IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, DAYTONA BEACH, FLORIDA

JAMES ARRAJJ, JR. and
BRANDY L. ARRAJJ,

Petitioners,

L.T. Case No. 2010-CA-7776

v.

Case No.: 5D10-

U.S. BANK, N.A., AS TRUSTEE FOR THE
REGISTERED HOLDERS OF MASTER
ASSET BACKED SECURITIES TRUST 2006-AM1,
MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2006-AM1, HONORABLE BELVIN PERRY, JR.,
Chief Judge of the Ninth Judicial Circuit, and
HONORABLE THOMAS KIRKLAND,

Respondents.
_____/

PETITION FOR WRIT OF CERTIORARI OR MANDAMUS

Petitioners, JAMES ARRAJJ, JR. and BRANDY L. ARRAJJ, by and through their undersigned counsel, petition this Court for a Writ of Certiorari, to quash an Administrative Order that precludes telephone appearances in any foreclosure case. Additionally, Petitioners seek certiorari to quash an Order that denies their Motion for Telephonic Appearance in the underlying case.

Alternatively, Petitioners petition this Court for a Writ of Mandamus, to compel the Honorable Thomas Kirkland, the presiding senior judge in the lower court proceeding ("Judge Kirkland") to adjudicate the Motion for Telephonic Appearance consistent with the principles set forth in Fla.R.Jud.Admin. 2.530(c).

In support, Petitioners would show:

BASIS FOR THIS COURT'S JURISDICTION

1. Petitioners challenge Administrative Order No. 2008-07-01 ("AO" or "the AO"), created by the Honorable Belvin Perry, Jr., Chief Judge of the Ninth Judicial Circuit in and for Orange County, Florida ("Chief Judge Berry"), which precludes attorneys from appearing at a hearing in a foreclosure case via telephone under any circumstances. Additionally, Petitioners challenge the lower court's October 15, 2010 Order, entered by Judge Kirkland, which denies their Motion for Telephonic Appearance without hearing, without explanation, and without regard to the requirements in Fla.R.Jud.Admin. 2.530(c).

2. This Court has jurisdiction to grant certiorari and/or mandamus pursuant to Fla.R.App.Pro. 9.030(b)(3). See 1-888-Traffic Schools v. Chief Circuit Judge, Fourth Judicial Circuit, 734 So. 2d 413 (Fla. 1999); Hatcher v. Davis, 798 So. 2d 765 (Fla. 2d DCA 2001).

FACTS: BACKGROUND

3. The lower court case is a lawsuit for mortgage foreclosure. Appendix to Petition, 1.

4. On October 5, 2010, Petitioners filed their Amended Motion to Dismiss, asserting a myriad of reasons why the Complaint does not state a cause of action. Appendix to Petition, 2.

5. Petitioners' undersigned counsel practices out of Tampa, approximately a 90-minute drive, each way, to and from the Orange County Courthouse. Appendix to Petition, 2. Respondent's counsel is likewise out of town, as she practices out of Deerfield Beach. Appendix to Petition, 1.

6. On October 12, 2010, Petitioners served their Motion for Telephonic Appearance, hoping to attend the October 19, 2010 hearing via telephone. The need for a telephonic appearance was heightened by the undersigned's scheduling conflicts. Appendix to Petition, 3.

7. In the undersigned's practice, motions to appear by phone are routinely granted as a matter of course, particularly for hearings of 15 minutes or less.[1] See Fla.R.Jud.Admin. 2.530(c) (requiring that a motion to appear by phone be granted absent "good cause" if the hearing is 15 minutes or less). Here, however, Judge Kirkland's office apprised the undersigned of the existence of the AO, then entered a written Order denying the Motion for Telephonic Appearance. Appendix to Petition, 4. The Order was entered without a hearing, without explanation, without regard for the requirements in Fla.R.Jud.Admin. 2.530(c), and, apparently, with 100% deference to the AO, which provides:

> … no foreclosure hearings in the circuit court shall be conducted with

[1] The undersigned has attended telephonic hearings, in foreclosure cases, in Pinellas, Pasco, Hillsborough, Hernando, Dade, Broward, and Highlands Counties, among others.

either party appearing via telephone.

Appendix to Petition, 5.

8. On October 18, 2010, Petitioners filed their Emergency Motion for Stay Pending Appellate Review ("Motion for Stay"). Appendix to Petition, 6. Recognizing that this issue was ripe for review by this Court, Judge Kirkland appropriately granted the Motion for Stay and entered an Order staying the hearing pending review in this Court. Appendix to Petition, 7.

