

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

BANK OF AMERICA, N.A.,

Plaintiff,

v.

Case No. 08-001619-CI-20

MICHAEL D. CARLSON, *et. al.*,

Defendants.

**VERIFIED MOTION TO VACATE FORECLOSURE JUDGMENT,
CANCEL FORECLOSURE SALE, AND RETURN DEFENDANT TO POSSESSION**

Defendant, MICHAEL D. CARLSON (“CARLSON”), by and through his undersigned counsel and pursuant to Fla.R.Civ.P. 1.540, moves this Court for an Order vacating the Final Judgment of Foreclosure in this cause, quashing the foreclosure sale, quashing service of process upon him, and restoring CARLSON to possession of the subject premises, and would show:

BACKGROUND

1. In February, 2008, Plaintiff filed suit for mortgage foreclosure, seeking foreclosure of a property owned by CARLSON, located at 1020 Forest Court, Dunedin, FL 34698 (“the Florida Property”).

2. On March 14, 2008, Plaintiff filed an Affidavit of Service reflecting that CARLSON had been served via substitute service on February 27, 2008 through an unnamed female “co-tenant” at the property located at 1701 Broadway C, Alameda, CA 94501 (“the California Property”). Even though the alleged service had been effectuated less than 20 days prior, the Clerk entered a default against CARLSON on March 14, 2008.

3. On April 1, 2008, this Court entered a Final Judgment of Foreclosure (“the Final

Judgment”). The Final Judgment reflects that a service copy thereof was mailed to CARLSON at the California Property.

4. On May 5, 2008, this Court sold the property at a foreclosure sale. Plaintiff was the high bidder.

FACTS

5. CARLSON was never served with a Summons or a Complaint in this lawsuit.

6. On February 27, 2008, at the time of the alleged service at the California Property, CARLSON did not reside at, live at, or otherwise inhabit the California Property. In fact, CARLSON has never resided at, lived at, or inhabited the California Property, even once, in his entire life. In February, 2008, CARLSON resided at 1200 Meredith Way, Carmichael, CA 95608.

7. CARLSON does not know why Plaintiff deemed service on an un-named, female tenant at the California Property as binding service upon him. That said, CARLSON suspects that Bank of America mistook him for his brother. To wit, in February, 2008, at the time of the purported service, CARLSON’s brother, Steve, was a tenant at the California Property (along with numerous other tenants) and was in a separate mortgage foreclosure lawsuit with Bank of America (on a property CARLSON had no interest in and knew nothing about). Hence, it seems that Bank of America believed that service upon a tenant at the California Property would be binding upon CARLSON, not realizing that Steve Carlson resided at the California Property, not CARLSON. In any event, Plaintiff was clearly mistaken. See citations, supra.

8. In early April, 2008, shortly after the Final Judgment of Foreclosure was entered, CARLSON learned, for the first time, of the existence of this lawsuit.¹ The tenants at the Florida

¹ There were numerous tenants at the California Property in February, 2008. If Steve Carlson

Property had stopped paying rent (and were not communicating with CARLSON), so CARLSON took a flight from California, to Florida, for an inspection of the Florida Property. Upon inspection, CARLSON saw two things. First, the tenants had moved out. Second, CARLSON found, in the foyer of the Florida Property, various court filings in this case, including a Motion for Default and a Notice of Filing Affidavits.

9. Prior to seeing those documents in the foyer of the Florida Property in early April, 2008, CARLSON did not know that this lawsuit had been filed. As such, by the time CARLSON knew about this lawsuit, the Final Judgment had already been entered.

10. CARLSON never received a copy of the Final Judgment or notice of the hearing that gave rise to the Final Judgment. The "cc" on the Final Judgment reflects that it was mailed to CARLSON at the California Property, but, again, CARLSON did not reside there and was never notified of any court papers having been served or mailed there. Quite simply, CARLSON was a stranger to the California Property, yet Plaintiff used said property as the basis for service upon him.

