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2017 Legal Update

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Updated California Requirements

A – Water Conservation Devices

The recent drought in California has forced us all to be more water conscience and effective January 1, 2017 Senate Bill 407 regarding water conserving fixtures went into effect requiring water conservation devices statewide.

Beginning January 1, 2017, the bill requires all single family property owners to replace noncompliant plumbing fixtures with water-conserving fixtures (ultra-low flow toilets and shower heads) regardless of whether the property is being sold or not. At the time of sale, a Seller will have to disclose in writing to the Buyer the requirement of water-conserving fixtures and whether the property has any noncompliant fixtures.

The bill will also require that a seller of multifamily residential real property disclose to a purchaser or transferee, in writing, specified requirements for replacing plumbing fixtures, and whether the real property includes noncompliant plumbing. The bill further stipulates that on or before January 1, 2019, all noncompliant plumbing fixtures in multifamily residential real property be replaced with water-conserving plumbing fixtures (ultra-low flow toilets and shower heads).

B – Pre Sale Inspection Report Cost Increase (City of Los Angeles)

A Pre-Sale Inspection and Report is required by some Cities before an Escrow can close. The Pre-Sale Report requires the Seller to disclose to the Buyer City building permit records and any code or ordinance violations that may exist. Policies and requirements for the sale of real estate vary from city to city. Effective December 11, 2016, the cost of the City of Los Angeles' pre-sale report (Report of Residential Property Records & Pending Special Assessment Liens, also known as the 9A Report) increased to $70.85 (from $70.20).

C – 2017 Renewal Time – City of Los Angeles Foreclosure Registry Program

The City of Los Angeles is eager to reduce blight in Los Angeles communities. To accomplish this goal, the Foreclosure Registry Program (Ordinance No. 181185) was enacted in July 8, 2010 to establish a residential property registration program as a mechanism to protect residential neighborhoods, including abandoned properties, from blight due to a lack of adequate maintenance and security resulting from the foreclosure crisis.

The Foreclosure Registry Program requires that any lender or beneficiary or trustee who holds or has an interest in a deed of trust of a property in the foreclosure process, located within the City of Los Angeles, must register the property with the Los Angeles Housing + Community Investment Department (HCIDLA) within 30 days of the issuance of the Notice of Default (NOD).

Annual re-registration is due for each subsequent year, after the recording of the Notice of Default, as long as the property remains in the foreclosure process. Annual (online only) re-registration along with a fee in the amount of $155 is due to HCIDLA by January 31, 2017. The fee and registration shall be valid

for the calendar year, or remaining portion of the calendar year in which the registration was initially required.

Additional Foreclosure Registry Program Requirements

1) All registered properties must be inspected monthly and reported online to HCIDLA. Monthly inspection reports shall record the date of the inspection and the condition of the property as observed during that inspection along with a direct contact name and phone number.

In regards to the monthly online inspection reports: If you have a department that is responsible for paying the Foreclosure Registry Program fees, they would also be responsible for completing the monthly online inspection reports. For those clients for whom we are responsible for paying the Foreclosure Registry Program fees and submitting for reimbursement, we complete the monthly online inspection reports.

2) De-registration must be requested within 10 calendar days after the property is no longer subject to the Ordinance. De-registration can be requested when one of the following is met:

a. Reinstatement of Loan/Loan Modification/Full Reconveyance
b. Sale to a third party (Non REO)

3) Any person, firm or corporation that has registered a property must report any change of information contained in the registration with HCIDLA within 10 days of the change.

4) A one-time proactive inspection fee in the amount of $356 is due upon property status change from NOD to REO, or upon registration of new REO properties that have not been previously registered, for all single-family and vacant multi-family residential properties.

Please note that failure to satisfy registration, proactive inspection fee and monthly inspection requirements may result in penalty fees of $250 per day.

Earl R. Wallace, Esq.- Ruzicka, Wallace, Coughlin LLP

I. Foreclosure Deed Must Be Recorded Prior To Serving Notice to Vacate

U.S. Financial, L.P. v. Michael McLitus

On November 30, 2016, the California Supreme Court clarified the purchaser of real property at a foreclosure sale must wait for the foreclosure deed to be recorded before serving a Notice to Vacate.

Over the years, various arguments have been asserted as to why the person or entity who purchases a property at a foreclosure sale should not have to wait for the recording of the foreclosure deed before serving a Notice to Vacate. For instance, there is a statute that says the foreclosure sale is deemed perfected as of 8:00 a.m. on the date of the sale if the deed is recorded within 15 calendar days of the sale. However, the Supreme Court disagreed stating that both the foreclosure sale and title must be perfected before a Notice to Vacate can be served. Title is perfected upon recording of the foreclosure deed.

II. Borrowers Lack Standing To Challenge Securitization of Real Property Loans

In Yvanova v. New Century Mortgage Corp. (2016) 62 Cal.4th 919 (Yvanova), the California Supreme Court issued a narrow ruling on a borrower's standing the challenge the validity of the chain of assignments involved in the securitization of real property loans. The court held that a borrower has standing to allege that an assignment of the promissory note and deed of trust to the foreclosing party was void, but the borrower does not have standing if the transfer was merely voidable. The Supreme Court did not decide whether a post-closing date transfer into a New York securitized trust is void or voidable.

On December 13, 2016, in Mednoza v. JPMorgan Chase Bank, N.A., the California Court of Appeal held that a post-closing date transfer into a New York securitized trust is merely voidable because any defect in the transfer can be ratified by the parties to the assignment. Accordingly, the borrower/plaintiff, Maria Mendoza, did not have standing to challenge alleged irregularities in the securitization of her loan.

The Court of Appeal explained that where assignment is void, meaning of no legal force or effect whatsoever, the foreclosing entity has acted without legal authority by pursuing a foreclosure sale. Because the assignment is without any effect, it can never be ratified or validated by the parties to it.

By contrast, a voidable contract or assignment is one that the parties to it may ratify and thereby give it legal force and effect or extinguish at their election. Only the parties to the contract or assignment have the power to ratify or extinguish; consequently, allowing a borrower to challenge an assignment based on a defect that only renders it voidable would allow the borrower to exercise rights belonging exclusively to the parties to the assignment.

Because defects in the securitization process may be ratified, the result is that borrowers in California do not have standing to challenge securitization of their real property loans.

III. Proceeding With An Eviction Lockout While An Appeal Is Pending Can Be Risky

Beach Break Equities v. Martin Lowell

On December 14, 2016, the San Diego Appellate Division addressed the procedure to be following when the purchaser of real property at a foreclosure sale evicts the occupants, but the eviction judgment is later reversed on appeal. The appellate court held that the trial court may hold a restitution hearing where the can award damages to the occupant. Interestingly, by the time the appellate court issued its ruling, the purchaser had already sold the property to a third party.

IV. City of Los Angeles Tenant Buyout Notification Ordinance

On December 15, 2016, City of Los Angeles enacted a Tenant Buyout Notification Ordinance. The purpose of the ordinance is to regulate and monitor voluntary vacancies of rental units subject to the City of Los Angeles Rent Stabilization Ordinance (RSO) pursuant to Buyout Agreements (aka Cash 4 Keys Agreements or Relocation Agreements). The new ordinance contains the following requirements:

1. RSO Disclosure Notice. Before making a Buyout Offer, the landlord is required to provide the tenant(s) with an RSO Disclosure Notice of tenant rights on a form authorized by the rent stabilization board, which must be dated and signed by the landlord and the tenant(s).

2. Written Buyout Agreement. Every Buyout Agreement (defined below) is required to be written in the primary language of the tenant and state in a minimum of 12-point bold type above the tenant signature line as follows:

> **"You, (tenant name), may cancel this Buyout Agreement any time up to 30 days after all parties have signed this Agreement without any obligation or penalty."**

Additionally, every Buyout Agreement must be signed and dated by the landlord and tenant, and a copy of the fully executed Buyout Agreement must be given to the tenant.

3. Cancellation of Buyout Agreement. A tenant has the right to cancel a Buyout Agreement for any reason for up to 30 days after execution by the landlord and the tenant without any financial obligation or penalty. Additionally, whenever an RSO Disclosure Notice and/or Buyout Agreement does not conform to the requirements of this the new law or applicable regulations, the tenant has the right to cancel the Buyout Agreement through the applicable statute of limitations period.

4. Filing Executed RSO Disclosure Notice and Buyout Agreement. Within 60 days of execution of a Buyout Agreement, the landlord is required to file copies of the Buyout Agreement and RSO Disclosure Notice signed by the tenant and the landlord, with the rent stabilization board.

5. Affirmative Defense. A violation of this the ordinance may be asserted as an affirmative defense in an unlawful detainer action.

6. Private Right of Action. Additionally, a tenant may bring a private right of action against a landlord who violates a provision of the ordinance and recover damages and a penalty of $500.

