IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RICHARD M. RIGBY,

Appellant,

v.

BANK OF NEW YORK MELLON,
et. al.,

Appellee.
_____/

Case No. 1D16-0665

L.T. Case No.: 10-1313-CA

AMICUS BRIEF OF AMICUS CURIAE, MARK P. STOPA, ESQ. AND STOPA LAW FIRM, IN SUPPORT OF APPELLANT, RICHARD M. RIGBY

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INTRODUCTION

Mark P. Stopa, Esq. of Stopa Law Firm, P.A. ("Stopa" or "the undersigned"), has litigated thousands of foreclosure cases on behalf of consumers since 2008, including several which resulted in published decisions based on a lender's lack of standing. See Peters v. Bank of New York Mellon, Case No. 2D15-2222 (Fla. 2d DCA, May 26, 2017); Walsh v. Bank of New York Mellon Trust, 2017 WL 1423559 (Fla. 5th DCA, April 21, 2017); Digiovanni v. Deutsche Bank Nat'l Trust Co., 2017 WL 1277737 (Fla. 2d DCA, April 5, 2017); Houk v. PennyMac Corp., 210 So. 3d 726 (Fla. 2d DCA 2017); Corrigan v. Bank of America, N.A., 189 So. 3d 187 (Fla. 2d DCA 2016) (*en banc*); Correa v. U.S. Bank, N.A., 118 So. 3d 952 (Fla. 2d DCA 2013). Most notably, Stopa was counsel for the successful appellants in Corrigan, where all 16 judges of the Second District unanimously upheld the concept of standing at inception in a foreclosure case, overruling a prior panel decision which permitted a lender to prevail where it had standing only at the time of its amended complaint. 189 So. 3d at 188-189. Stopa now appears in the instant appeal as an *amicus curiae*, presenting this Court with a similar argument to that advanced in Corrigan and urging this Court to follow long-standing precedent of all Florida DCAs, the Florida Supreme Court, and the Florida legislature by upholding the concept of "standing at inception" in the foreclosure context.

SUMMARY OF ARGUMENT

Subjective notions of equity are not a basis to deny foreclosure. For example, if Mr. Rigby were 80 years old and had stage four cancer, that would have no bearing on the adjudication of this appeal. For these same reasons, this Court's subjective perceptions of fairness *vis a vis* the concept of standing at inception have no place in the decision-making process. Quite simply, no matter how this Court may feel about it, established precedent from the Florida Supreme Court controls the outcome at bar.

The Court's precedent is clear. After all, the Florida Supreme Court has never allowed a plaintiff to obtain standing after the filing of a lawsuit. That explains why the Second District followed this principle of law – *en banc*, unanimously – in a recent appeal in which Stopa was counsel. This Court should follow suit.

Yes, the controlling decisions are decades old. That said, the Florida Supreme Court recently upheld the concept of "standing at inception" via the creation of Fla.R.Civ.P. 1.115, which expressly requires foreclosing lenders plead their standing to foreclose upon the filing of the complaint. This Rule, of course, comes on the heels of the Florida legislature enacting Fla. Stat. 702.015, upholding this same principle of law. With all due respect, a Florida DCA cannot contravene the express will of the Florida Supreme Court in this regard.

For the reasons set forth herein, this Court should uphold the concept of "standing at inception" in the foreclosure context.

STANDARD OF REVIEW

Appellate courts review the sufficiency of the evidence at trial in a foreclosure case under a *de novo* standard of review. Tremblay v. U.S. Bank, N.A., 164 So. 3d 85 (Fla. 4th DCA 2015); Lacombe v. Deutsche Bank Nat'l Trust Co., 149 So. 3d 152 (Fla. 1st DCA 2014). That is plainly the appropriate standard here.

ARGUMENT

I. SUBJECTIVE NOTIONS OF EQUITY CANNOT JUSTIFY THIS COURT STRAYING FROM FLORIDA SUPREME COURT PRECEDENT REQUIRING PLAINTIFFS PROVE STANDING AT THE INCEPTION OF A LAWSUIT.

Florida DCAs have consistently and repeatedly required plaintiffs prove their standing to sue at the inception of a lawsuit. In fact, when Stopa made that statement in the briefs in Corrigan, it was supported by a string-cite which was three pages long. Suffice it to say there are many dozens of cases supporting this proposition of law, including cases in non-foreclosure contexts. See e.g. Progressive Express Ins. Co. v. McGrath, 913 So. 2d 1281 (Fla. 2d DCA 2005).