11. In early April, 2008, when he realized that Plaintiff had filed a lawsuit for foreclosure of the Florida Property, CARLSON called Plaintiff's lawyer, Greenspoon Marder, whose telephone number was on the court papers he found in the foyer. Greenspoon Marder advised CARLSON that the Final Judgment had already been entered and he would have to talk to Plaintiff.

12. Beginning in early April, 2008 and continuing for the rest of the month, CARLSON conversed via telephone with Nancy Schime, an agent of Bank of America, on no less than eight occasions. From the outset, CARLSON advised Bank of America that he had the received notice of this lawsuit, he never informed CARLSON about it. At the time, the two were not communicating.

desire and wherewithal to pay the mortgage arrearages so as to reinstate the loan. From the outset, Ms. Schime advised CARLSON that the Florida Property was not scheduled for foreclosure sale and that he would be able to reinstate the mortgage. The tone and content of their conversations was such that Ms. Schime caused CARLSON to believe that he could pay the arrearages and reinstate the mortgage with no problem. However, Ms. Schime advised CARLSON that she was having trouble getting a hold of Greenspoon Marder.

13. On Thursday, May 1, 2008, Greenspoon Marder advised CARLSON that he needed to fax a letter to Greenspoon Marder authorizing the release of information for a reinstatement. CARLSON did so. That same day, Greenspoon Marder (through Stephanie Moorehead, an assistant to Marisol Morales) advised CARLSON that Bank of America would provide him with the payoff amount the following day.

14. On Friday, May 2, 2008, CARLSON did not receive the reinstatement figures, as promised. Hence, he followed up with Bank of America on Monday, May 5, 2008, when he was told Greenspoon Marder was reviewing the letter to him and he'd receive it later that day. That afternoon, CARLSON followed up with Ms. Schime again, but she directed him to Greenspoon Marder.

15. On Tuesday, May 7, 2008, CARLSON followed up with Ms. Moorehead again. It was then that CARLSON was advised the Florida Property had been sold in a foreclosure sale earlier that week. Prior thereto, CARLSON did not know a sale had been scheduled. In fact, Ms. Schime had insisted, all along, that no sale had been set, and nobody ever advised CARLSON differently.

16. On May 8, 2008, frustrated with this sequence of events, CARLSON sent a letter to Ms. Schime, a copy of which is attached as Exhibit "A." In this letter, CARLSON outlined

what had transpired and requested a reinstatement figure.

17. By May 19, 2008, after numerous additional conversations, CARLSON still did not have the reinstatement figures. As such, on that date, he sent a more aggressive letter to Laura Pirratano of Bank of America, a copy of which is attached as Exhibit "B." Two days later, Greenspoon Marder responded to CARLSON, in writing, and said:

I spoke to BOA and they are willing to accept reinstatement figures from you. I am going to request the figures today and forward them to you via fax at this same fax number. Please give me a call as soon as you get a chance.

See Exhibit "C." The reinstatement figures were attached.

18. Upon receipt of the reinstatement figures, CARLSON called Ms. Schime and told her he was ready to pay, but wasn't sure how to go about getting title to the Florida Property back in his name and the Mortgage reinstated. Ms. Schime responded by telling CARLSON that she was not sure, either.

19. By June, 2008, CARLSON still had no satisfactory answer. He wanted to pay, but he didn't want to pay and not have title or not have the Mortgage reinstated. Meanwhile, CARLSON needed to relocate from California to Florida because his children would be living with him, as agreed in his divorce settlement with his then-wife, Stacy Carlson. As such, CARLSON needed a place to live. He wanted to live in the Florida Property, but was unable to finalize the reinstatement with Plaintiff, so CARLSON was forced to find a different place to live.

ANALYSIS

20. The requirements for service of process on an individual are quite basic. Section 48.031, Fla. Stat., provides:

Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or

by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents.

21. Here, Plaintiff failed to comply with these requirements. To wit, the purported service was on an un-named tenant at the California Property, where CARLSON did not reside. That is insufficient service as a matter of law.

22. Under a well-established line of cases:

A judgment entered without service of process on the defendant is void and may be attacked at any time. ... A judgment entered without service of process is void and will be set aside and stricken from the record on motion at any time.