The ordinance defines a "Buyout Offer" as an offer, written or oral, by a landlord to a tenant to pay money or other consideration to vacate an RSO unit. A "Buyout Agreement" is defined as

a written agreement where a landlord pays a tenant money or offers other consideration to voluntarily vacate an RSO rental unit.

V. New Rent Control Ordinances

In November 2016, voters rejected strict rent control laws in Burlingame, San Mateo and Alameda but approved them in Richmond and Mountain View. Santa Rosa passed rent control, which is currently stayed based on a referendum filed challenging the measure.

VI. Sealing of Eviction Actions

Effective as of January 1, 2017, all California eviction actions remain sealed unless a judgment is entered for the plaintiff (person suing). Under prior law, evictions were sealed only for the first 60 days after the action was filed. The old law tended to create a disincentive for occupants to delay evictions as their case would become a public record. Because most cases are settled, it may be difficult for potential landlords to find out whether a prospective tenant has been evicted.

VII. Recreational Marijuana

Proposition 64 legalized recreational use of marijuana in California. Under the new law, (codified in California Health and Safety Code §11362 et seq.), people 21 years of age and older may possess, process, transport, purchase, obtain or give away (without compensation) up to 28.5 grams of non-concentrated cannabis and up to 8 grams of concentrated cannabis and possess, plant, cultivate, harvest, dry or process up to 6 living plants.

Marijuana possession, distribution, and use, regardless of purpose, remains illegal under Federal law (Controlled Substances Act (U.S.C. title 21).

Landlords may continue to prohibit marijuana and, if the property is subsidized by federal funds (i.e. HUD properties), the landlord may be required to do so.

VIII. New Bed Bug Notification Requirements

On September 26, 2016, California enacted Assembly Bill 551, which provides new duties for residential landlords and tenants regarding bedbugs.

Among the new requirements, Assembly Bill 551 requires residential landlords to provide prospective and existing tenants with a notification regarding bedbugs. On and after July 1, 2017, the notification must be provided to prospective tenants before they enter into a lease. The notice must be provided to all other tenants by January 1, 2018. The notice must be in at least 10-point type and be in substantially the following form:

Information about Bed Bugs

Bed bug Appearance: Bed bugs have six legs. Adult bed bugs have flat bodies about 1⁄4 of an inch in length. Their color can vary from red and brown to copper colored. Young bed bugs are very small. Their bodies are about 1⁄16 of an inch in length. They have almost no color. When a bed bug feeds, its body swells, may lengthen, and becomes bright red, sometimes making it appear to be a different insect. Bed bugs do not fly. They can either crawl or be carried from place to place on objects, people, or animals. Bed bugs can be hard to find and identify because they are tiny and try to stay hidden.

Life Cycle and Reproduction: An average bed bug lives for about 10 months. Female bed bugs lay one to five eggs per day. Bed bugs grow to full adulthood in about 21 days.

Bed bugs can survive for months without feeding.

Bed bug Bites: Because bed bugs usually feed at night, most people are bitten in their sleep and do not realize they were bitten. A person's reaction to insect bites is an immune response and so varies from person to person. Sometimes the red welts caused by the bites will not be noticed until many days after a person was bitten, if at all. Common signs and symptoms of a possible bed bug infestation:

- Small red to reddish brown fecal spots on mattresses, box springs, bed frames, mattresses, linens, upholstery, or walls.
- Molted bed bug skins, white, sticky eggs, or empty eggshells.
- Very heavily infested areas may have a characteristically sweet odor.
- Red, itchy bite marks, especially on the legs, arms, and other body parts exposed while sleeping. However, some people do not show bed bug lesions on their bodies even though bed bugs may have fed on them.

For more information, see the Internet Web sites of the United States Environmental Protection Agency and the National Pest Management Association.

Paul Stone & Lynndee Snyder- Consumer Title & Escrow Services

APPELLATE CASE NO. 4D14-4597, OBER v. TOWN OF LAUDERDALE-BY-THE-SEA

I. Overview

II. History

III. Summary

IV. Ruling in Abeyance pending Motion for Re-Hearing

V. Potential Ramifications if the Current Ruling is Upheld

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JAMES OBER,
Appellant,

v.

TOWN OF LAUDERDALE-BY-THE-SEA, a Florida Municipality,
Appellee.

No. 4D14-4597

[August 24, 2016]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Thomas M. Lynch, IV, Judge; L.T. Case No. 14-006782 (05).

Manuel Farach of McGlinchey Stafford, Fort Lauderdale, for appellant.

Susan L. Trevarthen, Laura K. Wendell, and Eric P. Hockman of Weiss Serota Helfman Cole & Bierman, P.L., Coral Gables, for appellee.

Heather K. Judd and Jordan R. Wolfgram, St. Petersburg, for Amicus Curiae City of St. Petersburg.

Alexander L. Palenzuela of Law Offices of Alexander L. Palenzuela, P.A., Miami, for Amicus Curiae City of Coral Gables.

FORST, J.

This case involves the application of Florida's lis pendens statute, section 48.23, Florida Statutes, to liens placed on property between a final judgment of foreclosure and the judicial sale. We agree with the Appellee, Town of Lauderdale-by-the-Sea ("the Town"), and hold that liens placed on property during this time window are not discharged by section 48.23. We affirm without discussion with respect to any other challenges to the trial court's entry of summary judgment.

Background

On November 26, 2007, a non-party bank recorded a lis pendens on the subject property as part of a foreclosure proceeding against a non-

party homeowner. On September 22, 2008, the bank obtained a final judgment of foreclosure. Beginning on July 13, 2009, and continuing through October 27, 2011, the Town recorded a total of seven liens on the property related to various code violations.[1] These liens all stemmed from violations occurring after the final judgment was entered.

On September 27, 2012, the property was sold at a foreclosure sale to the Appellant, James Ober ("the Property Owner"). Shortly thereafter, the clerk issued the certificate of title. Beginning on February 26, 2013, the Town imposed three more liens on the property.

The Property Owner filed suit to quiet title, attempting to strike the liens against his property. The Town counterclaimed to foreclose the liens. Both parties moved for summary judgment. The trial court granted the Town's motion (and denied the Property Owner's motion) and entered a final judgment of foreclosure on the ten liens. This appeal followed.

Analysis

The issue in this case is the interpretation of a statute, which we review de novo. *Brown v. City of Vero Beach*, 64 So. 3d 172, 174 (Fla. 2011). The statute at issue here states, in relevant part:

> [T]he recording of . . . lis pendens . . . constitutes a bar to the enforcement against the property described in the notice of all interests and liens . . . unrecorded at the time of recording the notice unless the holder of any such unrecorded interest or lien intervenes in such proceedings within 30 days after the recording of the notice. If the holder of any such unrecorded interest or lien does not intervene in the proceedings and if such proceedings are prosecuted to a judicial sale of the property described in the notice, the property shall be forever discharged from all such unrecorded interests and liens. . . .

§ 48.23(1)(d), Fla. Stat. This statute "not only bars enforcement of an accrued cause of action, but may also prevent the accrual of a cause of action when the final element necessary for its creation occurs beyond the time period established by the statute." *Adhin v. First Horizon Home Loans*, 44 So. 3d 1245, 1253 (Fla. 5th DCA 2010).

By its terms, section 48.23(1)(d) does not provide an end date for the lis

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[1] The Town also recorded one lien before the final judgment was issued, but concedes that this lien was discharged.

pendens. In order to avoid the absurd result of a lis pendens precluding any lien from ever being placed on the property into perpetuity, *see Maddox v. State*, 923 So. 2d 442, 448 (Fla. 2006) (avoiding absurd results), the parties both urge this Court to apply an implied end date to the lis pendens. The Town argues that the lis pendens applies only to liens existing or accruing prior to the date of final judgment, whereas the Property Owner argues that the lis pendens continues to the date of the judicial sale, which in this case was over four years later.