9. This timely petition ensued.

ARGUMENT

10. Fla.R.Jud.Admin. 2.530(c) provides:

> A county or circuit judge may, upon the written request of a party upon reasonable notice to all other parties, permit a requesting party to participate through communication equipment in a scheduled motion hearing; however, any such request (except in criminal, juvenile, and appellate proceedings), must be granted, absent a showing of good cause to deny the same, where the hearing is set for not longer than 15 minutes.

This rule applies in the lower court case and "shall supersede all conflicting rules and statutes." Fla.R.Jud.Admin. 2.110. This rule exists, of course, pursuant to the Florida Supreme Court's exclusive authority to invoke rules of practice and procedure in all Florida courts. See Art. V, Section II, Fla. Const.

11. Notwithstanding the Florida Supreme Court's invocation of Fla.R.Jud.Admin. 2.530(c), Chief Judge Berry enacted the AO, which provides:

> ... It has become extremely difficult to timely set telephonic hearings in foreclosure cases due to the dramatically increasing volume of foreclosure cases coming before the court ...
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> ... [N]o foreclosure hearings in the circuit court shall be conducted with either party appearing via telephone. ...

12. The language of Fla.R.Jud.Admin. 2.530(c) and the AO are clearly in conflict. After all, the Rule requires that phone appearances be granted for hearings of 15 minutes or less absent "good cause," whereas the AO precludes phone appearances in foreclosure cases in all circumstances, i.e. even without good cause to preclude a phone appearance.

13. The instant proceeding is not the first time Florida's appellate courts have been confronted with an administrative order that conflicts with a rule promulgated by the Florida Supreme Court. In Hatcher v. State, the Second District granted certiorari, ruling:

> If a chief judge issues an administrative order which attempts to amend a statute or rule by adding terms and conditions, that administrative order is invalid because it limits judicial discretion and exceeds the authority granted under Florida Rule of Judicial Administration 2.050(b). In the present case, we conclude that the language in paragraph six of [the Administrative Order] impermissibly conflicts with Florida Family Law Rule of Procedure 12.491(e)(1).

798 So. 2d 765, 766 (Fla. 2d DCA 2001).

14. Similarly, in Hewlett v. State, the Fourth District granted certiorari where a chief judge "exceeded his authority" by "issuing an administrative order

which attempts to amend the pretrial intervention statute by adding terms and conditions that were not part of the original legislation." 661 So. 2d 112, 115 (Fla. 4th DCA 1995).

15. In the case at bar, as in Hatcher and Hewlett, Chief Judge Berry exceeded his authority under Fla.R.Jud.Admin. 2.050(b) by creating an Administrative Order that materially conflicts with Fla.R.Jud.Admin. 2.530(c). Respectfully, Chief Judge Berry cannot impose a blanket rule forbidding phone appearances in all foreclosure cases when the Florida Supreme Court has ruled that phone appearances must be granted in some circumstances. See Hatcher and Hewlett, supra. In other words, Chief Judge Berry has improperly extinguished the discretion of circuit court judges to permit telephonic appearances in appropriate circumstances. See id.

16. To the extent the AO contradicts the language in Fla.R.Jud.Admin. 2.530(c), the AO is void and the Rule controls. See id. As such, absent good cause to preclude a phone appearance, the Motion for Telephonic Appearance should have been granted. This Court should grant certiorari.

17. Alternatively, even if this Court is disinclined to rule that the Motion for Telephonic Appearance should have been granted, it seems clear, at minimum, that Judge Kirkland should be directed to rule on the Motion for Telephonic Appearance within the parameters of Fla.R.Jud.Admin. 2.530(c). After all, Rule

2.530(c) controls, and Judge Kirkland should not be permitted or required to blindly defer to the AO when the AO is contrary to the Rule. In other words, Petitioners have never had a proper adjudication of their Motion for Telephonic Appearance because Judge Kirkland was obviously deferring to the AO when he denied the motion (without regard for Fla.R.Jud.Admin. 2.530(c)). At minimum, the Motion for Telephone Appearance should be adjudicated under the terms of the Rule.

18. To the extent this Court is inclined to grant mandamus, it should clarify that Judge Kirkland is not permitted to find the requisite "good cause" to preclude a phone appearance simply because this is a foreclosure case. Were that the law, then the Florida Supreme Court would have created an amendment to Rule 2.530 such that phone appearances are not permitted in foreclosure cases. Clearly, the Rule cannot be interpreted so narrowly. In other words, there must be instances, in foreclosure cases, where telephone appearances are permitted.