H & F Tires, L.P. v. D. Gladis Co., Inc., 981 So. 2d 647, 651 (Fla. 4th DCA 2008) (quoting M.L. Builders, Inc. v. Reserve Developers, LLP, 769 So. 2d 1079 (Fla. 4th DCA 2000)); see also Falkner v. Amerifirst Fed. Savings and Loan Ass'n, 489 So. 2d 758, 759 (Fla. 3d DCA 1986).

23. Florida's appellate courts have applied this same line of cases in mortgage foreclosure suits. For instance, in Gans v. Heathgate-Sunflower Homeowners Ass'n, Inc., the Fourth District held:

[W]e hold that the face of this record reveals that the Association's service by publication was void. Where the service by publication is void on its face a reversal of the order of sale will defeat the title of the non-party who purchases the property in good faith at the judicial sale.

593 So. 2d 549, 552-53 (Fla. 4th DCA 1992); see also Montero v. Duval Fed. Savings and Loan Ass'n of Jacksonville, 581 So. 2d 938 (Fla. 4th DCA 1991).

24. Plaintiff may want this Court to believe that the passage of time since this Court's entry of the Final Judgment somehow bars the relief CARLSON seeks. That is simply not so. To illustrate, in H & F Tires, supra, the Fourth District required that service be quashed, ruling:

[I]n the instant case, H & F's nineteen-month delay in moving to vacate the default judgment is of no consequence in light of the fact that proper service of process on H & F was never effected.

981 So. 2d at 651; see also M.L. Builders (“the passage of time cannot make valid that which has always been void”); Del Conte (“the fact that appellant moved to vacate over one year after the entry of judgment is irrelevant”).

25. In addition to the improper service, CARLSON never received notice of the hearing at which the Final Judgment was entered or the Final Judgment itself. Particularly since the default against him was premature (in that the default was entered less than 20 days after the alleged service), CARLSON was plainly entitled to such notice, absent which the Final Judgment is void. See Polani v. Payne, 654 So. 2d 202 (Fla. 4th DCA 1995).

26. Moreover, by not receiving notice, CARLSON lost his right to pay the arrearages prior to the foreclosure sale as well as his right of redemption post-foreclosure. This requires reversal, particularly where, as here, CARLSON was repeatedly trying to reinstate the mortgage and had the ability to do so. See Deluxe Motel, Inc. v. Patel, 770 So. 2d 283 (Fla. 5th DCA 2000).

27. It is unfortunate that Plaintiff sold the Florida Property to third party purchasers named Kevin and Gail Winters (“Winters”). However, Florida law is clear - CARLSON’s ownership claim takes precedence over that of Winters. After all, Winters’ claim to title is derived from that of Plaintiff, and Plaintiff’s title resulted from a foreclosure judgment that must be vacated. For what it’s worth, Winters are not without remedy – their recourse lies with Bank of America and/or the title insurance company that issued them a title insurance property at the closing with Bank of America.

28. In light of the foregoing, this Court should vacate the Final Judgment of Foreclosure in this cause, quash and cancel the Certificate of Sale and Certificate of Title issued by this Court, quash service of process upon CARLSON, and restore possession of the Florida

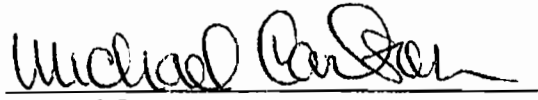
Property to CARLSON.

29. CARLSON is willing to give Winters some time to gather their personal possessions and vacate the property. However, the law is clear, based on the facts set forth herein, that CARLSON is the rightful owner of the Florida Property. This Court should rule accordingly.

WHEREFORE Defendant, CARLSON, respectfully requests that this vacate the Final Judgment of Foreclosure in this cause, quash the Certificate of Sale and Certificate of Title issued by this Court, to Plaintiff, after the foreclosure sale, quash service of process upon CARLSON, and grant such other and further relief that this Court deems proper.²

VERIFICATION

I HEREBY CERTIFY under penalty of perjury that I have read the foregoing and the facts stated therein are true and correct.


