Filing # 67979005 E-Filed 02/14/2018 04:19:42 PM

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 REPLY BRIEF

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RECEIVED, 02/14/2018 04:23:26 PM, Clerk, Supreme Court

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<u>ARGUMENT</u>[1]

I. SECTION 702.06 OF THE FLORIDA STATUTES IS UNAMBIGUOUS AND PERMITS A SEPARATE DEFICIENCY ACTION AT LAW.

A. <u>Section 702.06 Is Unambiguous.</u>

Section 702.06 is unambiguous on its face. It specifies that the courts in mortgage foreclosure actions have the discretion to enter deficiency decrees. It further provides that:

> 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*.

§ 702.06, Fla. Stat. (2013) (emphasis added). This is a clear and plain statement, and there is no uncertainty or ambiguity in it as applied to the facts of this case or otherwise. Here, the court in the prior foreclosure action did not grant or deny a

[1] Defendant's argumentative statement of the case and facts consists almost entirely of invective and matters that are irrelevant to the statutory interpretation issue before this Court, including the suggestion of "facts" about DONI that are not part of the record but are instead contained in a law review article. Since Defendant's statement of the case and facts is irrelevant and its sole purpose appears to be to malign DONI, the Court should strike or disregard it. *See Sabawi v. Carpentier,* 767 So. 2d 585, 586 (Fla. 5th DCA 2000) (striking unduly argumentative brief; purpose of statement of facts is to inform court of pertinent facts, not to malign other party); *Altchiler v. State, Dep't of Prof. Reg., Div. of Professions, Bd. of Dentistry*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983) ("That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court.").

claim for a deficiency judgment. Thus, DONI had a clear statutory right to sue at common law to recover the deficiency.

It is Defendant (and the First DCA) who try to introduce ambiguity where there is none by adding language to the statute that it does not contain. Section 702.06 provides only one exception to pursuing an action at law – if the foreclosure court already granted or denied a deficiency claim. It does not contain a second exception if the foreclosure court merely reserved jurisdiction to consider such a claim. Nor does the statute say that a claimant can pursue a deficiency in an action at law only if the foreclosure court "overlooked" or "refused to consider" a deficiency claim that had been pled. Instead the statute uses clear and plain language, permitting a common law deficiency claim unless the foreclosure court "granted or denied" such a claim.

"As this Court has recognized, where the Legislature made one exception clearly, if it had 'intended to establish other exceptions it would have done so clearly and unequivocally.' . . . Accordingly, where the Legislature articulates clear exceptions to a statute, 'no other exceptions may be implied.'" *Citizens Prop. Ins. Corp. v. Perdido Sun Condo. Ass'n, Inc.,* 164 So. 3d 663, 666 (Fla. 2015) (internal citations omitted). Similarly, "Florida courts are 'without power to construe an unambiguous statute in a way which would extend, modify, or *limit*, its express terms or its *reasonable and obvious implications*. To do so would be an abrogation

of legislative power.'" *Koster v. Sullivan*, 160 So. 3d 385, 390 (Fla. 2015) (emphasis in original). An attempt to add language to the statute that it does not contain does not render the statute ambiguous, in need of further interpretation, or permit the courts to modify its express terms.

Moreover, Defendant's insistence that the statute is somehow ambiguous because does not address a reservation of jurisdiction is inconsistent with the plain reading of the statute and illogical given the elements of a deficiency claim. The statute permits a claimant to seek deficiency relief either from the foreclosure court or in a separate action at law. The only way for the foreclosure court to resolve a deficiency claim is to reserve jurisdiction in the judgment. This is because, until the foreclosure judgment is entered, and the property is later sold at the foreclosure sale, a claim for a deficiency does not yet exist. *See Aluia v. Dyck-O'Neal, Inc.,* 205 So. 3d 768, 775 (Fla. 2d DCA 2016) (deficiency claimant must prove entry of final judgment of foreclosure, foreclosure sale, and issuance of certificate of title); *Chrestensen v. Eurogest, Inc.,* 906 So. 2d 343, 344 (Fla. 4th DCA 2005) (before deficiency cause of action can accrue, there must be final judgment of foreclosure and sale with proceeds applied in satisfaction of judgment).