In attempting to discern which of these dates was intended by the legislature to be the operative "shut off" date, we read the statute "in the context in which it is found and in conjunction with related statutory provisions." *Maddox*, 923 So. 2d at 448. One of the related provisions is section 48.23(1)(a), which states that "[a]n action in any of the state or federal courts in this state operates as a lis pendens . . . only if a notice of lis pendens is recorded." The plain meaning of this provision indicates that the action itself is the actual lis pendens, which takes effect if and when a notice is filed. The lis pendens therefore logically must terminate along with the action. The "action" in this case was the foreclosure action initiated by the non-party bank, which terminated thirty days after the court's issuance of a final judgment.[2]

Although it does not appear to have been a litigated issue, this conclusion has been reached by this Court and other District Courts of Appeal in the past. *See U.S. Bank Nat'l Ass'n v. Quadomain Condo. Ass'n*, 103 So. 3d 977, 979-80 (Fla. 4th DCA 2012) ("[T]he court presiding over the action which created the *lis pendens* has exclusive jurisdiction to adjudicate any encumbrance or interest in the subject property from the date the *lis pendens* is recorded *to the date it enters final judgment*" (emphasis added)); *Seligman v. N. Am. Mortg. Co.*, 781 So. 2d 1159, 1196 (Fla. 4th DCA 2001) ("[T]he court in the dissolution proceeding had jurisdiction over the property *until final judgment* . . . ." (emphasis added)); *Hotel Eur., Inc. v. Aouate*, 766 So. 2d 1149, 1151 (Fla. 3d DCA 2000) ("Because a Final Judgment has been entered, the instant case is no longer pending and thus the Notice of Lis Pendens is no longer valid"); *Marchand v. De Soto Morg. Co.*, 149 So. 2d 357, 359 (Fla. 2d DCA 1963) ("[T]he

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[2] When no appeal is taken, an action terminates when the time for appeal expires. *S. Title Research Co. v. King*, 186 So. 2d 539, 544-45 (Fla. 4th DCA 1966). That time is 30 days after rendition of the order. Fla. R. App. P. 9.110(b). Here, no appeal from the final judgment in the original action was taken. There is also no question in this case that the liens at issue accrued after this 30-day period, making the precise distinction between the date of the final judgment and the date of the termination of the action irrelevant under the facts before us.

doctrine of lis pendens is the jurisdiction, power or control which courts acquire of property involved in a suit pending the continuance of the action *and until final judgment therein*" (emphasis added)). The Florida Supreme Court has also used the "until final judgment" phrase when describing the scope of a lis pendens. *De Pass v. Chitty*, 105 So. 148, 149 (Fla. 1925). We find these authorities both controlling and persuasive, and hold that a lis pendens bars liens only through final judgment, and does not affect the validity of liens after that date, even if they are before the actual sale of the property.

We do note, however, that this case appears to reveal a misstatement of the law in Form 1.996(a) of the Florida Rules of Civil Procedure. That rule provides an example foreclosure judgment, and includes a provision stating: "On filing the certificate of sale, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed." Fla. R. Civ. P. Form 1.996(a). This language suggests that all liens from the filing of the lis pendens until the certificate of sale is filed are discharged. Although we recognize the conflict between the form and our holding in this case, to hold otherwise would be to create conflict between this decision and both the legislative intent and prior case law. But the form has been, and could again, be modified "to bring it into conformity with current statutory provisions and requirements . . . and better conform to prevailing practices in the courts." *In re Amendments to the Florida Rules of Civil Procedure-Form 1.996 (Final Judgment of Foreclosure)*, 51 So. 3d 1140, 1140 (Fla. 2010). Such an amendment may be appropriate here.

Conclusion

The lis pendens statute serves to discharge liens that exist or arise prior to the final judgment of foreclosure unless the appropriate steps are taken to protect those interests. However, it does not affect liens that accrue after that date. The ten liens that were involved in the case before us were all recorded and based on conduct which occurred after the date of the first final judgment. The trial court therefore did not err in entering summary judgment in favor of the Town foreclosing those liens.

Affirmed.

GROSS and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

Fourth District Court of Appeal Case Docket

Case Number: 4D14-4597

Final Civil Foreclosure Notice from Broward County

JAMES OBER vs. TOWN OF LAUDERDALE-BY-THE-SEA

Lower Tribunal Case(s): 14-006782 (05)

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01/18/2017 02:12

Date Docketed	Description	Date Due	Filed By	Notes
12/03/2014	Notice of Appeal Filed		Manuel Farach 0612138, Appellant	
12/03/2014	order appealed			
12/03/2014	Notice of Appeal Filed		Clerk Broward CC01	
12/04/2014	Case Filing Fee			
12/08/2014	Acknowledgment Letter			
12/09/2014	Notice of Appearance		Laura K. Wendell 0053007, Appellee	SUSAN L. TREVARTHEN AND ERIC P. HOCKMAN
01/27/2015	Notice of Agreed Extension - Initial Brief		Manuel Farach 0612138, Appellant	30 DAYS TO 02/27/15
02/20/2015	Received Records		Clerk Broward CC01	THREE (3) VOLUMES
03/17/2015	Notice of Agreed Extension - Initial Brief		Manuel Farach 0612138, Appellant	30 DAYS TO 03/27/15
03/26/2015	Notice of Agreed Extension - Initial Brief		Manuel Farach 0612138, Appellant	20 DAYS TO 04/16/15
04/16/2015	Notice of Agreed Extension - Initial Brief		Manuel Farach 0612138, Appellant	5 DAYS TO 04/21/15
04/22/2015	Notice of Agreed Extension - Initial Brief		Manuel Farach 0612138, Appellant	5 DAYS TO 04/27/15
05/06/2015	Show Cause Lack of Prosecution, Initial Brief			ORDERED that appellant in the above¿styled case is directed to show cause in writing, if any there be, on or before May 18, 2015, why the above¿styled case should not be dismissed for lack of timely prosecution, in that the appellant's initial brief has not been filed with this court as of this date. Failure to respond

Date Docketed	Description	Date Due	Filed By	Notes
				to this order will result in a sua sponte dismissal without further notice. If the initial brief is filed within this time, the order to show cause will be considered automatically discharged without further order.
05/07/2015	RESPONSE TO ORDER TO SHOW CAUSE		Manuel Farach 0612138, Appellant	INITIAL BRIEF WILL BE FILED NO LATER THAT MAY 18, 2015
05/18/2015	Initial Brief on Merits		Manuel Farach 0612138, Appellant	
05/19/2015	Motion For Attorney's Fees		Manuel Farach 0612138, Appellant	
05/19/2015	Request for Oral Argument			
05/19/2015	Motion To File Supplemental Record		Manuel Farach 0612138, Appellant	("AMENDED" - ORIGINAL WAS REJECTED) **DENIED**
05/20/2015	Notice of Supplemental Authority		Manuel Farach 0612138, Appellant	
05/26/2015	Notice of Supplemental Authority		Manuel Farach 0612138, Appellant	
06/09/2015	ORD-deny motion to supplement per 9.300 (a)			ORDERED that appellant's May 19, 2015 amended motion to supplement the record is denied without prejudice for failure to comply with Florida Rule of Appellate Procedure 9.300(a). See also this court's Notice to Attorneys and to Parties Representing Themselves, Paragraph 1.
06/09/2015	Notice of Agreed Extension - Answer Brief		Laura K. Wendell 0053007, Appellee	TO 07/27/15
06/15/2015	Motion To File Supplemental Record		Manuel Farach 0612138, Appellant	
06/18/2015	Supplemental Records		Manuel Farach 0612138, Appellant	ONE (1)
06/18/2015	ORD-Allowing Attachment to Record			ORDERED that the appellant's June 15, 2015 amended motion to supplement the record is granted, and the record is supplemented to include the October 15, 2014 hearing transcript. Said supplemental record is deemed filed as of the date of this order.
07/17/2015	Notice of Agreed Extension - Answer Brief		Laura K. Wendell 0053007, Appellee	TO 08/26/15
07/20/2015	Notice of Supplemental Authority		Manuel Farach 0612138, Appellant	
08/20/2015	Notice of Agreed Extension - Answer Brief		Laura K. Wendell 0053007, Appellee	TO 09/25/15
09/25/2015				

Date Docketed	Description	Date Due	Filed By	Notes
	Appellee's Answer Brief		Laura K. Wendell 0053007, Appellee	
09/25/2015	Motion For Attorney's Fees		Laura K. Wendell 0053007, Appellee	
09/25/2015	Motion To File Amicus Curiae Brief		Alexander Louis Palenzuela 0946095, Amicus for Appellee	
10/01/2015	Motion To File Amicus Curiae Brief		Jordan Wolfgram 0112145, Amicus for Appellee	
10/06/2015	Notice		Manuel Farach 0612138, Appellant	OF STIPULATION OF SUBSTITUTION OF COUNSEL
10/15/2015	Notice of Agreed Extension - Reply Brief		Manuel Farach 0612138, Appellant	TO 11/19/15
10/28/2015	Amicus Curiae Brief		Jordan Wolfgram 0112145, Amicus for Appellee	
10/28/2015	Amicus Curiae Brief		Alexander Louis Palenzuela 0946095, Amicus for Appellee	
10/28/2015	ORD-Permitting Amicus Curiae Brief			ORDERED that The City of Coral Gables' September 25, 2015 motion for leave to file brief of amicus curiae in support of the appellee is granted, and the amicus curiae brief of The City of Coral Gables is deemed filed as of the date of this order; further; ORDERED that The City of St. Petersburg, Florida's October 1, 2015 motion for leave to file amicus brief in support of the appellee is granted, and the amicus curiae brief of The City of St. Petersburg, Florida is deemed filed as of the date of this order.
11/19/2015	Notice of Agreed Extension - Reply Brief		Manuel Farach 0612138, Appellant	30 DAYS TO 12/21/15
12/21/2015	Notice of Agreed Extension - Reply Brief		Manuel Farach 0612138, Appellant	30 DAYS TO 01/20/16
01/21/2016	Appellant's Reply Brief		Manuel Farach 0612138, Appellant	
03/03/2016	ORD-Setting Oral Argument			This case is set for Oral Argument on May 3, 2016, at 10:30 A.M. for 15 minutes per side. The court calendars can be viewed on this court's website at HYPERLINK "http://www.4dca.org" www.4dca.org. Attorneys not registered with this court¿s eDCA and pro se parties are required to file a "Notice of Receipt of Oral Argument" within ten (10) days from the date of this order, acknowledging they have received this order.
03/15/2016	Motion For Continuation of Oral Argument		Manuel Farach 0612138, Appellant	