Unfortunately, some Florida judges have openly expressed their displeasure at having to enforce this proposition of law in the foreclosure context, lamenting the perceived "inequity" of borrowers prevailing when they did not make mortgage payments. See Corrigan, 189 So. 3d at 196 (J. Lucas, *concurring*); Focht, 124 So. 3d at 312-313. Respectfully, this entire thought process misses the mark.

First off, it is disappointing how, on the rare instances that the concept of "equity" is raised in the foreclosure context, the discussion invariably begins and ends by lamenting the borrower's default in mortgage payments. See Corrigan, 189 So. 3d at 196; Focht, 124 So. 3d at 312-313. After all, there are legions of circumstances in which foreclosure could be deemed "inequitable," yet such facts never seem to enter the fray.

By way of example, one could argue the entire concept of foreclosure is inequitable because the financial institutions which now seek foreclosure judgments by the thousands throughout Florida caused the real estate collapse precipitating these foreclosures, if not the entire Great Recession, via the securitization process. Unfortunately, no Florida decision has ever addressed this concept, and it takes a recent Hollywood movie for many Americans to understand what securitization even is.[1] See Pitt, Brad (Producer) & McCay, Adam (Director). (2015). *The Big Short* [Motion picture]. United States: Paramount Pictures.

In the past several years, countless homeowners were encouraged by their lenders to default under the auspices of obtaining a loan modification, yet, upon default, were denied a modification, sued for foreclosure, and could not reinstate because the lender included so many miscellaneous fees in the reinstatement amount.[2] Many other homeowners dutifully remitted payments pursuant to a loan

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[1] Even in the context of a deficiency, where equity is expressly permitted to enter the fray, see e.g. FDIC v. HY KOM Dev. Co., 603 So. 2d 59 (Fla. 2d DCA 1992), there are no decisions which address the inequity of foreclosure based on mortgage securitization precipitating the Great Recession. The few cases that even mention securitization, see e.g. Russell v. Aurora Loan Services, LLC, do so only in the context of standing. 163 So. 3d 639 (Fla. 2d DCA 2015).

[2] To those in the industry, lenders are notorious for including property inspection fees even where the mortgage does not authorize them, 3-4 times the normal market rate for homeowners' insurance, and service of process fees for unknown tenants, spouses, and heirs even in situations where the inclusion of such parties is plainly inappropriate (e.g. the property is the lender's homestead).

modification agreement entered post-acceleration, yet saw the lender refuse to dismiss the pending foreclosure lawsuit and proceed to judgment – a practice so common it has a nickname, "dual-tracking."[3] Despite such obvious inequities permeating the system, only one Florida case (to the undersigned's knowledge) has ever dismissed a foreclosure case based on such facts, and even then, it ruled based upon contract principles, not equitable considerations. See Nowlin v. Nationstar Mortg., LLC, 193 So. 3d 1043 (Fla. 2d DCA 2016).

The undersigned could line up hundreds of clients who are elderly, handicapped, or struggling through some difficulty in life that most judges would agree makes foreclosure "inequitable." By way of example, suppose the Appellant in this action, Mr. Rigby, were 80 years old, recently diagnosed with stage four cancer, and given six months to live.[4] No matter how much this Court might *want* to deny foreclosure based on "equity" (or, at minimum, delay foreclosure until after his death), it undoubtedly would not do so. In fact, it would not occur to the undersigned - if Mr. Rigby had been his client - to even ask.[5]

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[3] The Consumer Financial Protection Bureau explains how federal law prohibits "dual-tracking," see www.consumerfinance.gov, yet not a single Florida decision even mentions the term. A Westlaw search of Florida cases with the term "dual-tracking" does not yield a single case in the foreclosure context.

[4] Bear in mind, this would mean the lender gave this consumer a 30-year mortgage at age 73 at the height of a lender-induced real-estate boom.

[5] If this fact pattern were to unfold in a Florida trial court – and the undersigned has watched it unfold many times, typically by a *pro se* homeowner – the presiding

No matter how egregious the facts, the "equitable" nature of foreclosure does not allow judges to inject their own, subjective view of fairness into the adjudication of a case. That is why no published decision has *ever* held that notions of "equity" allow a judge to decide a case based on what he/she subjectively believes to be fair. In fact, Florida Supreme Court precedent precludes subjective notions of equity from invading the decision-making process, requiring foreclosure cases be decided based on specific, delineated "rules" which confer "predictability" on the outcome:

> It is well established in this state that an acceleration clause or a promise in a mortgage confers a contract right upon the note or mortgage holder which he may elect to enforce upon default. Safeguarding the validity of such contracts, and assuring the right of enforcement thereof, is an obligation of the courts which has constitutional dimensions. …
>
> Although providing equitable relief in a proper case is discretionary with the trial judge, were that discretion not guided by fixed principles, the degree of uncertainty injected into contractual relations would be intolerable. Equity cannot therefore look solely to the result in determining whether to grant relief, but must apply rules which confer some degree of predictability on the decision-making process.
>
> Equitable principles established by years of judicial decisions represent specific circumstances which courts regard as adequate to bar acceleration and foreclosure. The *Campbell* court set out a number of situations which courts have traditionally recognized as permitting relief from foreclosure: [listing such situations] …

David v. Sun Fed. Savings & Loan, 461 So. 2d 93, 95 (Fla. 1984).