Yet after the foreclosure judgment is entered and the time for rehearing has expired, the foreclosure court ordinarily loses jurisdiction to consider any further matters in the case. *See Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 800–01

(Fla. 2003) (once judgment entered, court loses subject matter jurisdiction over case except to enforce judgment). Therefore, to address a deficiency claim, a foreclosure court must reserve jurisdiction to consider it after the sale. Defendant's attempt to create ambiguity in the statute, by claiming it does not address the reservation of jurisdiction scenario, must fail. Since the statute is unambiguous, there is no need to review the legislative history or look to sources outside the statute to interpret and apply its plain language.

B. Section 702.06's Legislative History Does Not Support Defendant's (or the First DCA's) Interpretation of the Statute.

Even if the legislative history for section the 2013 amendment to 702.06 is considered, it does not support Defendant's or the First DCA's interpretation of the statute. As Defendant acknowledges, that history specifies that the 2013 amendment was remedial and not intended to change substantive law. *See* Ans. Brf. at 10-11. For at least 90 years the law, as codified in section 702.06 and its predecessors, has been that a claimant can sue for a deficiency in a foreclosure case or in a separate action at law. *See* Ch. 11993, Laws of Fla. (1927); Comp. Gen. Laws 1927, § 5751. In 1929, the statute was amended to preclude purchase money mortgagees from pursuing an action at law if they had already obtained a deficiency decree against the original mortgagor. Ch. 13625, Laws of Fla. (1929). The case law at the time also precluded a claimant who had been denied deficiency relief by the foreclosure court from seeking deficiency relief in an action at law. *Woodward v. Dishong*, 135

So. 804, 805 (1931) (where court actually considered and denied deficiency claim, such adjudication had same force and effect as adjudication of any other question properly submitted to court and was final as between parties and those in privity, under time-honored doctrine of res judicata); *Provost v. Swinson,* 146 So. 641, 643 (1933) (if chancellor assumed jurisdiction and held complainant was not entitled to deficiency or if granted deficiency decree in any amount, complainant barred from attempting to enforce claim in any other jurisdiction).

In 2013, the statute was amended to "simplify the language of current law" specifying that a claimant could not seek a deficiency in action at law if the foreclosure court had granted or denied such relief. *See* Fla. H.R. Final Bill Analysis, Bill No. CS/CS/HB 87, Summary Analysis at p.6 (dated 6/13/13). The Final Bill analysis cited *Cragin v. Ocean & Lake Realty Co.,* which held that because the claimant had applied for and obtained a deficiency judgment in some amount, it could not seek additional amounts on a deficiency claim in an action at law. 135 So. 795, 797-99 (Fla. 1931). Thus the 2013 amendment, consistent with res judicata principles, provides that if the foreclosure court had already adjudicated a deficiency claim on the merits, the claimant is precluded in trying again to seek the relief in an action at law. Defendant agrees, stating:

> Section 702.06 was merely intended to codify well-established and long-standing jurisprudence, based on the doctrine of res judicata, that a plaintiff cannot get a second bite at the apple if the foreclosure court has already *ruled* on the deficiency claim; but if the foreclosure court

> *does not rule* on the deficiency claim, then the plaintiff can file a separate action at law.

Ans. Brf. at 16 (emphasis added).

In this instance, although the foreclosure court had reserved jurisdiction to *consider* a deficiency claim, it never *ruled* on a deficiency claim by either granting or denying it. As such, under the clear language of section 702.06, DONI was permitted to pursue the deficiency claim in an action at law. Nothing in the text of section 702.06 or its legislative history suggests otherwise.

II. THIS COURT HAS NEVER HELD THAT A FORECLOSURE COURT'S MERE RETENTION OF JURISDICTION TO CONSIDER A DEFICIENCY CLAIM PRECLUDES PURSUING A DEFICIENCY IN AN ACTION AT LAW.

A. This Court Has Consistently Held that a Claimant Can Pursue a Deficiency Action at Law So Long as Such Relief Has Not Already Been Granted or Denied by the Foreclosure Court.

According to Defendant and the First DCA, this Court's precedent justifies reading additional exceptions into the statute that are not contained in its text. They conclude that not only does a foreclosure court's *ruling* on a deficiency claim (by granting or denying it) preclude the pursuit of a deficiency in an action at law, but a foreclosure court's mere reservation of jurisdiction to *consider* such a claim, without actually ruling on it, has the same preclusive effect. *See* Ans. Brf. at 16-20. This is not, and has never been, the holding of this Court, so there is no justification for trying to read this non-existent language into the unambiguous statute.

