

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

NATIONSTAR MORTGAGE LLC,

CASE NO. 10-6330-CI-20

PLAINTIFF,

v.

CRAIG K. LUNT AND DOROTHEA C. LUNT,

DEFENDANT.

NOTICE OF APPEARANCE

COMES NOW, the Defendants CRAIG K. LUNT and DOROTHEA C. LUNT by and through undersigned counsel MATTHEW D. WEIDNER, and hereby requests that their attorney of record be listed as

MATTHEW D. WEIDNER
Attorney for Defendants
1229 Central Avenue
St. Petersburg, Fl. 33705
(727)894-3159
Bar No.: 185957

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 26th day of April, 2010 to MICHAEL GELETY, Law Offices of Marshall C. Watson, P.A., 1800 N.W. 49th Street, Suite 120, Fort Lauderdale, FL 33309.

By: 

MATTHEW D. WEIDNER
Attorney for Defendants
1229 Central Avenue
St. Petersburg, FL 33705
(727) 894-3159
FBN: 0185957

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NATIONSTAR MORTGAGE LLC,

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PLAINTIFF,

v.

CRAIG K. LUNT AND DOROTHEA C. LUNT,

DEFENDANT.

**DEFENDANT’S MOTION TO DISMISS ACTION/MOTION FOR MORE DEFINITE
STATEMENT**

COMES NOW, the Defendants CRAIG K. LUNT and DOROTHEA C. LUNT (hereinafter “Defendants”) by and through the undersigned counsel MATTHEW D. WEIDNER and respectfully moves this Court to DISMISS WITH PREJUDICE the above entitled civil action, pursuant to Rules 1.420(b) and 1.110(b) Fla. R. Civ. P., and precedent case law, and in support thereof states:

FACTS

1. This is an action for foreclosure of residential real property owned by the Defendants.
2. The named Plaintiff in this case is ABC (hereinafter “Plaintiff”). The Plaintiff initiated this action when it filed its complaint on or about April 20, 2010.
3. The Plaintiff’s complaint is devoid of any oath, affirmation, or verification statement which should state “under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief” as mandated by Fla. R. Civ. Pro. 1.110(b).

4. Upon information and belief, the Plaintiff's counsel deliberately chose to not include such an oath, affirmation, or verification statement in the complaint.

5. The Plaintiff's counsel has been warned repeatedly by defense attorneys across the state, including your undersigned counsel, of their failure to include this information in foreclosure complaints filed by their firm. Nevertheless, to date, the Plaintiff's counsel has refused to provide any reasonable justification, either in this case or in any case known to your undersigned counsel, for their failure to abide by the express mandate of Rule 1.110(b).

6. Moreover, upon information and belief, the Plaintiff itself has manifested to its counsel, either directly or indirectly, that counsel should not comply with Rule 1.110(b) for reasons herein unknown.

STANDARD OF REVIEW

7. In ruling on a defendant's motion to dismiss, a trial court is limited to the four corners of the Complaint, and it must accept all the allegations in the Complaint as true. *See Lutz Lake Fern Rd. Neighborhood Groups, Inc. v. Hillsborough County*, 779 So.2d 380, 383 (Fla. 2d DCA 2000).

8. A motion to dismiss tests whether a plaintiff has stated a cause of action. *Crocker v. Marks*, 856 So.2d 1123 (Fla. 4th DCA 2003).

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION

I. The Plaintiff's Complaint Should be Dismissed for Failure to Attach a Verified Complaint

a. Legal Standards

9. Fla. R. Civ. Pro. 1.420(b) provides, in pertinent part, that "[a]ny party may move for dismissal of an action or of any claim against that party for failure of an adverse party to comply

with these rules or any order of court.” Thus, any judgment which is not in compliance with the Florida Rules of Civil Procedure is null and void.

10. The dismissal of action or claim for failure of an adverse party to comply with the Rules of Civil Procedure or any order of the court operates as an adjudication on the merits. Cash v. Airport Mini-Storage, 782 So.2d 983 (Fla. 3d DCA 2001).

11. In Kozel v. Ostendorf, 629 So.2d 817 (Fla. 1993), the Florida Supreme Court listed six factors which trial courts should use in determining whether to dismiss a case with prejudice and noted that “if a sanction less severe than dismissal with prejudicial appears to be a viable alternative, the trial court should employ such an alternative.” Id at 818. The trial court is therefore allowed other measures of dispute resolution, such as dismissal without prejudice, should the court feel dismissal without prejudice is a more proper remedy.

12. Nevertheless, the six factors listed in Kozel are as follows: (1) whether attorney's disobedience was willful, deliberate, or contumacious; (2) whether attorney was previously sanctioned; (3) whether client was personally involved in act of disobedience; (4) whether the disobedience prejudiced opposing party; (5) whether attorney offered reasonable justification for noncompliance; and (6) whether the disobedience created significant problems of judicial administration. Id at 818.