Michael Carlson

² CARLSON has still not received a copy of the Complaint in this cause. Hence, CARLSON reserves the right to move to dismiss the Complaint if and when Plaintiff effectuates proper service.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Marisol Morales, Greenspoon Marder, P.A., 100 W. Cypress Creek Road, Ft. Lauderdale, FL 33309 and Kevin and Gail Winters, 1020 Forest Court, Dunedin, FL 34698 on this 28th day of October, 2010.



Mark P. Stopa, Esquire
FBN: 550507
STOPA LAW FIRM
2202 N. Westshore Blvd.
Suite 200
Tampa, FL 33607
Telephone: (727) 667-3413
ATTORNEY FOR DEFENDANT

May 8, 2008

Bank of America
Nancy Schime
Pre-Foreclosure Department
716-655-2013
716-635-7246 fax

Re: Loan #6111571110
1020 Forest Court, Dunedin, FL 34698

Dear Ms. Nancy Schime,

Pursuant to our phone call today, I am sending this letter of authorization, as you instructed. This letter authorizes the release of any and all data regarding this loan to "Solutions Management, Inc." and its employees or contracted attorneys.

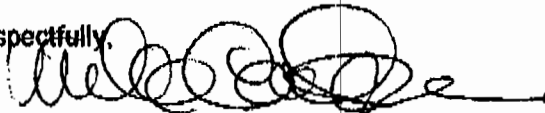
This specific data of interest is the time-line and specific sequence of events surrounding the illegal sale of the above referenced property. As you are fully aware, I have been working with you for over a month, discussing this matter no less than 8 times in an attempt to pay my loan deficiencies. I have been able and willing to pay my loan current for over a month now and offered to walk into any Bank of America branch and pay the funds current, but you informed me this was not possible.

During one of our conversations, you falsely represented to me that the home was NOT planned for sale and that we would be able to handle this matter. I relied upon you as an agent of Bank of America and relied upon your representation (apparently to my detriment) that this matter could be handled. You assured me no sale date was scheduled. You represented to me that you were unable to reach Bank of America's attorney, just as I was, and had great difficulty in contacting and obtaining cooperation from them. You finally did reach them last week and I did finally make contact on last Thursday (May 1st, 2008), when I was told to fax in a letter authorizing the release of the information to me for reinstatement. I complied with this request, which was apparently designed to mask the real events unfolding. I do not understand why I would need authorization to have my own data released to me for the purpose of bringing the account current pursuant to Bank of America's and your direction. I was promised by Stephanie Moorehead (secretary to Marisol Morales and also an agent of Bank of America) that I would receive this amount owed on Friday, May 2, 2008. When I did not receive the information as promised I followed up on the morning of May 5th, and was told that the draft letter to me was with the attorney for approval since Friday and I would have the figure that day. On May 7th, I followed up once again with Stephanie Moorehead and was informed that the property had gone to sale on May 5th or 6th. Up to this point I had assumed I was working with an inefficient law firm, not a deceptive one.

As I understand it now, from my conversation with you today, the house has in fact now sold and is retained by Bank of America. I have the funds to pay the mortgage current and I would like your assistance in this matter, by overcoming whatever barriers there are to making this matter right. I would prefer your assistance rather than go through the expense of encumbering the property to prevent further illegal title transfer, and filing suit to ascertain damages. I will stop at no ends to make this matter just, including notification to local media, my Senator, my Governor, as well as notifying the State and Federal authorities of what are clearly Banking and Charter Violations.

I would like your assistance in ensuring Bank of America to live up to its Agent's representations and accept my payment to re-instate the loan. Please forward to my immediate attention the EXACT amount owed.

