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

VERICREST FINANCIAL, INC,

Plaintiff,

Case No. 2012-124-CI-13

v.

CECIL D. MEANS and
PAMELA MEANS, et al.,

Defendants,
_____/

MOTION FOR REHEARING ON MOTION TO DISMISS

Defendants, CECIL D. MEANS and PAMELA MEANS, by and through undersigned counsel, move this Court for rehearing of its June 6, 2012 ruling which "granted" Defendants' Motion to Dismiss for Plaintiff's failure to post a cost bond but did not dismiss the case and instead gave Plaintiff an additional 20 days to post the bond, and as grounds would show:

1. In their Motion to Dismiss, Defendants showed that they gave Plaintiff notice of its failure to post a non-resident cost bond. The Motion to Dismiss was served on March 4, 2012 and was set for hearing on June 6, 2012 – some three months later! Despite this extraordinary amount of time to comply (far more than the 20 days set forth in Fla. Stat. 57.011), Plaintiff failed to post the bond. Nonetheless, this Court declined to dismiss the case outright, giving Plaintiff still more time to post the cost bond. In so ruling, this Court explained that it did not think it would be "equitable" for the Court to dismiss the case, and allow the undersigned to follow that dismissal with a fee motion, since this is a mortgage foreclosure case.[1]

[1] In so ruling, this Court also indicated it would not dismiss a case where a Plaintiff failed to provide the notice and cure required under paragraph 22 of the Mortgage because it was not "equitable." Though that is not an issue in this case at this point, the Court's rationale on this issue is misguided for the same reasons as those explained herein.

2. With all due respect, this Court is mistaken. See Bank of South Palm Beaches v. Stockton, Whatley, Davis & Co., 473 So. 2d 1358, 1361 (Fla. 4th DCA 1985) ("courts of equity have no power to overrule established law") (citing Orr v. Trask, 464 So. 2d 131 (Fla. 1985)).

3. With all due respect, this Court is not permitted to substitute its own, subjective, equitable views in place of the statutes and contracts which must govern this case. In other words, this Court cannot and should not "legislate from the bench."

4. Fla. Stat. 57.011 is clear. It requires that a case be dismissed where a nonresident Plaintiff fails to post the non-resident cost bond despite notice. Here, Plaintiff has months to post the bond but failed to do so. Dismissal was required. The statute has no exceptions for mortgage foreclosure cases. The statute has no exceptions for "equitable" cases, situations where the presiding judge deems dismissal "inequitable," or cases where the judge does not want the movant to be able to procure prevailing party fees. Under the plain language of the statute, dismissal was and is required.

5. This Court seems to believe it can disregard or overlook the cost bond statute or even the terms of the Mortgage between the parties (*vis a vis* conditions precedent) because this case is an "equitable" case. Respectfully, that rationale is misguided and contrary to law.

6. "[C]ourts are powerless to rewrite contracts or interfere with the freedom of contracts or substitute its judgment for that of parties to the contract in order to relieve one of the parties from apparent hardships or an improvident bargain." Green v. Life & Health of America, 704 So. 2d 1368 (Fla. 1998); Quinerly v. Dundee Corp., 31 So. 2d 533 (Fla. 1947) (same).

7. Florida courts have consistently and repeatedly refused to rewrite contracts for parties, or disregard contract terms upon which the parties have agreed, based on some type of equitable consideration. See Fla. Ins. Guar. Ass'n v. Somerset Homeowners Ass'n, Inc., 83 So.

2d 850 (Fla. 4th DCA 2011) (quoting Buckley Towers Condo., Inc. v. QBE Ins. Corp., 395 F. App'x 659 (11th Cir. 2010)).

8. The undersigned's argument here is hardly unique to mortgage foreclosure. To illustrate, Florida courts are inundated with cases where an insurance company refused to pay a covered claim merely because a homeowner did not comply with a condition precedent in the insurance policy, i.e. a proof of loss or examination under oath. Often, these claims are covered under the insurance policy, yet insurance companies refuse to pay covered claims because the insured violated a condition precedent to suit in the policy. Frankly, the undersigned finds this terribly inequitable, yet Florida courts agree with these insurance companies, granting summary judgment where the conditions precedent in the policy were not met. See Edwards v. State Farm Fla. Ins. Co., 64 So. 3d 730 (Fla. 3d DCA 2011); Amica Mut. Ins. Co. v. Drummond, 970 So. 2d 456 (Fla. 2d DCA 2007) ("Because the condition precedent was never met, AMICA was within its rights in refusing to pay"). In fact, an insurance claim is precisely the context where the Somerset court ruled that equitable considerations cannot justify a court re-writing a contract.

