 2013 amendments to § 702.06, Fla. Stat. (2013). Ten appellate decisions have held the statute resolves any previous doubt concerning a right to sue via a separate action “unless the court in the foreclosure action has granted or denied a claim for a deficiency judgment.” *Id.* However, the First District held in *Higgins* that the Legislature did not permit a separate deficiency action if a deficiency is sought and jurisdiction is reserved for it in a foreclosure action. By *stare decisis*, the First District barred independent relief three additional times (including in the above-styled appeal).

This Court should resolve this conflict to bring clarity and uniformity to Florida decisional law, a fundamental element of this Court’s discretionary jurisdiction. Consistency on identical facts and law is key to “just, speedy, and inexpensive determination of every action.” Fla. R. Civ. P. 1.010.

While this conflict persists, borrowers in the First District will receive a windfall and lenders will lose the bargained-for benefit of their secured lending transactions. In this case and others involving DONI, deficiency judgments arising from foreclosures prosecuted by other entities and subsequently passed through the Federal National Mortgage Association (FNMA or “Fannie Mae”), and the Federal

Home Loan Mortgage Corporation (FHLMC or “Freddie Mac”), and others were assigned to DONI. DONI has 228 accounts in the First District with a value of \$22,904,211.00 in various stages of litigation or collection, including 23 accounts on appeal. Most, if not all, of the accounts were acquired and suits were filed before July 1, 2014 to comply with §§ 95.11(5)(h) and 702.06, Fla. Stat. as amended effective July 1, 2013. This conflict arose in June 2016, long after the statute of limitations had run on the claims, preventing DONI from adapting litigation strategy to the conflict.

Resolution of the conflict is critical to uniformity and consistency of law, to DONI’s continued existence, and to every current and future lender seeking recovery of the full benefit of their bargains when lending money via real property notes and mortgages.

II. THE CONFLICT: FIRST DISTRICT ALONE LIMITS WHERE A DEFICIENCY ACTION MAY BE ADJUDICATED.

The principal decisions in this conflict are the Third District decision in *Garcia v. Dyck-O’Neal, Inc.* and the First District decision in *Higgins v. Dyck-O’Neal, Inc.*

Garcia applied the plain language of § 702.06 Fla. Stat. (2014). BAC Home Loans Servicing filed a foreclosure suit in Miami-Dade County Circuit Court. True to Supreme Court-approved civil practice forms, BAC’s complaint asked for a deficiency decree and the foreclosure judgment reserved jurisdiction to enter same.

Garcia, 178 So. 3d at 434. DONI received the judgment and note by assignment and filed an independent action in Miami-Dade County Circuit Court for the difference between the judgment amount and the value of the property at foreclosure. Garcia moved to dismiss based on lack of subject matter jurisdiction. The trial court denied the motion, entered judgment for DONI, and Garcia appealed. *Id.*

Affirming, the Third District began its analysis with § 702.06, Fla. Stat., finding this language “clear and unambiguous:”

The complainant shall also have the right to sue at common law to recover such deficiency, unless the court in the foreclosure action has granted or denied a claim for a deficiency judgment.

Garcia, 178 So. 3d at 435 (quoting § 702.06, Fla. Stat. (2014)). The foreclosure court previously had been asked to enter a deficiency decree and reserved jurisdiction to do so. On those facts, Garcia argued only the foreclosure court had jurisdiction for such relief, no matter whether it was granted or denied.

The Third District rejected Garcia’s reliance on *First Federal Savings and Loan Ass’n of Broward County v. Consolidated Development Corp.*, 195 So.2d 856 (Fla. 1967) and *Reid v. Compass Bank*, 164 So.3d 49 (Fla. 1st DCA 2015). The court found that Garcia relied on *dicta* because neither *First Federal* nor *Compass Bank* decided the issue of subject matter jurisdiction for an independent deficiency

suit. *Garcia*, 178 So. 3d at 435-436. The court also noted that other 20th Century decisions of this Court on the matter diverged.¹ The Third District concluded:

We need look no further than the plain language of section 702.06. The *dicta* in *First Federal Savings* and *Compass Bank* does not carry the weight of authority of section 702.06 as it is now constituted. The remedial nature of the 2013 amendment to section 702.06 militates against our further interpreting an inconsistent body of case law.