Date Docketed	Description	Date Due	Filed By	Notes
04/01/2016	Grant Continuance of Oral Argument			ORDERED that the appellant's March 15, 2016 motion for continuance of oral argument is granted. Oral argument scheduled for May 3, 2016 is cancelled and rescheduled for Tuesday, June 14, 2016 at 2:00 P.M.
04/06/2016	Grant Continuance of Oral Argument			ORDERED that the appellant's March 15, 2016 motion for continuance of oral argument is granted. Oral argument scheduled for May 3, 2016 is cancelled and rescheduled for Tuesday, June 14, 2016 at 11:00 A.M.
06/14/2016	Oral Argument Date Set			4DCA
08/24/2016	Affirmed - Authored Opinion			
08/24/2016	Order Granting Attorney Fees-Unconditionally			ORDERED that the appellee's September 25, 2015 motion for attorney's fees is granted. On remand, the trial court shall set the amount of the attorney's fees to be awarded for this appellate case. If a motion for rehearing is filed in this court, then services rendered in connection with the filing of the motion, including, but not limited to, preparation of a responsive pleading, shall be taken into account in computing the amount of the fee.
08/24/2016	Deny Attorney's Fees			ORDERED that the appellant's May 19, 2015 motion for attorney's fees is denied.
09/08/2016	Motion for Rehearing / Rehearing En Banc		Manuel Farach 0612138, Appellant	
09/08/2016	Notice of Appearance		Chris William Altenbernd 0197394, Amicus for Appellant	
09/08/2016	Motion To File Amicus Curiae Brief		Chris William Altenbernd 0197394, Amicus for Appellant	
09/08/2016	Motion To File Amicus Curiae Brief		Irwin R. Gilbert 0099473, Amicus for Appellant	
09/08/2016	Notice of Appearance		Irwin R. Gilbert 0099473, Amicus for Appellant	
09/08/2016	Appendix		Manuel Farach 0612138, Appellant	TO MOTION FOR REHEARING
09/08/2016	Motion To File Amicus Curiae Brief		Carrie Ann Wozniak 0012666, Amicus for Appellant	
09/16/2016	Motion To File Amicus Curiae Brief		John W. Little, I I I 0384798, Amicus for Appellant	
09/23/2016			Laura K. Wendell 0053007, Appellee	TO MOTION FOR REHEARING AND RESPONSE TO MOTIONS

Date Docketed	Description	Date Due	Filed By	Notes
	Motion for Extension of Time to File Response			FOR LEAVE TO FILE AMICUS BRIEFS
09/27/2016	Amicus Curiae Brief		Carrie Ann Wozniak 0012666, Amicus for Appellant	
09/27/2016	Amicus Curiae Brief		Irwin R. Gilbert 0099473, Amicus for Appellant	
09/27/2016	ORD-Permitting Amicus Curiae Brief			ORDERED that the motions to permit filing of an amicus curiae brief filed by the Florida Land Title Association ("FTLA"), the Business Law Section of the Florida Bar ("BLS"), the Florida Bankers Association ("FBA"), and the Real Property, Probate and Trust Law Section of the Florida Bar ("RRPTL") are granted. The amicus briefs filed by BLS and FBA are deemed filed as of the date of this order. FTLA and RRPTL shall file their amicus briefs within twenty (20) days from the date of this order; further, ORDERED that appellee's September 23, 2016 motion for extension is granted and appellee shall file a response to appellant's motion for rehearing, rehearing en banc, and to certify question of great public importance, as well as a response to the amicus briefs, within twenty (20) days from the date the last amicus brief is filed; further, ORDERED that no extensions of time will be granted as to the time frames set forth in this order.
09/29/2016	Motion To File Amicus Curiae Brief		David Yehuda Rosenberg 0100963, Amicus for Appellant	
10/04/2016	ORD-Permitting Amicus Curiae Brief			ORDERED that The American Legal and Financial Network's (ALFN) September 29, 2016 motion to permit filing of an amicus curiae brief is granted, and ALFN shall file its amicus brief on or before October 17, 2016.
10/14/2016	Amicus Curiae Brief		Chris William Altenbernd 0197394, Amicus for Appellant	
10/17/2016	Amicus Curiae Brief		David Yehuda Rosenberg 0100963, Amicus for Appellant	
10/17/2016	Amicus Curiae Brief		John W. Little, I I I 0384798, Amicus for Appellant	
11/07/2016	RESPONSE		Laura K. Wendell 0053007, Appellee	TO MOTION FOR REHEARING, REHEARING EN BANC AND TO CERTIFY QUESTION

Date Docketed	Description	Date Due	Filed By	Notes
11/10/2016	Motion To File Amicus Curiae Brief		Ernest Mueller , Amicus for Appellee	
11/16/2016	Amicus Curiae Brief		Ernest Mueller , Amicus for Appellee	
11/16/2016	ORD-Permitting Amicus Curiae Brief			ORDERED that the City of Tampa and the City, County and Local Government section of the Florida Bar's November 10, 2016 motion to permit filing of an amicus curiae brief is granted. The amicus curiae brief is deemed filed as of the date of this order.
01/11/2017	Notice of Supplemental Authority		Manuel Farach 0612138, Appellant	

Select Year: 2016 Go

The 2016 Florida Statutes

Title VI Chapter 48 View Entire Chapter

CIVIL PRACTICE AND PROCEDURE PROCESS AND SERVICE OF PROCESS

48.23 Lis pendens.—

(1)(a) An action in any of the state or federal courts in this state operates as a lis pendens on any real or personal property involved therein or to be affected thereby only if a notice of lis pendens is recorded in the official records of the county where the property is located and such notice has not expired pursuant to subsection (2) or been withdrawn or discharged.

(b)1. An action that is filed for specific performance or that is not based on a duly recorded instrument has no effect, except as between the parties to the proceeding, on the title to, or on any lien upon, the real or personal property unless a notice of lis pendens has been recorded and has not expired or been withdrawn or discharged.

2. Any person acquiring for value an interest in the real or personal property during the pendency of an action described in subparagraph 1., other than a party to the proceeding or the legal successor by operation of law, or personal representative, heir, or devisee of a deceased party to the proceeding, shall take such interest exempt from all claims against the property that were filed in such action by the party who failed to record a notice of lis pendens or whose notice expired or was withdrawn or discharged, and from any judgment entered in the proceeding, notwithstanding the provisions of s. 695.01, as if such person had no actual or constructive notice of the proceeding or of the claims made therein or the documents forming the causes of action against the property in the proceeding.

(c)1. A notice of lis pendens must contain the following:

a. The names of the parties.

b. The date of the institution of the action, the date of the clerk's electronic receipt, or the case number of the action.

c. The name of the court in which it is pending.

d. A description of the property involved or to be affected.

e. A statement of the relief sought as to the property.

2. In the case of any notice of lis pendens filed on the same date as the pleading upon which the notice is based, the clerk's notation of the date of receipt on the notice shall satisfy the requirement that the notice contain the date of the institution of the action.

(d) Except for the interest of persons in possession or easements of use, the recording of such notice of lis pendens, provided that during the pendency of the proceeding it has not expired pursuant to subsection (2) or been withdrawn or discharged, constitutes a bar to the enforcement against the property described in the notice of all interests and liens, including, but not limited to, federal tax liens and levies, unrecorded at the time of recording the notice unless the holder of any such unrecorded interest or lien intervenes in such proceedings within 30 days after the recording of the notice. If the holder of any such unrecorded interest or lien does not intervene in the proceedings and if such proceedings are prosecuted to a judicial sale of the property described in the notice, the property shall

be forever discharged from all such unrecorded interests and liens. If the notice of lis pendens expires or is withdrawn or discharged, the expiration, withdrawal, or discharge of the notice does not affect the validity of any unrecorded interest or lien.

(2) A notice of lis pendens is not effectual for any purpose beyond 1 year from the commencement of the action and will expire at that time, unless the relief sought is disclosed by the pending pleading to be founded on a duly recorded instrument or on a lien claimed under part I of chapter 713 against the property involved, except when the court extends the time of expiration on reasonable notice and for good cause. The court may impose such terms for the extension of time as justice requires.