Whether or not a claimant has prayed for deficiency relief, this Court has consistently held that if the claimant did not obtain such relief, he can sue for it in an action at law. *See McLarty v. Foremost Dairies,* 57 So. 2d 434, 434 (Fla. 1952) (plaintiff requested deficiency in foreclosure case but no action taken so permitted to sue at law); *Luke v. Phillips,* 3 So. 2d 799, 799 (Fla. 1941) (no deficiency entered in foreclosure case so permitted to sue at law); *Reid v. Miami Studio Props.,* 190 So. 505, 505 (Fla. 1939) (plaintiff asked for deficiency but not considered so could sue at law); *Coffrin v. Sayles,* 175 So. 236, 238 (Fla. 1937) (plaintiff did not request or obtain deficiency from foreclosure court so permitted to sue at law); *Coe-Mortimer Co. v. Dusendschon,* 152 So. 729, 730 (Fla. 1934) (if no deficiency decree asked for or obtained, can sue at law; claimant not compelled to seek relief from foreclosure court); *Cragin*, 135 So. at 799 (statute "means that he has an election of remedies; he may obtain a deficiency decree in the mortgage foreclosure, or he may sue at law to recover such deficiency); *Younghusband v. Ft. Pierce Bank & Trust Co.*, 130 So. 725, 727 (Fla. 1930) (if no deficiency judgment entered in foreclosure case, clear can sue at law).

Similarly, this Court has also held that if a claimant requests deficiency relief from the foreclosure court but then either abandons or waives that claim, or if the court denies it on the merits, the claimant cannot then proceed with a deficiency action at law. *See Crawford v. Woodward,* 191 So. 311 (Fla. 1939) (plaintiff

specifically waived or abandoned deficiency plea in foreclosure case so could not sue at law); *Dishong*, 135 So. at 805 (1931); *Provost,* 146 So. at 643 (1933).

This precedent, based on the predecessors to section 702.06 and the doctrine of res judicata, establishes that if a claimant seeks and obtains or is denied deficiency relief from the foreclosure court, it cannot try to "double dip" by seeking such relief in an action at law. This is fully consistent with the current version of section 702.06, which provides that a claimant can sue for a deficiency in an action at law unless the foreclosure court already granted or denied such relief.

B. The Only Outlier To This Precedent Is Contained *Dicta*.

In an unsuccessful attempt to avoid the foregoing precedent, Defendant and the First DCA rely heavily on *dicta*. For instance, in *Belle Mead*, this Court stated that "after specifically praying for a deficiency, the complainant may waive the relief prayed for in that regard, but it does not avoid the choice of the forum by not applying for the deficiency decree." *Belle Mead Dev. Corp. v. Reed,* 153 So. 843, 844 (Fla. 1934). However, the facts in *Belle Mead* were not that the claimant had declined to apply for a deficiency decree. To the contrary, "the complainant asked for a deficiency decree which was resisted by the defendant and the chancellor refused to enter a deficiency judgment." *Id.* Presumably, then, the chancellor considered the claim on its merits and denied it. Thus, in the context of the facts before it, the Court's actual holding that the claimant could not seek relief in an action at law was

consistent with res judicata principles, in which a party who has been denied relief cannot try to obtain it in a different action.

To the extent *Belle Mead's* imprecise dictum is inconsistent with this Court's precedent that a party can sue at law to recover a deficiency if the foreclosure court did not consider its request for a deficiency, this Court has overruled it. *See McLarty,* 57 So. 2d at 435. In other words, notwithstanding the language in *Belle Mead*, the law is that even if a claimant requested deficiency relief in a foreclosure case, if the court never grants or denies that relief, either because it was "overlooked", "ignored", or "not considered", a claimant can sue at law.