19. In adjudicating the instant petition, this Court should take stock of two significant, underlying issues.

20. First, the attorneys' fees incurred by homeowners facing foreclosure, such as Petitioners herein, are much greater when attorneys such as the undersigned are required to personally attend every hearing. After all, there is a huge difference in time and expense between attending a hearing via phone and

traveling to the courthouse for an in-person hearing, particularly when the courthouse is out of town.[2] Without phone appearances, many foreclosure clients would not be able to retain counsel through the conclusion of a case given the fees incurred in connection therewith. Requiring personal appearance in every case hence becomes tantamount to a denial of one's ability to retain counsel, not just in this case, but in thousands of foreclosure cases throughout the State.[3] That may

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[2] The undersigned does not envision attending every hearing via phone. However, for less important hearings, or where the client does not want to incur the fees associated with the undersigned's personal attendance, the undersigned should be able to attend by phone.

[3] The undersigned speculates (and, admittedly, it is speculation) that one of the reasons for administrative orders such as the AO at issue in this case is to make it harder for attorneys such as the undersigned to represent homeowners facing foreclosure, enabling courts to "push through" foreclosure cases more quickly (because the relief requested by banks goes unopposed). That sounds harsh, but in the undersigned's vast experience in this area of law, the counties that preclude phone appearances, and the judges who apply such a procedure, tend to be the same counties and judges that treat foreclosure defense attorneys with the most disdain. For example, the judges who preclude phone appearances tend to be the same judges who: (1) systematically deny bona-fide defense arguments, often at rocket dockets, without giving counsel much, if any, opportunity to be heard; (2) openly express hostility towards counsel at hearings, sometimes merely for presenting a bona-fide proposition of law; and (3) *sua sponte* set hearings, refuse to clear the date with the undersigned, and refuse to reschedule even if the undersigned has a prior scheduling conflict.

The undersigned realizes the backlog of foreclosure files is a big problem for the judiciary. That said, it appears to the undersigned as if some judges want to create an atmosphere where it's virtually impossible for defense attorneys to represent homeowners, just so the courts can move the foreclosure cases quicker. Respectfully, that should not happen.

These statements lack record support, and to the extent this Court finds them inappropriate, the undersigned apologizes. That said, the undersigned deems it

sound overly dramatic, but homeowners facing foreclosure obviously do not have much money, so inconveniences that may typically be deemed "minor" can make a world of difference.

21. One could argue that Petitioners should have retained a local attorney from the outset to avoid this problem. Respectfully, Petitioners take the view that there are not many attorneys who are competent in the intricate area of foreclosure defense. Also, Petitioners' right to counsel of their choice is well-established; that right should not be diluted because an administrative order contravenes a rule of the Florida Supreme Court.

22. Second, when counties such as Orange County invoke an administrative order such as the AO, a perversion of judicial procedure often results. To illustrate, in the undersigned's experience, when plaintiffs' attorneys are faced with an administrative order that precludes a phone appearance in foreclosure cases, they typically do not attend the hearing in person. Instead, they retain a local attorney, from a different law firm, commonly deemed a "coverage" attorney, to attend that specific hearing. The problem, of course, is that these "coverage" attorneys are not counsel of record (absent a Notice of Appearance),

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significant to note that the blanket prohibition on phone appearances in counties such as Orange is part of the undersigned's larger concern that some judges are trying, albeit subtly, to create an atmosphere where homeowners cannot retain counsel.

see Pasco County v. Quail Hollow Props., Inc., 693 So. 2d 82 (Fla. 2d DCA 1997) and Fla.R.Jud.Admin. 2.505(e), yet judges routinely accept the arguments of such attorneys as if they were. This creates significant questions, as outlined in Quail Hollow, about who is able to bind the client. Respectfully, such issues should not arise, particularly where they can be easily remedied by following Fla.R.Jud.Admin. 2.530(c), obviating the need for "coverage" attorneys.

CONCLUSION

23. In light of the foregoing, this Court should grant certiorari, quash the AO to the extent it conflicts with Fla.R.Jud.Admin. 2.530(c), and quash the lower court's October 15, 2010 Order denying the Motion for Telephonic Appearance. Additionally or alternatively, this Court should grant mandamus and direct Judge Kirkland to adjudicate the Motion for Telephonic Appearance consistent with the requirements of Fla.R.Jud.Admin. 2.530(c).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Honorable Belvin Perry, Jr., CR 19-D, 425 N. Orange Ave., Orlando, FL 32801 , Honorable Thomas R. Kirkland, 425 N. Orange Ave., Orlando, FL 32801, and Alan Schwartzseid, Esq., 1701 W. Hillsboro Blvd., Suite 307, Deerfield Beach, FL 33442 on this 10th day of November, 2010.

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ATTORNEY FOR PETITIONERS

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant Petition complies with the font requirements of Fla.R.App.P. 9.100(l).

Mark P. Stopa, Esquire