(3) When the pending pleading does not show that the action is founded on a duly recorded instrument or on a lien claimed under part I of chapter 713 or when the action no longer affects the subject property, the court shall control and discharge the recorded notice of lis pendens as the court would grant and dissolve injunctions.

(4) This section applies to all actions now or hereafter pending in any state or federal courts in this state, but the period of time specified in subsection (2) does not include the period of pendency of any action in an appellate court.

History.—RS 1220; GS 1649; RGS 2853; ss. 1-3, ch. 12081, 1927; CGL 4550; s. 1, ch. 24336, 1947; s. 4, ch. 67-254; s. 1, ch. 67-567; s. 1, ch. 85-308; s. 19, ch. 90-109; s. 5, ch. 93-250; s. 1, ch. 2009-39.

Note.—Former s. 47.49.

FORM 1.996(b). FINAL JUDGMENT OF FORECLOSURE FOR REESTABLISHMENT OF LOST NOTE

FINAL JUDGMENT

This action was tried before the court. On the evidence presented

IT IS ADJUDGED that:

1. **Amounts Due.** Plaintiff, …. (name and address) ….., is due

Principal $.....

Interest to date of this judgment ……...

Title search expenses ……

Taxes …….

Attorneys' fees total ……..

Court costs, now taxed ……..

Other: …….. …….....

Subtotal $.....

LESS: Escrow balance ……..

LESS: Other …….…….

TOTAL $.....

2. **Lien on Property.** Plaintiff holds a lien for the total sum superior to all claims or estates of defendant(s), on the following described property …….. County, Florida:

(describe property)

3. **Sale of Property.** If the total sum with interest at the rate described in paragraph 1 and all costs accrued subsequent to this judgment are not paid, the clerk of this court shall sell the property at public sale on .....(date)….., to the highest bidder for cash, except as prescribed in paragraph 4, at the courthouse located at ….(street address of courthouse)…. in …… County in ……(name of city)….., Florida, in accordance with section 45.031, Florida Statutes (2013), using the following method (CHECK ONE):

At .....(location of sale at courthouse; *e.g.*, north door)....., beginning at .....(time of sale)..... on the prescribed date.

By electronic sale beginning at .....(time of sale)..... on the prescribed date at .....(website).....

4. **Costs.** Plaintiff shall advance all subsequent costs of this action and shall be reimbursed for them by the clerk if plaintiff is not the purchaser of the property for sale, provided, however, that the purchaser of the property for sale shall be responsible for the documentary stamps payable on the certificate of title. If plaintiff is the purchaser, the clerk shall credit plaintiff's bid with the total sum with interest and costs accruing subsequent to this judgment, or such part of it as is necessary to pay the bid in full.

5. **Distribution of Proceeds.** On filing the certificate of title the clerk shall distribute the proceeds of the sale, so far as they are sufficient, by paying: first, all of plaintiff's costs; second, documentary stamps affixed to the certificate; third, plaintiff's attorneys' fees; fourth, the total sum due to plaintiff, less the items paid, plus interest at the rate prescribed in paragraph 1 from this date to the date of the sale; and by retaining any remaining amount pending further order of this court.

6. **Right of Redemption/Right of Possession.** On filing the certificate of sale, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed of all estate or claim in the property and defendant's right of redemption as prescribed by section 45.031, Florida Statutes (2013) shall be terminated, except as to claims or rights under chapter 718 or chapter 720, Florida Statutes, if any. Upon the filing of the certificate of title, the person named on the certificate of title shall be let into possession of the property.

7. **Attorneys' Fees.**

[If a default judgment has been entered against the mortgagor]

Because a default judgment has been entered against the mortgagor and because the fees requested do not exceed 3% of the principal amount owed at the time the complaint was filed, it is not necessary for the court to hold a hearing or adjudge the requested attorneys' fees to be reasonable.

[If no default judgment has been entered against the mortgagor]

The court finds, based upon the affidavits/testimony presented and upon inquiry of counsel for the plaintiff that ___ hours were reasonably expended by plaintiff's counsel and that an hourly rate of $_____ is appropriate. Plaintiff's counsel represents that the attorney fee awarded does not exceed its contract fee with the plaintiff. The court finds that there are no reduction or enhancement factors for consideration by the court pursuant to *Florida Patients Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985). (If the court has found that there are reduction or enhancement factors to be applied, then such factors must be identified and explained herein).

[If the fees to be awarded are a flat fee]

The requested attorneys' fees are a flat rate fee that the firm's client has agreed to pay in this matter. Given the amount of the fee requested and the labor expended, the court finds that a lodestar analysis is not necessary and that the flat fee is reasonable.

8. **Re-establishment of Lost Note.** The court finds that the plaintiff has re-established the terms of the lost note and its right to enforce the instrument as required by applicable law. Plaintiff shall hold the defendant(s) maker of the note harmless and shall indemnify defendant(s) for any loss defendant(s) may incur by reason of a claim by any other person to enforce the lost note. Adequate protection has been provided as required by law by the following means: …..(identify means of security under applicable law: a written indemnification agreement, a surety bond, include specific detail)…...

Judgment is hereby entered in favor of the plaintiff as to its request to enforce the lost note.

9. **Jurisdiction Retained.** Jurisdiction of this action is retained to enforce the adequate protection ordered and to enter further orders that are proper including, without limitation, a deficiency judgment.

IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THE FINAL JUDGMENT.

IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS.

[If the property being foreclosed on has qualified for the homestead tax exemption in the most recent approved tax roll, the final judgment shall additionally contain the following statement in conspicuous type:]

IF YOU ARE THE PROPERTY OWNER, YOU MAY CLAIM THESE FUNDS YOURSELF. YOU ARE NOT REQUIRED TO HAVE A LAWYER OR ANY OTHER REPRESENTATION AND YOU DO NOT HAVE TO ASSIGN YOUR RIGHTS TO ANYONE ELSE IN ORDER FOR YOU TO CLAIM ANY MONEY TO WHICH YOU ARE ENTITLED. PLEASE CHECK WITH THE CLERK OF THE COURT, (INSERT INFORMATION FOR APPLICABLE COURT) **WITHIN 10 DAYS AFTER THE SALE TO SEE IF THERE IS ADDITIONAL MONEY FROM THE FORECLOSURE SALE THAT THE CLERK HAS IN THE REGISTRY OF THE COURT.**

IF YOU DECIDE TO SELL YOUR HOME OR HIRE SOMEONE TO HELP YOU CLAIM THE ADDITIONAL MONEY, YOU SHOULD READ VERY CAREFULLY ALL PAPERS YOU ARE REQUIRED TO SIGN, ASK SOMEONE ELSE, PREFERABLY AN ATTORNEY WHO IS NOT RELATED TO THE PERSON OFFERING TO HELP YOU, TO MAKE SURE THAT YOU UNDERSTAND WHAT YOU ARE SIGNING AND THAT YOU ARE NOT TRANSFERRING YOUR PROPERTY OR THE EQUITY IN YOUR PROPERTY WITHOUT THE PROPER INFORMATION. IF YOU CANNOT AFFORD TO PAY AN ATTORNEY, YOU MAY CONTACT (INSERT LOCAL OR NEAREST LEGAL AID OFFICE AND TELEPHONE NUMBER) **TO SEE IF YOU QUALIFY FINANCIALLY FOR THEIR SERVICES. IF THEY CANNOT ASSIST YOU, THEY MAY BE ABLE TO REFER YOU TO A LOCAL BAR REFERRAL AGENCY OR SUGGEST OTHER OPTIONS. IF YOU CHOOSE TO CONTACT** (NAME OF LOCAL OR NEAREST LEGAL AID OFFICE AND TELEPHONE

NUMBER) **FOR ASSISTANCE, YOU SHOULD DO SO AS SOON AS POSSIBLE AFTER RECEIPT OF THIS NOTICE.**

ORDERED at …….., Florida, on …..(date)……

_____
Judge

NOTE: Paragraph 1 must be varied in accordance with the items unpaid, claimed, and proven. The form does not provide for an adjudication of junior lienors' claims or for redemption by the United States of America if it is a defendant. The address of the person who claims a lien as a result of the judgment must be included in the judgment in order for the judgment to become a lien on real estate when a certified copy of the judgment is recorded. Alternatively, an affidavit with this information may be simultaneously recorded. For the specific requirements, see section 55.10(1), Florida Statutes; *Hott Interiors, Inc. v. Fostock*, 721 So. 2d 1236 (Fla. 4th DCA 1998).

Committee Note

2014 Amendment. This new form is to be used when the foreclosure judgment re-establishes a lost note.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH APPELLATE DISTRICT

JAMES OBER,

Appellant,

v.