13. The Florida Constitution gives the Florida Supreme Court complete authority to promulgate or rescind the Florida Rules of Civil Procedure. Specifically, Article V, Section 2(a) of the Florida Constitution provides that “[t]he supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause

shall be dismissed because an improper remedy has been sought.” *See also Ser-Nestler, Inc. v. General Finance Loan Co. of Miami Northwest*, 167 So.2d 230 (3d DCA 1964) (“Supreme Court is vested with sole authority to promulgate, rescind and modify the Florida Rules of Civil Procedure, which remain inviolate until changed by Supreme Court”), *appeal dismissed* 174 So.2d 35; *State v. Battle*, 302 So.2d 782 (3d DCA1974) (“language of the rules promulgated by the Supreme Court of Florida are binding upon the trial and appellate courts”); *State v. Lyons*, 293 So.2d 391 (2d DCA 1974) (“Supreme Court has right to adopt a rule at variance from its own precedents”).

14. On February 11, 2010 by the Florida Supreme Court amended Fla. R. Civ. Pro. 1.110(b) to read

[w]hen filing an action for foreclosure of a mortgage on residential real property **the complaint shall be verified**. When verification of a document is required, the document shall include an oath, affirmation, or the following statement: Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief. *Emphasis added.*

Therefore, mortgage foreclosure action filed after February 11, 2010 must be verified.

15. The Supreme Court noted that

[t]he primary purposes of this amendment are: (1) to provide incentive for the plaintiff to appropriately investigate and verify its ownership of the note or right to enforce the note and ensure that the allegations in the complaint are accurate; (2) to conserve judicial resources that are currently being wasted on inappropriately pleaded “lost note” counts and inconsistent allegations; (3) to prevent the wasting of judicial resources and harm to defendants resulting from suits brought by plaintiffs not entitled to enforce the note; and (4) to give trial courts greater authority to sanction plaintiffs who make false allegations. In re: Amendments to the Florida Rules of Civil Procedure, No. SC09-1579, (Feb. 11, 2010).

16. Furthermore, Fla. Stat. §92.525 provides that

(1) When it is authorized or required by law, by rule of an administrative agency, or by rule or order of court that a document be verified by a person, the verification may be accomplished in the following manner:

(a) Under oath or affirmation taken or administered before an officer authorized under s. 92.50 to administer oaths; or

(b) By the signing of the written declaration prescribed in subsection (2).

(2) A written declaration means the following statement: "Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true," followed by the signature of the person making the declaration, except when a verification on information or belief is permitted by law, in which case the words "to the best of my knowledge and belief" may be added. The written declaration shall be printed or typed at the end of or immediately below the document being verified and above the signature of the person making the declaration.

See also Muss v. Lennar Florida Partners I, L.P., 673 So. 2d 84 (Fla. 4th DCA 1996).

b. Argument

17. Here, the Plaintiff has failed to file a verified complaint. The instant action is one for foreclosure of residential real property which was filed on or about April 20, 2010 and therefore squarely comes within the authority of the revised Florida Rule of Civil Procedure. Nevertheless, the Plaintiff's Complaint does not contain an oath, affirmation, or the verification statement as required by Fla. R. Civ. Pro. 1.110(b).

18. A dismissal with prejudice is warranted based upon the six factors set forth by the Florida Supreme Court in Kozel have expressly been met. Specifically:

- i. The disobedience by the Plaintiff's counsel was willful and deliberate;
- ii. While Plaintiff's counsel may not have been expressly sanctioned for this act, Plaintiff's counsel has been warned by defense attorneys across the State, including your undersigned counsel, that their action was in violation of Rule 1.110(b);

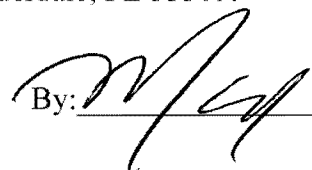
- iii. Upon information and belief, the Plaintiff itself was involved in the disobedience as it, directly or indirectly, manifested to its counsel to avoid compliance with the Rule
- iv. The disobedience unduly prejudices the Defendants through coercing them to spend time and resources on a claim which may prove frivolous or one which is otherwise not subject to adjudication;
- v. The Plaintiff's counsel has not offered a reasonable explanation as to its noncompliance; and
- vi. The disobedience creates significant problems to judicial administration as it forces the courts to also expand time and resources on claims which may prove frivolous or otherwise not subject to adjudication.

19. The Plaintiff's complaint thus frustrates the purposes given by the Florida Supreme Court for the amendment to Rule 1.110(b) making dismissal with prejudice is warranted under the circumstances.

WHEREFORE, because the Plaintiff has failed to file a verified complaint and because the six factors set forth in Kozel have been expressly met, the Defendants respectfully request that the Court dismiss with prejudice the instant case and any other relief the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 28th day of April, 2010 to MICHAEL GELETY, Law Offices of Marshall C. Watson, P.A., 1800 N.W. 49th Street, Suite 120, Fort Lauderdale, FL 33309.

By:  _____

MATTHEW D. WEIDNER
Attorney for Defendants
1229 Central Avenue
St. Petersburg, FL 33705
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FBN: 0185957