STOPA LAW FIRM Mark P. Stopa, Esq.

May 23, 2012

The Honorable Robert Foster
800 East Twiggs Street
Tampa FL 33602

RE: Court's consideration of a new Administrative Order

Your Honor:

I write this letter as a follow-up to today's hearing, wherein you invited comments and emails from lawyers for plaintiffs and defendants in foreclosure cases regarding a proposed Administrative Order that the Court is considering (regarding the scheduling of summary judgment hearings in foreclosure cases). I appreciate you giving me the chance to be heard (and I apologize for the unusual procedural nature of this letter, but my comments don't pertain to any particular case, so, given your invitation to email you, this seemed to make the most sense.)

I have had a few cases where a judge has *sua sponte* scheduled a CMC, summary judgment, and/or trial in foreclosure cases (which, according to one lawyer in court today, Judge Sisco has apparently started doing). As a result, I've thought long and hard about this issue and done a lot of research. Here are my concerns.

First, when a judge takes it upon himself/herself to *sua sponte* schedule a case for trial, even in a case that is old, that very much feels like the judge is no longer "neutral and detached," but is acting as a second prosecutor. I raise this concern respectfully, of course, but please consider this from the defense perspective. Even if a foreclosure lawsuit is a 2008 or 2009 case, if the plaintiff has chosen not to prosecute that case, that is the plaintiff's prerogative. Perhaps the plaintiff does not want to proceed. Perhaps the plaintiff does not think it can win. Whatever the plaintiff's motives, I do not think it a judge's role to say "the plaintiff has let this case languish, I need to prosecute this case to judgment."

Please bear in mind that, in most foreclosure cases, the plaintiff is the only party asking for affirmative relief. Hence, where the court *sua sponte* sets a trial in a foreclosure case, the court is, in my view, necessarily siding with the plaintiff. It is as if the judge is saying "I realize the plaintiff has let this case languish, but I want to give the plaintiff a chance to procure the relief it seeks sooner." Even if that is not a judge's intention, that is certainly how it feels from the defense perspective. After all, the defense does not benefit from trial, as the defense is not

seeking relief. As such, scheduling trial or summary judgment *sua sponte* necessarily inures solely to the benefit of plaintiffs.

I think a comparison is in order. To illustrate, I have had the opportunity to litigate all sorts of cases through my legal career – not just foreclosure cases – including lawsuits on behalf of plaintiffs. At no time, in any such case, have I ever seen a judge take it upon him or herself to *sua sponte* set a case for trial or *sua sponte* require a plaintiff to set a motion for summary judgment for hearing. Candidly, a few of the cases where I represent plaintiffs have been pending for years with little activity, but there has never been an instance where a judge took it upon him or herself to prosecute the case for me. If I let the case languish, then that's what happens – the case languishes. Outside of foreclosure-world, I can hardly imagine any other result, so the question becomes … why should foreclosure cases be treated any differently?

I believe, rightly or wrongly, that some judges perceive that foreclosure cases should be set for trial or summary judgment *sua sponte* because homeowners have been living for free, don't have a defense, and the bank is going to win anyway, so there is no harm by setting a trial. I respectfully submit that this is a slippery slope down which no judge should go. Consider these thoughts, for instance, in the criminal context. Can you imagine a judge requiring a state attorney to prosecute a case that the state has decided, for whatever reason, not to prosecute? Or how about divorce – can you imagine a family law judge requiring two spouses to get divorced merely because one filed a divorce petition (but the petitioner has decided not to prosecute it to judgment)? That may sound ridiculous, but that's sort of the point. If a divorce case languishes because the petitioner has decided not to prosecute it, no judge would take it upon himself to prosecute the case and require a divorce. Why are foreclosures any different?

For another comparison, I have represented plaintiffs in lawsuits against insurance companies for a few years now. Respectfully, I can scarcely imagine the day when a judge sets such a case for trial where I have not tried to do so. I'm sure you're aware of this dynamic … can you imagine the backlash and pushback from the insurance defense industry if judges started *sua sponte* setting cases for trial in lawsuits against insurance companies?

I believe my concerns are supported by case law. To illustrate, many appellate decisions have reversed orders denying a motion to disqualify where the judge helped the plaintiff in the prosecution of the lawsuit. See Blackpool Assocs., Ltd. v. MS-106, Ltd., 839, So. 2d 837 (Fla. 4th DCA 2003); Evans v. State, 831 So. 2d 808 (Fla. 4th DCA 2002); Lee v. State, 789 So. 2d 1105 (Fla. 4th DCA 2001); Asbury v. State, 765 So. 2d 965 (Fla. 4th DCA 2000); Chastine v. Broom, 629 So. 2d 293 (Fla. 4th DCA 1993) ("When the judge enters into the proceedings and becomes a participant, a shadow is cast upon judicial neutrality so that disqualification is required."). Hence, I respectfully but strongly submit that there should not be an administrative order that allows trials or summary judgment hearings to be scheduled by the Court *sua sponte*.