TOWN OF LAUDERDALE-BY-THE-SEA, a Florida municipality,

Appellee.
_____ /

CASE NO. 4D14-4597
L.T. CASE NO. 14-6782 (05)

APPELLANT OBER'S MOTION FOR REHEARING, MOTION FOR REHEARING *EN BANC*, AND MOTION TO CERTIFY QUESTION OF GREAT PUBLIC IMPORTANCE

Appellant JAMES OBER ("Appellant") respectfully moves this Court for rehearing and certification of a question of great public importance pursuant to Florida Rule of Appellate Procedure 9.330, and for rehearing *en banc* pursuant to Florida Rule of Appellate Procedure 9.331, and shows the court:

I. MOTION FOR REHEARING

On August 24, 2016, this Court held that a *lis pendens* in a foreclosure case terminates when the final judgment is entered, and accordingly, liens recorded after a final judgment of foreclosure are not extinguished by a foreclosure sale. The court overlooked or misapprehended controlling points of law in deciding this

issue[1] in favor of the Appellee TOWN OF LAUDERDALE-BY-THE-SEA ("Appellee" or "Town"), and Appellant Ober asks the Court to note the following.

A. The Court's Ruling Will Call Into Question Thousands of Foreclosures

Florida Rule of Civil Procedure Form 1.996, which states that all liens and interests recorded between the lis pendens and confirmation of foreclosure sale are extinguished, has been in effect since December 13, 1971. *In re Rules of Civil Procedure*, 253 So. 3d 404 (Fla. 1971). The Court's *Ober* opinion, however, has called into question the form and the corresponding method of foreclosure that has been used for forty-five years, and has resulted in created great uncertainty in the real estate markets.

The result of this Court's *Ober* opinion is that every foreclosure since the adoption of the Florida Supreme Court approved foreclosure judgment in 1971 may need to be re-reviewed to see if any interests appeared or liens were filed after foreclosure judgment.[2] This is because the *Ober* opinion holds those interests appearing after foreclosure judgment are not extinguished. As a result, lenders

[1] Mr. Ober asks the Court to recall that his briefs were written well before oral argument was conducted in this case, and that he placed reliance on the Court's prior opinion of Jallali v. Knightsbridge Village Homeowners Ass'n, Inc., 2016 WL 320601, which was receded from on rehearing in Jallali v. Knightsbridge Village Homeowners Ass'n, Inc., --- So. 3d ---- 2016 WL 3548843 (Fla. 4th DCA June 29, 2016). Mr. Ober seeks not to reargue points previously raised in his briefs, but does seek to present a more complete argument in light of the Jallali opinion on rehearing.

[2] While a certified copy of a judgment is only good for ten years under Florida Statute section 57.10 (2016), the judgment lien may be re-recorded under the same judgment for an another ten years. Additionally and notwithstanding the limitations of Florida Statute section 55.10, a judgment may be renewed after twenty years (and conceivably into perpetuity) through an "action on a judgment." See Corzo Trucking v. West, 61 So. 3d 1285, 1286 (Fla. 4th DCA 2011). Since it is not the judgment debtor, no notification of the foreclosing lender need be given under any of these scenarios.

will not know if they are conveying valid titles to purchasers and title companies will be unable to certify "clean" title policies, i.e., title policies without exceptions for liens and encumbrances.

The numbers and potential problems created by the *Ober* opinion are staggering: a Westlaw search for the word "forclos!" since 2007 alone reveals 8,416 cases and does not even cover these foreclosures that were not appealed. The net effect of the *Ober* decision will be to create a new foreclosure crisis in the Florida courts, one of unnecessary re-foreclosures to determine and extinguish interests that appeared after final judgment but before foreclosure sale.

The Court misapprehended the effect its opinion would have on real estate markets, and fails to balance the rights of those who have relied on a long line of Florida Supreme Court cases affirming long established foreclosure practice versus municipalities who choose to not intervene in pending foreclosures. As a result, the Court has now created a legal game of "gotcha" as potential lienors will wait until after final judgment to record liens and then claim *Ober* as justification for demanding payouts for their claims. Foreclosing lenders will be forced to make a choice between paying the demanded sums or restarting the entire foreclosure process. The *Ober* court misunderstood the interplay between Florida Statutes Chapter 45 (foreclosure sales) and 48.23 (lis pendens), and as a result misapplied the law.

B. The Court's Opinion Fails To Consider Regulatory Requirements Placed on Lenders And The Practicalities Of The Foreclosure Process

The *Ober* opinion adopts a new policy that a *lis pendens* only extends through the final judgment, but Appellant Ober respectfully posits the Court has failed to consider the impact of adopting such a policy on lenders and the foreclosure process.

Under *Ober*, a lender presented with an appropriate loss mitigation package from a borrower will be faced with two equally unfavorable choices: cancel the foreclosure sale and risk having additional, non-extinguishable liens placed on the property after final judgment or violate federal lending regulations. This is because lenders are required by federal regulations to cancel foreclosure sales when a borrower meets promulgated criteria for loss mitigation. *See* 12 C.F.R. § 1024.41 (2016).

Specifically, this set of regulations is known as the "dual-tracking provisions." If the borrower submits a complete application more than 37 days before the foreclosure sale, the applicable regulation prohibits the servicer from seeking (or "moving for") foreclosure judgment or foreclosure sale (including conducting the sale) until the servicer makes a decision to approve or reject the loss mitigation application, the borrower rejects an offer, or the borrower fails to perform. If a sale has been set and then the servicer receives a complete application before sale, the regulation requires the servicer take reasonable steps to

avoid the sale. Violations of the regulations are punishable by fines imposed by the Consumer Financial Protection Bureau or by suit for damages for violation of the Real Estate Settlement Procedures Act.

Even if federal regulations were not in play, the *Ober* opinion has the effect of discouraging workouts by lenders as lenders will be unwilling to cancel or extend foreclosure sale dates beyond thirty days as doing so will place the lender at risk of having new, non-extinguished liens attach to the property. Lenders in this situation will be forced to restart the foreclosure process over again.

The *Ober* opinion likewise fails to account for the realities of foreclosure practice in that the lender cannot require the foreclosure sale be set within 30 days: the trial court and the clerk of court determine when a foreclosure sale will take place and that date may be months beyond the final judgment date. The *Ober* opinion has the effect of punishing lenders for things a lender cannot control such as the scheduling of foreclosure sale dates.

C. The Court Misapprehended the Facts of the Case

The Court's opinion states that "[o]n September 27, 2012, the property was sold at a foreclosure sale to the Appellant, James Ober ('the Property Owner')." Ober v. Town of Lauderdale-By-The Sea, Page 2, Case No. 4D14-4597 (Fla. 4th DCA August 24, 2106).

This is not correct, however, as Bank of America took the property back through foreclosure sale, and Mr. Ober purchased the property from Bank of America after foreclosure sale. This misunderstanding of the Record on Appeal is important as the effect of the *Ober* opinion is to punish Mr. Ober for rehabilitating the property as opposed to punishing the party that allegedly caused the "zombie foreclosure" of which the Town complains. If the intent of the panel in adopting a new rule is to punish a dilatory lender, then the *Ober* opinion fails because it is Mr. Ober and not the lender that is being punished.

Additionally, the Court misapprehended the facts of the case and punished the only innocent party in the process. It is undisputed there was a time period of approximately four years between the Bank of America foreclosure judgment and corresponding foreclosure sale, but the Court misapprehends that fact that the Town itself waited years to foreclose its code enforcement liens. For example, the code enforcement proceeding set forth in Case No. 09-KP-00039 reflects that the Town's notice of violation existed as of February 29, 2008 (R. 413), i.e., seven months before the Bank of America foreclosure judgment of September 22, 2008. Nonetheless, the panel opinion holds that this pre-judgment lien was not extinguished by the foreclosure judgment even while stating that only post-judgment liens survived.

Additionally, the Town itself is responsible for a foreclosure delay of approximately six years while complaining that Mr. Ober should be punished for the acts that delayed a sale by a "mere" four years. If the Town is correct in its argument that a "zombie foreclosure" problem exists, then the Town should bear the responsibility of allowing a "zombie home" to exist for six years. Mr. Ober is the only innocent party in the problem created by the Town and a prior lender, and should not be punished for the acts of either.

D. The Court Misapprehended The Law When It Held That Lis Pendens and Foreclosure Sales Do Not Work Together to Extinguish Inferior Liens

The Town's argument in the trial court (which necessarily carried over into this appeal) was straightforward: it is the *lis pendens* that extinguishes junior claimants, and the Town's liens were not extinguished because the *lis pendens* ended before the Town's liens were placed on the real property. The Town is mistaken, however in that its liens were foreclosed out by the Bank of America mortgage foreclosure sale and not the *lis pendens* filed by Bank of America.