Id. at 436 (footnote omitted). Thus, the *Garcia* court enforced the language of the statute, holding DONI had a right to an independent deficiency action because the court in the foreclosure action had neither granted nor denied a deficiency judgment. *Id.* at 436. *Accord, Dyck-O'Neal, Inc. v. Weinberg*, 190 So. 3d 137 (Fla. 3d DCA 2016).

The Fourth District also affirmed a trial court's refusal to grant relief from a deficiency judgment because § 702.06 Fla. Stat. is "unambiguous." *Cheng v. Dyck-O'Neal, Inc.*, 199 So. 3d 932 (Fla. 4th DCA 2016). It held: "[t]he foreclosure judgment's reservation of jurisdiction does not preclude a separate suit to recover

¹ Compare, *Provost v. Swinson*, 109 Fla. 42, 146 So. 641 (1933) and *Belle Mead Development Corp. v. Reed*, 114 Fla. 300, 153 So. 843 (1934) (plaintiff seeking deficiency decree bound by forum selection and cannot seek deficiency in another court) with *McLarty v. Foremost Dairies*, 57 So.2d 434 (Fla.1952) and *Reid v. Miami Studio Properties*, 139 Fla. 246, 190 So. 505 (1939) (plaintiff may seek deficiency in another court if it asked for deficiency decree in foreclosure case and foreclosure court overlooked or did not consider deficiency). *Garcia*, 178 So. 3d at 435 n. 3.

the deficiency where the foreclosure court has not granted or denied a claim for a deficiency judgment.” *Id. Accord Dyck–O’Neal, Inc. v. McKenna*, 198 So. 3d 1038 (Fla. 4th DCA 2016) (certifying conflict with *Higgins*); *Dyck-O’Neal, Inc. v. Stavola*, 198 So. 3d 1131 (Fla. 4th DCA 2016) (following *McKenna*, certifying conflict with *Higgins*).²

The Fifth District also agreed that § 702.06 is “unambiguous,” making “[t]he dispositive question under the statute . . . whether the foreclosure court has granted or denied a claim for a deficiency judgment.” *Dyck-O’Neal, Inc. v. Hendrick*, 200 So. 3d 181, 182 (Fla. 5th DCA 2016). Because the foreclosure court did not grant or deny a deficiency, “the plain language of section 702.06 permitted Appellant to bring the suit at issue to recover a deficiency.” *Id.* The court certified conflict with *Higgins. Id.*, at 183. *Accord Dyck-O’Neal, Inc. v. Beckett*, 200 So. 3d 179, 180-81 (Fla. 5th DCA 2016) (certifying conflict with *Higgins*).³

The Second District reached this issue in *Gdovin v. Dyck-O’Neal, Inc.*, 198 So. 3d 986 (Fla. 2d DCA 2016). It agreed with *Garcia* that “the plain language of

²See *Dyck-O’Neal, Inc. v. Meikle*, 215 So. 3d 604 (Fla. 4th DCA 2017) (§ 702.06 neither vague nor violation of due process).