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judge would likely respond with some variation of: "The court is very sympathetic to your circumstances. Unfortunately, those facts do not provide a lawful basis for the court to deny a foreclosure." Any such argument to this Court would then be met with a PCA.

"Equity" in the foreclosure context does not mean "fairness." Rather, it means only that foreclosure is not an action "at law," as the plaintiff is not seeking monetary relief and has no attendant right to trial by jury. See Adams v. Citizens Bank of Brevard, 248 So. 2d 682 (Fla. 4th DCA 1971). This is, of course, consistent with long-standing precedent distinguishing actions "at law," i.e. those which seek monetary relief, and those in "equity," i.e. those which do not.[6] See Cerrito v. Kovitch, 457 So. 2d 1021 (Fla. 1984).

With this backdrop in place, this Court has indicated its intent to reconsider the standing-at-inception rule in the foreclosure context. If it were to so rule, this Court would have to recede from many of its own cases and certify conflict with many dozens of its sister courts' rulings, including Corrigan, which decided the precise issue at bar just last year. Perhaps more significantly, this Court would have to disregard controlling precedent from the Florida Supreme Court - something it is simply not authorized to do.

Back in 2013, when the Second District decided Focht v. Wells Fargo Bank, N.A., 124 So. 3d 308 (Fla. 2d DCA 2013), and certified the question of standing at inception to the Florida Supreme Court as one of great public importance, id. at 312, it may have been fair for it to question whether foreclosing lenders should be forced

[6] Lawsuits seeking "specific performance" sound in equity, and no judge would begin to suggest this enables a judge to subjectively decide what he/she thinks is fair. Foreclosure should be no different.

to prove standing upon filing suit. Now, though, the situation is markedly different. Not only have countless more decisions been issued since then, but effective July 1, 2013, the Florida legislature enacted Florida Statute § 702.015 to require all foreclosing lenders plead their standing to foreclose in the original complaint. See § 702.015(2). Such lenders must "contemporaneously" file a certification under penalty of perjury setting forth the factual basis of its standing to foreclose, be it the holder of the original, endorsed note, see § 702.015(4), based on authority delegated by a different entity, see § 702.015(3), or one seeking to enforce a lost instrument. See § 702.015(5). Moreover, sanctions are authorized for failure to comply. See § 702.015(6).

In January, 2016, the Florida Supreme Court incorporated the requirements of Fla. Stat. § 702.015 into Fla.R.Civ.P. 1.115. In re Amendments to Florida Rules of Civil Procedure, 190 So. 3d 999 (Fla. 2016). In so ruling, the Court created a new rule of civil procedure for the express purpose of forcing foreclosing lenders to plead and prove the basis of their standing at the inception of a case. See id.

The Florida legislature has spoken. It clearly wants foreclosing lenders to plead (under penalty of perjury) and prove their standing at the inception of a lawsuit. See § 702.015. The Florida Supreme Court has done the same. See Fla.R.Civ.P. 1.115. As such, and given the volume of cases that have ruled on the issue of standing in the past several years, a Florida DCA is in no position to change the law.

Quite simply, the Florida Supreme Court's invocation of Rule 1.115, and its attendant obligation that foreclosing lenders plead and prove their standing to foreclose at the inception of a lawsuit, prevents this Court from issuing a contrary ruling.

Even if Rule 1.115 did not exist, this Court would still be constrained to follow the "standing at inception" rule. To illustrate, one of the decisions which lamented this requirement, Focht, appropriately explained (even in the days preceding the creation of Rule 1.115):

> For our part, appellate courts have seen a recent influx of appeals in which defendants have successfully argued that the trial court erred in entering a foreclosure judgment in favor of the plaintiff because the plaintiff failed to establish standing at the time of filing. See e.g. Cutler, 109 So. 3d at 225; Gonzalez, 95 So. 3d at 253-254; Green, 109 So. 3d at 1288; McLean, 79 So. 3d at 174. In many of these cases, the plaintiff presented unrefuted proof of standing acquired after filing but prior to the final hearing. See id. **The appellate courts are nonetheless compelled to reverse based on the district courts' application of a long line of supreme court cases applying the general principle that 'the plaintiff's lack of standing at the inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed.'** Progressive Express,[913 So. 2d at 1284-1285] (following Voges v. Ward, 123 So. 785 (Fla. 1929) and Marianna & B.R. Co. v. Maund, 56 So. 670 (Fla. 1911); see also Jeff-Ray Corp. v. Jacobson, 566 So. 2d 885, 886 (Fla. 4th DCA 1990) (following Marianna, 56 So. 670)).