The concept of the lis pendens and final judgment of foreclosure (and corresponding foreclosure sale) working together to extinguish inferior liens is so well established as prevailing law that it has been adopted into Attorney's Title Insurance Fund Title Note 18.06.02. The Note specifically addresses both lis pendens and code enforcement liens and states:

> If the code enforcement lien is recorded after the lis pendens filed in the foreclosure action, the lien may be treated as eliminated by the lis pendens provided the foreclosure is completed through certificate of title. Id. (citing AGO Op. 93-77 (Nov. 4, 1993))

The Third District analyzed a similar issue in *AG Group Investments, LLC v. All Realty Alliance Corp.*, 106 So. 3d 950 (Fla. 3d DCA 2013), and held that a mortgage foreclosure sale, not a *lis pendens*, eliminates subordinate interests. In fact, the Third District held a mortgage foreclosure sale extinguishes junior claimants even if the foreclosing lender has not filed a *lis pendens*:

> We next consider the slightly-different issue of whether the Bank's foreclosure action eliminated Striding's inferior interest in light of the fact that the Bank did not file a lis pendens and Striding was not a party to the Bank's foreclosure. Striding was the legal title holder of the subject property at the time the court entered a final judgment of foreclosure in favor of the Bank. As legal title holder, Striding would normally be an indispensable party to the Bank's foreclosure action and the lower court could not normally adjudicate the suit in Striding's absence. . .
>
> Another exception to this rule [that a party must be joined in a foreclosure suit to have that party's claims extinguished by foreclosure] concerns a party who acquires an interest in property with actual or constructive knowledge of another party's lawsuit concerning the property. This common law exception was modified in part by section 48.23(b), but, as explained above, the modification does not apply to actions based on duly recorded instruments. For actions based on a duly record[ed] instrument, like the Bank's mortgage in this case, the common law rule still applies: the filing of a notice of lis pendens is not required in order to enforce a lien against a subsequent purchaser who has actual or constructive knowledge of the pending litigation. (e.s.)

Bevans, 138 So. 3d at 1188 – 89.

There is no question the Bank of America mortgage was a duly recorded instrument, and there is no question the Town had actual or constructive notice of Bank of America's mortgage when it filed its lien. And there is no question that parties who record instruments (such as the Town recording its liens) are on constructive notice of the title record whether they search the record or not. *Regions Bank v. DeLuca*, 97 So. 3d 879, 883 (Fla. 2d DCA 2012). Thus, the Bank of America *lis pendens* was not even necessary to foreclose out the Town's interest, and it doesn't matter when the Bank of America *lis pendens* terminated.

The true question the Court sought to answer in this case is when are liens extinguished in the foreclosure process, and the only conclusion that can be drawn from the *Ober* opinion is that the Court believes extinguishment of junior liens and interests occurs at the final judgment (not the foreclosure sale) stage of the litigation process. While this may have been correct at the common law, this is not the current state of the law as extinguishment of junior liens has been at the foreclosure sale stage since the 1993 amendment to Florida Statute section 45.0315:

> Before the Statute [Florida Statute section 45.0315] was enacted in 1993, the common law rule provided that a junior mortgagee's lien was extinguished at the entry of the final judgment of foreclosure. See, e.g., Abdoney v. York, 903 So.2d 981 (Fla. 2d DCA 2005); Islamorada Bank v. Rodriguez, 452 So.2d 61 (Fla. 3d DCA 1984); Shipp Corp. v. Charpilloz, 414 So.2d 1122 (Fla. 2d DCA 1982). Under the common law, the granting of the final summary

> judgment of foreclosure to Bank United would have eliminated Appellant's interest in the property.
>
> However, the Statute provides that a junior lien holder's interest cannot be extinguished before the issuance of a certificate of sale. See In re Neely, 256 B.R. 322, 325 (Bankr.S.D.Fla.2000) ("[J]unior mortgages survive the entry of a judgment of foreclosure by a senior interest, and are only extinguished by the issuance of a certificate of sale subsequent to a foreclosure sale or as otherwise provided in a judgment of foreclosure."). Any other suggestion runs counter to the actual practice of foreclosure sales, in which a junior mortgage holder has a claim to money paid for a property at a foreclosure sale that is in excess of the value of the senior mortgage. See JP Morgan Chase Bank v. U.S. Bank Nat'l Ass'n, 929 So.2d 651, 653 (Fla. 4th DCA 2006) ("Certainly, the foreclosure of the first [mortgage] did not extinguish the second; it merely transferred the lien from the property to the surplus funds that took its place."). If the foreclosure judgment itself extinguished any interest held by the junior mortgage holder, there would be no basis for such a practice, and any excess funds would go to the debtor owner of the underlying property.

AG Group Investments, LLC v. All Realty Alliance Corp., 106 So. 3d 950, 951 – 52 (Fla. 3d DCA 2013).

Under the scenario put forth by the Town, no junior encumbrancer could ever recover their share of surplus foreclosure sale proceeds as the interest of the junior encumbrancer would be extinguished at foreclosure judgment, i.e., before any monies were paid at foreclosure sale. Thus the junior encumbrancer's interests would be wiped out at judgment, and the junior encumbrancer could not claim upon any excess foreclosure sale proceeds because it had no interest with which to claim against the proceeds. The Court misapplied the law on this issue.

E. The Court's Opinion Violates The Recording Act

Florida's Recording Act is found at Florida Statute Section 695.01 *et seq.* and is straightforward: a party gains priority in the title record if it records without notice of a prior lien. As seen above in the *DeLuca* case, this rule to parties who file claims of lien whether or not they search the public land records. The Court misapplied the effect its opinion will have on the Recording Act as the *Ober* opinion creates a situation where subsequently filed liens will take priority over prior recorded mortgages that are foreclosed. An example with the facts of this case demonstrates how.

Bank of America had a mortgage on the property that was recorded prior to any liens filed by the Town, but and the Court's *Ober* decision has the effect of allowing the property to be foreclosed back to Bank of America but not foreclosing out the Town's lien. In other words, the *Ober* decision allows the Town's liens to jump in priority in advance of the Bank of America mortgage despite the fact they were recorded after the Bank of America mortgage and recorded with constructive notice of the prior lien, i.e., the Bank of America mortgage. This is the same "code enforcement liens have first lien priority" argument the Florida Supreme Court rejected in *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924 (Fla. 2013), as violative of the Florida Recording Act.

F. The Court Misapprehends That the Lis Pendens Statute Was Amended to Capture Post-Judgment Interests Like Those of the Town

The Court misapplied Florida Statute section 48.23 by holding that the Lis Pendens statute only captures prejudgment liens and does not capture post-judgment interests. The 1985 amendment to the statute reflects that all interests (and not merely recorded interests) were intended to be encompassed by the statute. Specifically, Chapter 85-308, § 1, at 1902 – 03, Laws of Florida, reads as follows:

> Section 1. Subsection (1) of section 48.23, Florida Statutes, is amended to read:
>
> 48.23 Lis pendens. - -
>
> (1)(a) No action in any of the state or federal courts in this state operates as a lis pendens on any real or personal property involved therein or to be affected thereby until a notice of the commencement of the action is recorded in the office of the clerk of the circuit court of the county where the property is, containing the names of the parties, the time of the institution of the action, the name of the court in which it is pending, a description of the property involved or to be affected and a statement of the relief sought as to the property.
>
> (b) The filing for record of such notice of lis pendens shall constitute a bar to the enforcement against the property described in said notice of lis pendens of all interests, except for interests of persons in possession, or easements in use and liens including but not limited to federal tax liens and levies, unrecorded at the time of filing for record such notice of lis pendens unless the holder of any such unrecorded interest or lien shall intervene in such proceedings within 20 days after the filing and recording of said notice of lis pendens,

> and if the holder of any such unrecorded interest or lien does not intervene in the proceedings, and if such proceedings are prosecuted to a judicial sale of the property described in said notice of lis pendens, the said property shall be forever discharged from all such unrecorded interests and liens. In the event said notice of lis pendens is discharged by order of the court, the same shall not in any way affect the validity of any unrecorded interest or lien.

As the Court can see, the word "interests" was added to the statute in 1985 without limitation to liens appearing before final judgment. And while legislative history can sometimes be difficult to decipher, the legislative history in this case demonstrates that unrecorded interests were intended to be captured and extinguished by the statute itself. In other words, interests such as those of the Town in this case prior to filing its liens. See attached Appendix. The *Ober* opinion also creates a conflict with another of this Court's opinions with similar facts.

The right of the subsequent lienor in *Jallali v. Knightsbridge Village Homeowners Ass'n, Inc.,* - - - So. 3d - - -, 2016 WL 3548843 (Fla. 4th DCA June 29, 2016), to record liens also predated the foreclosing lender's interests (i.e., the Town's municipal ordinances right of the Town to file a lien in this case) predated the lender's *lis pendens* just like the community association's declaration in *Jallali* predated the lender's mortgage. And as *Jallali* pointed out, the inchoate right to lien is an "interest" that becomes choate when the lien is filed just as the Town's

choate enforcement ordinance was an inchoate "interest" that became choate when the town filed its lien.