³ See *Dyck-O’Neal, Inc. v. Rojas*, 197 So. 3d 1200 (Fla. 5th DCA 2016) (noting in *dicta* “[w]e attribute no significance to Appellant pursuing the deficiency judgment in a separate action, as opposed to reopening the original foreclosure proceeding because, under the facts of the case, the plain language of section 702.06 permitted it to do so”).

section 702.06, Florida Statutes (2013), authorizes the filing of an independent deficiency action in such cases because “the foreclosure court did not grant or decline to grant the deficiency judgment claim.” 198 So. 3d at 986 (quoting *Garcia*, 178 So.3d at 436). The *Gdovin* panel also cited the dissent in *Higgins* and certified conflict with the majority’s decision therein. *Gdovin*, 198 So. 3d at 987. *Accord Dyck–O’Neal, Inc. v. Konstantinos*, --- So.3d ----, 2016 WL 7174170 *1 (Fla. 2d DCA Dec. 9, 2016) (citing *Garcia* and *Gdovin* and certifying conflict with *Higgins*) and *Valdes v. Dyck-O’Neal, Inc.*, 2017 WL 2210664 (Fla. 2d DCA May 14, 2017) per curiam (citing *Gdovin* and *Rojas*).

The First District alone has held that if a foreclosure court is asked and has reserved jurisdiction to adjudicate a deficiency, only that court may do so. In *Higgins*, DONI had brought an independent action at law in Duval County Circuit Court for a deficiency arising out of a prior foreclosure in which the same circuit court had reserved jurisdiction to enter a deficiency judgment. The trial court declined to set aside a default deficiency judgment and *Higgins* appealed, asserting that only the original foreclosure court could adjudicate the deficiency claim. *Higgins*, 201 So. 3d at 159. The *Higgins* majority copied a five-page analysis from *Compass Bank* that reviewed the various and divergent 20th Century decisions already argued in *Garcia*. *Id.*, at 159-164 (quoting *Compass Bank*, 164 So. 3d at 52-57). Adopting *Compass Bank dicta* as its holding, the *Higgins* majority

expressly disagreed with *Garcia*, stating the Third District’s interpretation of § 702.06 Fla. Stat. would “effect a monumental change in the law,” and “the statute cannot be logically or fairly read to permit the plaintiff in the original action to disregard the court’s reservation of jurisdiction, and file another action at law.”

Higgins, 201 So. 3d at 165-166. The *Higgins* majority continued:

[W]e read the revised statutory language as simply clarifying and reiterating long-standing judicial holdings that if the original foreclosure court ignores a claim for a deficiency judgment, or one is not sought there, the lender may seek relief at common law.

Id. at 166. The *Higgins* majority held: “a party is not entitled to pursue an action at law on a promissory note where that party includes a prayer for a deficiency judgment in its foreclosure complaint and the trial court reserves jurisdiction to enter a deficiency judgment.” *Id.*

The majority decision and the later refusal to reconsider it *en banc* or certify conflict with *Higgins*, drew a dissent which argued “[t]he trial court properly denied Higgins’ request because the Legislature had just recently enacted a clearly worded statute that established a ‘right to sue’ for a deficiency judgment ‘unless the court in the foreclosure action has granted or denied a claim for a deficiency judgment’ § 702.06 Fla. Stat. Ch. 2013-137, Laws of Fla.” *Higgins*, 201 So. 3d at 167 (Makar, J., *dissenting*). After that, the First District applied *stare decisis* to deny independent relief herein and in *Joseph v. Dyck-O’Neal, Inc.*, 197 So. 3d 1291

(Fla. 1st DCA 2016), *rev'd* per curiam (Makar, J., *dissenting*: "I would affirm, or, alternatively, certify conflict") and *Dyck-O'Neal, Inc. v. Hogan*, 201 So. 3d 835 (Fla. 1st DCA 2016), *affirmed* per curiam, (Winsor, J., *concurring*: "Bound by that [*Higgins*] decision, I join the Court's opinion in this case.").

CONCLUSION

The conflict in interpreting and applying § 702.06, Fla. Stat. has been certified by four district courts of appeal. The conflict is express, direct, and significant to litigants. Resolution is essential to the consistency and uniformity of administration of justice in Florida. This Honorable Court should exercise its discretionary jurisdiction and resolve it.

Dated: June 19, 2017

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this Brief has been prepared in Times Roman fourteen (14) font as required by Fla. R. App. P. 9.210(a)(2).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this 19th day of June 2017 via email to:

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