Respectfully,



Michael Carlson
916-934-8980
727-548-0402 fax

EXHIBIT
"A"

May 19, 2008

To: Laura Pirratano
Bank of America
Fax ~~716-635-2998~~
716 635-7245

From: Michael Carlson
916-934-8980 cell

2 pages

RE: Loan #6111571110
1020 Forest Court, Dunedin, FL 34698

Dear Ms Laura Pirratano,

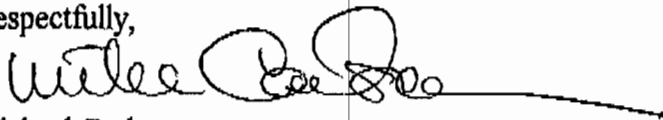
Please review the attached fax sent to Ms. Nancy Schime on May 8th, 2008.

My representative, attorney John DeLuc of Solutions Management, Inc. has been attempting to communicate with Bank of America representatives for over 2 weeks now with regards to this matter.

This facsimile will again serve as my authorization for release of information of any and all data regarding this loan. This facsimile message is my final attempt to communicate with BofA directly on this matter, and I will be forced to take decisive legal action if I, or my legal representatives are unable to communicate through normal means.

Please return a call to myself or Mr. John DeLuc at 586-770-8455 immediately to discuss the matter at hand.

Respectfully,



Michael Carlson
916-934-8980

EXHIBIT
"B"



GREENSPOON MARDER, P.A.

ATTORNEYS AT LAW

Marisol Morales
 Trade Centre South, Suite 700
 100 W. Cypress Creek Road
 Fort Lauderdale, Florida 33309-2140
 Phone: (954) 491-1120
 Fax: (954) 771-9264
 Direct Phone: (954) 343-6981
 Direct Fax: (954) 343-6982
 Email: Marisol.Morales@gmlaw.com

FACSIMILE TRANSMITTAL

To: MICHAEL CARLSON
 Fax No: 727-548-0402
 Date: May 21, 2008
 Re: BANK OF AMERICA, N.A. vs. MICHAEL CARLSON
 File No.: 17892.0006

Total number of pages, including Facsimile transmittal: 1

COMMENTS:

Mr. Carlson I spoke to BOA and they are willing to accept reinstatement figures from you. I am going to request the figures today and forward them to you via fax at this same fax number. Please give me a call as soon as you get a chance.

My number is 954-491-1120 x1216.

Thanks,
 Stefanie

document2

NOTICE

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EXHIBIT
 "C"

AUG 437,000

Attn. Mr. Carlson -
727-548-0402



TO: Greenspoon Marder Pa

ATTN: _____

Bank of America
475 CrossPoint Parkway
PO Box 9000
Getzville, NY 14068-9000

FROM:

DATE: May 27, 2008

RE: Reinstatement figures good through 06-05-08

Loan Number 6111571110

Mortgagor: Michael D Carlson

Due date: 07-01-07

PAYMENT	BEGIN	PMTS	RATE	P & I	ESCROW	TOT PAYMT
2,716.73	07/01/07	3	7.75000	1,432.98	1,283.75	8,150.19
2,716.73	10/01/07	2	7.37500	1,432.98	1,283.75	5,433.46
2,716.73	12/01/07	2	7.25000	1,432.98	1,283.75	5,433.46
2,716.73	02/01/08	1	7.12500	1,432.98	1,283.75	2,716.73
2,716.73	03/01/08	1	7.00000	1,432.98	1,283.75	2,716.73
2,716.73	04/01/08	1	6.75000	1,432.98	1,283.75	2,716.73
2,716.73	05/01/08	1	6.50000	1,432.98	1,283.75	2,716.73
2,716.73	06/01/08	1	6.25000	1,432.98	1,283.75	2,716.73

Total Regular Payments: 32,600.76
 Accrued Late Charges: .00
 (Forecasted Late Charge) .00
 NSF Balance: .00
 Corporate Advance Balance: .00
 Delinquency Inspections: 102.00
 ATTY FEES/COSTS : 5,813.50
 : .00
 : .00

Sub Total Due: \$ 38,516.26

Please add in outstanding attorney fees and costs relating to this foreclosure to obtain the total reinstatement amount

In the event that you cannot reinstate in full, there may be an alternative to foreclosure, please call 1.716.635.2264 to discuss.

If you have any questions regarding these figures please contact me at.

XF992 003 F5S