Conflicting statements in this Court's *First Federal* opinion have also created confusion, and seemingly led the First DCA to error, but those statements were also dicta. The *First Federal* Court had originally accepted jurisdiction of the case based upon a conflict among the circuits, but ultimately decided there was no conflict and dismissed the writ as unadvisedly granted. *First Federal S&L Ass'n of Broward Cty. v. Consolidated Dev. Corp.,* 195 So. 2d 856, 858-59 (Fla. 1967). Before dismissing the writ, the *First Federal* Court summarized its earlier decision in *Reid v. Miami Studio Properties,* 190 So. 505, which held that "if a deficiency decree is not requested or if requested and overlooked *or not considered*, the right of a complainant to sue at law is not affected." *First Federal,* 195 So. 2d at 858 (emphasis added). The *First Federal* Court contrasted that with the case before it,

in which the complaint had requested a deficiency, but it was "not immediately considered but was deferred as the court retained jurisdiction to settle any motion for deficiency." *Id.* The Court then said "[s]o it may be said that the request for deficiency was *neither considered* nor overlooked." *Id.* (emphasis added). Although the Court said the deficiency request was not considered, it nonetheless suggested the plaintiff was not free to seek an adjudication elsewhere. That would have set up a conflict between *Reid* and the case before it, but the Court found no conflict and thus declined to exercise jurisdiction over the case.

Regardless, these statements in *First Federal* were dicta. *See Shaps v. Provident Life & Acc. Ins. Co.*, 826 So. 2d 250, 253 (Fla. 2002) ("denial of certiorari by an appellate court cannot be construed as a determination of the issues presented in the petition therefor"). As such they "cannot be utilized as precedent or authority for or against the propositions urged or defended in such proceedings." *Id.* Accordingly, the *First Federal* statements cannot eradicate this Court's binding precedent nor contradict the plain language of section 702.06 of the Florida Statutes.

The Third District Court of Appeal properly recognized this and all other DCAs, except the First, agree that the plain language of the statute controls. *See Garcia v. Dyck-O'Neal, Inc.,* 178 So. 3d 433, 436 (Fla. 3d DCA 2015); *Dyck-O' Neal, Inc. v. Weinberg*, 190 So. 3d 137 (Fla. 4th DCA 2016); *Cheng v. Dyck-O'Neal,* 199 So. 3d 932 (Fla. 4th DCA 2016); *Dyck-O'Neal v. Rojas,* 197 So. 3d 1200 (Fla.

5th DCA 2016); *Dyck-O'Neal, Inc. v. Hendrick*, 200 So. 3d 181 (Fla. 5th DCA 2016); *Dyck-O'Neal, Inc. v. Beckett*, 200 So. 3d 179 (Fla. 5th DCA 2016); *Dyck-O'Neal, Inc. v. Konstantinos,* -- So. 3d --, 2016 WL 7174170 (Fla. 2d DCA Dec. 9, 2016).

C. The "Priority" Decisions that Defendant Cites are Inapposite and Do Not Contradict Established Law or the Statute.

Defendant insists that the principle of priority or continuing jurisdiction compels ignoring the plain language section 702.06. *See* Ans. Brf. at 21-22. None of the decisions Defendant cites, however, involved deficiencies. Instead they address inapposite situations, such as attempts by a trial court to exercise jurisdiction over a case after it has been lost, or comity considerations when courts in two different states have assumed jurisdiction over a claim, neither of which is at issue here. *See e.g., Davidson v. Stringer*, 147 So. 228, 230 (1933) (lower court without jurisdiction to appoint a receiver for mortgaged property after original case had been concluded by final decree of foreclosure and sale to mortgagee); *Central Park A Metrowest Condo. Assoc., Inc. v. AmTrust REO I, LLC*, 169 So. 3d 1223, 1226 (Fla. 5th DCA 2015) (after judgment was final foreclosure court had no jurisdiction to determine amount of assessments owed to condominium associations); *PLCA Condo. Ass'n v. AmTrust-NP SFR Venture, LLC*, 182 So. 3d 668, 669–70 (Fla. 4th DCA 2015) (same); *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Ainsworth*, 630 So. 2d 1145, 1147 (Fla. 2d DCA 1993) (securities fraud case; if courts of different

states have concurrent jurisdiction over same parties and subject matter, "principle of priority" may be applied as matter of comity).