Notwithstanding the fact that the association's interest predated the *lis pendens* filed by the lender, the *Jallali* court held that the association lien was junior in right to the lender because the association lien was recorded after the lender's *lis pendens*. The *Ober* opinion, however, allows a later filed lien to gain priority over an earlier lien while the *Jallali* court held the later filed lien did not gain priority over the earlier lien. *Ober* accordingly conflicts with *Jallali.*

G. The Court Misapprehends that Foreclosure Cases Are Actually Multiple Claims (Quiet Title and Specific Performance) In One Suit

The Court relied on the non-foreclosure cases of *Seligman v. N. Am. Mortg. Co.*, 781 So. 2d 1159, 1196 (Fla. 4th DCA 2001); *Hotel Eur., Inc. v. Aouate*, 766 So. 2d 1149, 1151 (Fla. 3d DCA 2000); and *Marchand v. De Soto Morg. Co*., 149 So. 2d 357, 359 (Fla. 2d DCA 1963), to reach the conclusion that *lis pendens* terminate at final judgment in foreclosure cases.[3] The two types of cases are so different that applying one concept to another type of case misapplies the law.

A mortgage foreclosure case is actually two cases in one: a quiet title suit where the priorities of ownership are determined combined together with a suit for specific performance of sale to secure a debt. In order to accomplish the second

[3] *U.S. Bank Nat. Ass'n v. Quadomain Condominum Ass'n, Inc*., 103 So. 3d 977 (Fla. 4th DCA 2012), is a foreclosure case, but it merely cites to *Seligman* for the unremarkable proposition that a *lis pendens* terminates at final judgment

purpose, the law intentionally extends the trial court's jurisdiction reach beyond final judgment date in order to ensure that the court's specific performance function of selling the property (i.e., of the security for the debt if the debt is not paid by foreclosure sale date) is accomplished. Much like any other case when a party's property is being disposed, the court retains jurisdiction to ensure the dispossession is in accordance with law.

For example and in the case of foreclosure sales, the statutes provide the court retains jurisdiction to entertain objections to sale under Florida Statute section 45.031 (5) (2016). And it is only after objections are ruled upon or the time for filing objections has passed that the clerk of court may issue a certificate of title under Florida Statute section 45.031 (6) (2016). These statutory provisions demonstrate the Florida Legislature's intention that a foreclosing court have jurisdiction and continuing control over the property well beyond foreclosure judgment. On the other hand, the cases cited by the *Ober* court are in the nature of divorce, partition and breach of contract, i.e., actions in which there are no legislative statutory instructions to a trial court to remain involved well after judgment. Accordingly, the cases cited by the *Ober* court cannot stand for the proposition that a *lis pendens* in a foreclosure case terminates on final judgment.

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in a dissolution case. This is understandable and proper as family law courts do not conduct sales of property under Florida Statutes Chapter 45 in order to effectuate the judgment.

II. MOTION FOR REHEARING *EN BANC*

In support of this Motion for Rehearing *En Banc*, Appellant contends that the *Ober* panel misinterpreted the operation of extinguishment of junior liens as reflected by the *Bevans* and *AG Group* decisions, misinterprets the amendments to Florida Statute section 48.23, calls into question the efficacy and operation of all foreclosures conducted since 1973, conflicts with a clear pronouncement of the Florida Supreme Court, conflicts with an opinion of this Court, has the effect of abrogating the clear dictates of the Florida Recording Act, and will cause confusion and uncertainty in the real estate markets as properties will have to be re-foreclosed or sold with diminished titles in order for transfers to be effective.

III. REQUEST FOR CERTIFICATION OF QUESTION OF GREAT PUBLIC IMPORTANCE

Because the holding of this case is a matter of first impression and will affect foreclosure proceedings and all parties therein throughout this state, the clearing of land titles through the foreclosure process, the rights of lenders and bona fide purchasers of properties that have been the subject of prior foreclosure proceedings, and the obligations of title insurers on policies issued in the past as well as the future, and pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v) and the related provision in the Florida Constitution, the Appellant moves this court to certify the following as a question of great public importance:

IS PROPERTY SOLD PURSUANT TO A FINAL JUDGMENT OF FORECLOSURE DISCHARGED OF LIENS FILED AFTER THE FINAL JUDGMENT BUT BEFORE THE FILING OF THE CERTIFICATE OF SALE OR CERTIFICATE OF TITLE?

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this case or the issues contained in this case are of exceptional importance, and that the panel decision in *Ober* is contrary to the *Jallali* decision of this Court as well as decisions of the Florida Supreme Court and other courts of appeal, that a consideration by the full court is necessary to maintain uniformity of decisions of this Court as well as to answer questions of exceptional importance.

CONCLUSION

For the reasons set forth above, Appellant Ober seeks rehearing of the Court's opinion, requests re-argument on the issues, requests the Court certify the question of whether post-foreclosure judgment liens are extinguished at foreclosure sale either by a *lis pendens* or a foreclosure judgment, and requests the Court seek input from *amici curiae* in the real estate and title industries on the effect the *Ober* opinion will have on Florida foreclosure law and the real estate and title insurance industries, including therein seeking input from the Real Property, Probate and Trust Law and the Business Law Sections of the Florida Bar to determine their understanding of the law and practice in this area.

Respectfully Submitted,

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Counsel for Appellant

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was served, this 8th day of September, 2016, via electronic mail to Susan L. Trevarthen, Esq., Laura K. Wendell, Esq., Eric P. Hockman, Esq., Weiss Serota Helfman Cole Bierman & Popok, P.L., 2525 Ponce de Leon Boulevard, Suite 700, Coral Gables, FL 33134 strevarthen@wsh-law.com; nsalgado@wsh-law.com; lwendell@wsh-law.com; lmartinez@wsh-law.com; ehockman@wsh-law.com; isevilla@wsh-law.com. Alexander L. Palenzuela, Esq., Law Offices of Alexander L. Palenzuela, P.A., 1200 Brickell Avenue, Suite 1230, Miami, FL 33131-3255 alp@alp-law.com; and Heather J. Judd, Esq., and Jordan R. Wolfgram, Esq., Assistant City Attorney, City of St. Petersburg, FL 33731, eservice@stpete.org; heather.judd@stpete.org, and jorgan.wolfgram@stpete.org.

By: /s/ Manuel Farach

South Carolina Eviction Procedures

Obtaining a Lockout Date (Eviction)

1. Judge Issues Writ without Hearing:
   - Sheriff Sets the Lockout Date
   - 45 to 60 Days
2. Rule to Show Cause (RTSC) Hearing Required
   - Writ sent to Sheriff, Sheriff serves, Sheriff sets Lockout
   - 75 to 100 days
3. Direct Contact with Sheriff
   - Firm sends Deed and Judgment to Sheriff, Sheriff serves/posts, Sheriff sets Lockout
   - 30 to 45 days

Riley Pope & Laney, LLC / Lowndes Pope / lpope@rplfirm.com

Ownership Runs Deep in the South

- Since the Act of 1791 – Mortgages in South Carolina are not Absolute Conveyances of Title
  - No Right of Possession
  - Possible Exception – value of security threatened by waste
    - Court Injunction
- S.C. Code Sec. 27-5-110 (dates to 1902): … entry onto another's land granted in law must not be with strong hand nor with multitude of people but only in peaceable manner …
- Abandoned Property valued at more than $500 – recommend Eviction proceeding to dispose of the Property
  - From the S.C. Residential Landlord and Tenant Act)
  - Landlord Only Liable if Gross Negligent

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lpope@rplfirm.com

The "Not So Fast" Expedited Foreclosure South Carolina Code Sec. 29-3-625

- Not Abandoned:
  - Undergoing Construction
  - Secure Building Occupied Seasonally
  - Secure Building subject of an Ownership Issue

PROCESS

Mortgagor Moves for an Expedited Hearing Supported by Affidavit and Facts

RESULT

"**Heard by the Court as Quick as Possible**"

Since June 2, 2014

Riley Pope & Laney, LLC / Lowndes Pope /
lpope@rplfirm.com

The "Not So Fast" Expedited Foreclosure South Carolina Code Sec. 29-3-625

- Abandoned Property: Not Occupied/In Need of Repair and at least 2 of the Following
  - Windows are Boarded Up or Broke Up
  - Doors are Smashed
  - Smells or otherwise Hazardous
  - Utilities Off due to non-payment – 30 days
  - Risk to the Public
  - Code Violations for 1 year
  - Government Agency determines Unfit
  - Mortgagor Written Statement of Intent to Abandon
  - Written Statements by Neighbors, Delivery Persons of Abandonment

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Q & A

- South Carolina – For Locals Only
  - Judicial Foreclosure State
  - 46 Counties and 46 Ways to Succeed
  - Section 29-3-625: Expedited Mortgage Foreclosure for Abandoned Property
  - Cleaning House
  - Eviction Processes

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