I am also concerned about the appearance that this creates for the public when senior judges are the ones presiding over these trials. I'm sure you are aware of the objections some of

my colleagues have been making to senior judges presiding over these cases. Candidly, I can understand the need for senior judges given the volume of cases before the court and the lack of funding from the Florida legislature. However, the combination of setting cases for trial *sua sponte* and having those trials adjudicated by senior judges, who are not elected officials and do not have any accountability to the public, is troubling to many homeowners in Hillsborough County. I have heard many homeowners lament that their cases are not being adjudicated by elected, circuit court judges. I have heard many homeowners express concerns that senior judges are in place not to administer justice, but to push foreclosure cases to judgment. Please don't misunderstand; I am not trying to argue with you about the need for senior judges. My point, simply, is that if senior judges are going to be used, AND trials are set *sua sponte*, then it would very much create the impression that the court system has been designed to foreclose on homeowners quicker so as to reduce the caseloads of judges – not to adjudicate cases fairly and impartially.

I cannot help but note that Pinellas County has adopted a procedure whereby senior judges adjudicate only those cases that are uncontested – contested files are decided by the circuit court judges. In my view, this makes a lot of sense. Let the senior judges push through the slop on uncontested files however the courts see fit. But for homeowners who are defending their cases, especially with attorneys, it makes sense to give them the courtesy of their case being handled by an elected, presiding, circuit court judge.

Even if you disagree with that suggestion, why not limit the judge's ability to act *sua sponte* to those cases that are uncontested? On uncontested cases that are languishing, fine – let the courts set trials. Nobody on the defense side cares, so no harm, no foul. But on contested files, allowing the courts to prosecute cases *sua sponte* raises reasonable and legitimate concerns about impartiality.

A second concern I share about the possibility of a judge a judge *sua sponte* setting a foreclosure case for trial is the absence of legal authority for such a procedure. In other words, I submit there is a reason I have never seen a judge *sua sponte* set a case for trial outside of the foreclosure context, and that is because there is no procedure authorizing such.

As you know, Rule 1.440 sets forth the manner in which a case can be set for trial. The Rule entails a three-step process, each step corresponding with a subsection of the Rule, i.e. step one is in subsection (a), step two is in subsection (b), and step three is in subsection (c). In other words, once a case is "at issue," it may then be noticed for trial, and only then may it be set for trial. Hence, I respectfully submit that a judge cannot skip to step three (subdivision (c)), and set a case for trial, where a party has not noticed the case for trial, as required under step two (subdivision (b)). As I told you in open court, I am confident that there is no Florida case that authorizes such a procedure. In fact, there are many cases which hold that such a procedure is simply not authorized. Genuine Parts Co. v. Parsons, 917 So. 2d 419 (Fla. 4th DCA 2006) (reversing final judgment where the court set the case for trial without a notice for trial having been filed); Garcia v. Lincare, Inc., 906 So. 2d 1268 (Fla. 5th DCA 2005) ("Procedural readiness

for trial differs from actual readiness for trial. It is the former, coupled with a properly filed 'Notice for Trial,' that imposes on the court the obligation to set a trial date."); Hartford Fire Ins. Co. v. Controltec, Inc., 561 So. 2d 1334 (Fla. 5th DCA 1990) ("The rule requires the filing of a notice of trial for review by the court in order to determine whether the cause is ready for trial"); Balboa Ins. Co. v. Shores of Madeira, Inc., 457 So. 2d 596 (Fla. 2d DCA 1984) ("Once a proper notice of trial has been filed, the duty is on the court to set the cause for trial."). Of course, the requirement of strict compliance with Rule 1.440 is well-established. See Bennett v. Continental Chemicals, Inc., 492 So. 2d 724 (Fla. 1st DCA 1986) (*en banc*); Precision Constructors, Inc. v. Valtec Constr. Corp., 825 So. 2d 1062 (Fla. 3d DCA 2002) ("Failure to strictly adhere to the mandates of Rule 1.440 is reversible error. Accordingly, the judgment is vacated and the cause is remanded for a new trial.").

The issue, as I see it, is that judges do not like cases languishing on their dockets when plaintiffs won't prosecute them. If that is the concern, then I respectfully submit that all of Florida's circuit court judges, including yourself, should approach the Florida Supreme Court and tell it that the Court's rule for lack of prosecution is too stringent. As you know, under the new version of Rule 1.420(e), any piece of paper filed within a one-year period constitutes record activity, precluding dismissal for lack of prosecution. See Chemrock Corp. v. Tampa Elec. Co., 71 So. 3d 786 (Fla. 2011). Over the past several months, I have spoken to several circuit court judges who have openly lamented this new rule. In my experience, these judges want to dismiss old cases that the plaintiffs aren't prosecuting, but the Court has tied its hands with Chemrock. Respectfully, I think the answer here is to suggest that the Court amend Rule 1.420(e), such that, at minimum, the "record activity" be something designed to move the case to judgment (like the old version of the rule). With the lack of court funding and the abundance of old foreclosure cases that plaintiffs won't prosecute, there is simply no reason for plaintiffs to keep cases pending merely by filing any piece of paper. All of that said, of course, the absence of a rule that allows stale cases to be dismissed more easily is not, in my view, a reason for judges to act as a second prosecutor or to prosecute cases that plaintiffs don't or won't prosecute.

I realize these are trying times for judges and staff. The courts are flooded with cases from plaintiffs who won't prosecute them, yet the courts have not been funded or staffed commensurately. I can understand the temptation to "push through" old foreclosure cases. Respectfully, however, the Rules and the judicial canons do not have exceptions for foreclosure cases, and I respectfully submit that no such exception should be created at this time.

I greatly appreciate the opportunity to be heard about these issues.

Sincerely,
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