Moreover, even if applicable, application of the priority principle is discretionary, not mandatory. *See Siegel v. Siegel,* 575 So. 2d 1267, 1271 (Fla. 1991) (determination by court that valid jurisdiction should be declined in favor of another state is discretionary; child custody case); *Perelman v. Estate of Perelman*, 124 So. 3d 983, 986 (Fla. 4th DCA 2013) (trial court not always required to stay proceedings when prior proceedings involve same issues and parties are pending in another state; will probate contest). Section 702.06 provides for alternate remedies to pursue a deficiency and does not require an action at law to defer to a foreclosure action unless the deficiency claim has already been adjudicated on the merits. Since the foreclosure court here never actually considered DONI's deficiency claim by granting or denying it, DONI was permitted to proceed with an action at law.

III. POLICY CONSIDERATIONS DO NOT AND CANNOT SUPPORT DEPARTING FROM THE PLAIN LANGUAGE OF THE STATUTE.

Defendant's and the First DCA's concerns about the potential for a double recovery if a claimant is permitted to sue in an action at law are unfounded. The statute itself, and principles of res judicata, already prevent a claimant from obtaining relief in an action at law if the foreclosure court granted or denied such relief. Particularly since the law already provides ample mechanisms to preclude

duplicate relief, there is no cause for ignoring the plain language of section 702.06 which specifically permits a claimant to pursue a deficiency in either forum.

Similarly unfounded is the idea of forum shopping because there is no incentive for such conduct, particularly in a case such as this. For instance, filing a new action in the same court in the same circuit, as DONI did here, does not make it any more or less likely that a different judge would be assigned to the case, given judicial rotations. Nor was there any reason for DONI to try to avoid the foreclosure judge, since its predecessor had already succeeded in obtaining relief against the Defendant. Filing a separate action also required DONI to personally serve Defendant, rather than simply mailing a motion to his last known address, which may have been the foreclosed property at which Defendant no longer lives. *See NCNB Nat. Bank of Fla. v. Pyramid Corp.,* 497 So. 2d 1353, 1355 (Fla. 4th DCA 1986) (personal service of process not necessary for deficiency claim in foreclosure action). This gives Defendant more due process but adds time and expense for DONI. In short, the risk of forum shopping is no higher here than in any other type of case.

It is also pure speculation to suggest that the foreclosure court here might have reserved jurisdiction to consider a deficiency based on some type of equitable factors, rather than because such a reservation was requested in the pleadings and contained in this Court's standard form order. *See* Ans. Brf. at 30-31. Defendant's

attempt to support such a speculative suggestion by citing to a law review article that discusses DONI's alleged licensing issues in other states is improper. There is no basis in the record to indicate such issues were before the foreclosure court. Even if they were, administrative matters in other states would not provide a proper basis for denying a deficiency judgment, whether considered by the foreclosure court or in a separate action at law.

In both forums courts have discretion to consider equitable matters, but that discretion is not unbridled, and the considerations must be specific to the case and parties before the court. *See, e.g., Kornfeld v. Diaz*, 634 So. 2d 799, 800 (Fla. 4th DCA 1994) (discretion to grant or deny deficiency "must be "sound"—i.e. based on the application of legal principles to specific facts"); *Thomas v. Premier Capital, Inc.*, 906 So. 2d 1139, 1141 (Fla. 3d DCA 2005) (amount paid by assignee for otherwise enforceable debt legally irrelevant to whether assignee is entitled to deficiency judgment). A court is not free to deny deficiency relief based on some type of generalized dislike of one of the parties or its business practices.

Finally, like the other policy arguments raised by Defendant and the First DCA, the concern over judicial economy is addressed to the wrong decision-maker. Since at least 1927, the statute has always permitted a claimant the choice to pursue a deficiency action at law, rather than in the foreclosure case. If Defendant believes this is unwise or inefficient, she must direct her policy concerns to the legislature.

The court are bound by the clear and unambiguous language of the statute. *See, e.g., Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 753 (Fla. 2013) (policy considerations regarding statute best addressed by Legislature, not by Court).

CONCLUSION

This Honorable Court should exercise its discretionary jurisdiction, resolve the conflict, and approve the decisions of the Second through Fifth District Courts,[2] disapprove and expressly overrule *Higgins v. Dyck-O'Neal, Inc.*, 201 So. 3d 157 (Fla. 1st DCA 2016), remand this cause for determination on its merits, and direct the First District to reinstate all actions that were dismissed or judgments that were vacated by application of *Higgins*.

Dated: February 14, 2018

Respectfully submitted,

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[2] *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).

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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 14th day of February 2018 via email to:

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