9. The undersigned's perception of what is equitable is obviously irrelevant, but, respectfully, this Court's belief about what is equitable is just as irrelevant. After all, our laws are not enforced or applied based on one person's view of what is equitable, even if that person is the judge. Were the law otherwise, then it would be impossible to enforce or apply the law in a uniform way, as every judge would have a different, subjective view about what is equitable, and the law would be nothing more than a haphazard mishmash of what one particular judge thinks is fair.

10. In the mortgage foreclosure context, for instance, many people, including many judges, would credibly argue that throwing an 85-year old, disabled veteran out onto the streets

would be disabled, particularly if that person was given a 30-year loan at age 81. But the financial hardship of the borrower is not a reason to deny foreclosure, no matter how inequitable or unjust the undersigned or this Court may find the outcome. If this Court were to somehow disagree, the slippery slope here would be never-ending.

11. Respectfully, this Court may not like that the mortgage has a notice and cure provision as a condition precedent to suit. However, that is a contract term the parties negotiated, and it is not this Court's right to re-write that contract term or disregard it simply because the Court thinks it is unfair.[2]

12. Likewise, the Court cannot simply ignore or disregard the plain language of Fla. Stat. 57.011 simply because it does not like the result. See E.B. v. Dept. of Children and Family Svcs., 733 So. 2d 1145 (Fla. 3d DCA 1999) ("The trial court recognized that section 90.803(23) does not apply to children over eleven years of age, but nonetheless opted to disregard the statute. We would like to remind the trial court that although it may disagree with the statute and

[2] Apparently, this Court believes its position is supported by one sentence of *dicta*, made without any legal citations, from a concurring opinion in Fowler v. First Fed. Sav. & Loan, 643 So. 2d 30 (Fla. 1st DCA 1994). Respectfully, this Court is mistaken. Lest there be any ambiguity, this Court should review all of the following cases, which make it clear that a bank's compliance with the notice/cure condition precedent in a mortgage foreclosure case clearly requires more than just the filing of suit. Taylor v. Bayview Loan Servicing, LLC, 74 So. 3d 1115 (Fla. 2d DCA 2011) ("Paragraph 22 of the mortgage attached to the complaint requires the lender to give the borrower notice prior to acceleration of the debt."); Goncharuk v. HSBC Mortgage Services, Inc., 62 So. 3d 680 (Fla. 2d DCA 2011); Valencia v. Deutsche Bank National Trust Co., 67 So. 3d 325 (Fla. 4th DCA 2011); Konsulian v. Busey Bank, N.A., 61 So. 3d 1283 (Fla. 2d DCA 2011); Sandoro v. HSBC Bank, USA N.A., 55 So.3d 730 (Fla. 2d DCA 2011); Lazuran v. Citimortgage, Inc., 35 So. 3d 189 (Fla. 4th DCA 2010); Frost v. Regions Bank, 15 So. 3d 905 (Fla. 4th DCA 2009). In other words, were the one sentence of *dicta* from the concurring opinion in Fowler the law, then all of these cases (including Second District cases) would not have reversed summary judgments where the bank failed to comply with this condition precedent. After all, the bank could have easily shown that it complied with this condition precedent merely by filing the lawsuit – something that necessarily happens in every single mortgage foreclosure case. By systematically and repeatedly ruling that banks cannot win a foreclosure case without sending the pre-suit notice and cure letter, the Florida courts have clearly and unequivocally explained that more is required than merely filing suit.

believes that the eleven-year-old age limit creates an "absurdity," it was still bound to follow the statute. Any amendments to section 90.803(23) must be made by the legislature, not the judiciary.").

13. In light of the foregoing, this Court should reconsider its Order on Defendants' motion to Dismiss and dismiss this case without leave to amend (and without additional opportunity to post the cost bond). Additionally, this Court should reconsider the approach it is taking to foreclosure cases, where it is rejecting legitimate defenses merely because the Court believes them to be inequitable. Respectfully, the Court cannot rewrite a contract, disregard a statute, or inject its own, subjective views of equity any more than it can refuse a foreclosure because it does not want to throw a disabled, 85-year old veteran onto the streets.

WHEREFORE Defendants respectfully request relief in accordance with the foregoing.

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, Esq., Morales Law Group, P.A., 14750 NW 77th Court, Suite 303, Miami Lakes, Florida 33016 on this 6th day of June, 2012.

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