124 So. 3d at 311-312 (boldface added).

Focht's citation to Voges and Marianna is significant, not only because those cases are controlling, but the language from those decisions is so powerful. In

Marianna, for instance, the Florida Supreme Court could not have been clearer in setting forth the obligation that plaintiffs have standing upon filing suit (notably, in the real estate context):

> A plaintiff cannot supply the want of a valid claim at the commencement of the action by the acquisition or accrual of one during the pendency of the action. Nor can plaintiff recover in a pending action on a cause of action which accrued after the institution of such action, even though such cause of action relate to the subject-matter of the pending action.' It is stated in this case that, where the right to sue arises out of a transaction subsequent to the institution of the suit, relief cannot be had by a supplemental or amended complaint, for the obvious reason that the cause of action did not then exist. [I]t is a rule of law to which there is, perhaps, no exception, either at law or in equity, that to recover at all there must be some cause of action at the commencement of suit. … The deed to the plaintiff, made October 24, 1910, several months after this suit was brought, could not alone support this action … So it is obvious he has not clearly shown a right of action when the suit was brought on the 24th of March, 1910, under the assignment of the right to sue executed on January 5, 1911. That assignment gave a new right of action long subsequent to the date of the bringing of the suit. It is decided in this state that in ejectment a plaintiff cannot recover upon a deed made after the suit is brought. We know of no reason why the same principle should not apply to a case like the instant one.

56 So. at 543-545. As Focht noted, Voges and Marianna are binding unless and until the Florida Supreme Court say otherwise. As that has not happened, this Court is constrained to follow the standing-at-inception rule in the foreclosure context.[7]

[7] Even if this Court were to disregard the standing-at-inception rule in the face of the foregoing, the question becomes: at what point in time in a lawsuit must a lender have standing to foreclose? The undersigned cannot imagine any court taking the position that a lender need only prove standing at the time of trial. After all, if lenders could obtain standing right as a trial begins, then how would defendants ever

CONCLUSION

Long-standing, Florida Supreme Court precedent requires plaintiffs have standing at the inception of a lawsuit. By enacting Fla.R.Civ.P. 1.115 in January of 2016, the Florida Supreme Court reiterated this concept in the foreclosure context, requiring lenders plead and prove their standing to foreclose at the inception of a case. This Court's subjective views of equity cannot justify a contrary ruling, particularly where the Florida Supreme Court's position is so clear. As such, this Court should follow the Second District's lead in Corrigan and uphold the standing-at-inception rule in the foreclosure context.

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conduct meaningful discovery on the dispositive issue? In that scenario, lenders could always duck pleading requirements or discovery obligations by asserting such inquiries were irrelevant (essentially admitting they lacked standing at that moment but would prove such as of the day of trial). Undoubtedly, one reason standing is required upon filing suit is to avoid this dynamic, forcing lenders to plead the issue, see Fla. Stat. § 702.015 and Fla.R.Civ.P. 1.115, and ensuring borrowers can defend a lawsuit accordingly. Quite simply, one of the "fixed principles of law" in the foreclosure context, see David, 461 So. 2d at 95, is that lenders prove standing at the inception of a lawsuit. This Court should rule accordingly.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to Liebler Gonzalez & Portuondo, Courthouse Tower – 25th Floor, 44 W. Flagler St., Miami, FL 33130, mjw@lgplaw.com; Gladstone Law Group, P.A., 1499 W. Palmetto Park Rd., Suite 300, Boca Raton, FL 33486, eservice@gladstonelawgroup.com; Burke Blue Hutchison Walters & Smith, P.A., 221 McKenzie Ave., PO Box 70, Panama City, FL 32402, dsmith@burkeblue.com; Tiffany Rigby n/k/a Tiffany Cooper, 938 Hammon Lake Dr., Fountain, FL 32438, cooperlj1@aol.com; and Michael R. Reiter, Esq., PO Box 330, Lynn Haven, FL 32444; mikelawbk@gmail.com on this the 11th day of June, 2017.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is Times New Roman 14-point, in compliance with Fla.R.App.Pro. 9.210(a)(2).

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