In the District Court of Appeal
Second District of Florida

CASE NO. ________

(Lower Tribunal Case No. 09-003595-CI-020)

CHRISTOPHER B. PHILLIPS,

Petitioner,

v.

CITIBANK, N.A.,

Respondent.

PETITION FOR WRIT OF PROHIBITION

Respectfully Submitted,

Matthew D. Weidner, P.A.
Counsel for Petitioner
1229 Central Avenue
St. Petersburg, FL 33705
Telephone: (727) 894-3159
Facsimile: (727) 894-2953
Email: weidner@mattweidnerlaw.com

TABLE OF CONTENTS

Table of Authorities iv

Preliminary Statement 1

Statement of the Case and Facts 2

Standard of Review 5

Nature of Relief Sought 5

Basis for Invoking the Jurisdiction of the Court 5

Summary of the Argument 5

Argument..... 7

I. A WRIT OF PROHIBITION SHOULD BE ENTERED BECAUSE THE CLEAR LANGUAGE OF THE MASTER ORDER DISMISSED THE CASE WITHOUT PREJUDICE AND WITHOUT LEAVE TO AMEND 7

A. The Dismissal Without Prejudice Divested the Trial Court of All Jurisdiction Over the Case. 9

1. The Effect of a Dismissal Without Prejudice is to Leave All Parties as if No Lawsuit Has Been Filed. 10

2. The Master Order was a Final Order Which Could Only Be Reviewed on Appeal.. 13

3. The Recordation of the Master Order Acted as a Final Judgment within meaning of Fla. Stat. §28.222(3)(c) (2006) and effected the rights and interests of individuals and entities that were not parties to the suit.. 14

B. Rule 1.070(j) Provides the Trial Court With Only Three (3) Options When Service Has Not Been Effectuated. 15

C. The Master Order Keeps with Rule 1.070(j)'s Purpose 17

D. Other Circuit Courts and Plaintiff Law Firms Have Construed the Master Order to Be a Final Order of Dismissal... 18

E. The Master Order is Virtually Identical to Other Mass Final Orders of Dismissals Issued in Pinellas County 19

II. A WRIT OF PROHIBITION SHOULD BE ENTERED BECAUSE IF THE CIRCUIT COURT MEANT TO ONLY DROP CERTAIN DEFENDANTS FROM THE LAWSUIT, THE CLEAR LANGUAGE OF THE ORDER WAS A MISTAKE 21

A. If the Circuit Court Committed a Mistake in the Master Order, Same was a Judicial Error and the Time Period for Correcting Judicial Errors Has Run 21

B. Even if This Court Construes the Circuit Court Error's As Being Correctable Under Fla. R. Civ. Pro. 1.540(b), the Time Period for Correcting Under This Rule Has Also Run 24

III. A WRIT OF PROHIBITION SHOULD BE ENTERED BECAUSE ALLOWING THIS CASE TO PROCEED FURTHER WOULD CAST A CLOUD OVER THE TITLE TO THE SUBJECT REAL PROPERTY 26

Conclusion 27

Certificate of Service 28

Certificate of Compliance 28

TABLE OF AUTHORITIES

CASES

84 Lumber Co. v. Cooper,
656 So.2d 1297 (Fla. 2d DCA 1994) 10-11

Agency for Persons with Disabilities v. F.G.,
917 So. 2d 887 (Fla. 3d DCA 2005) 9

Aviateca, S.A. v. Friedman,
678 So. 2d 387 (Fla. 3d DCA 1996) 8

Capital Bank v. Knuck,
537 So.2d 697 (Fla. 3d DCA 1989).......................... 11

Chaffin v. Jacobson,
793 So. 2d 102 (Fla. 2d DCA 2001) 16

City of Palm Bay v. Palm Bay Greens, LLC,
969 So. 2d 1187 (Fla. 5th DCA 2007).......................... 8

City of Sanibel v. Maxwell,
925 So. 2d 486 (Fla. 2d DCA 2006) 7, 9

Commonwealth Land Title Ins. Co. v. Freeman,
884 So. 2d 164, 167 (Fla. 2d DCA 2004).......................... 25

Countrywide Home Loans, Inc. v. Jack E. Hamersma, et al,
Case No. 08-13605-CI-08 (Fla. 6th Jud. Cir. 2010).......................... 18

Curbelo v. Ullman,
571 So. 2d 443 (Fla. 1990) 23, 25

D'Angelo v. Fitzmaurice,
863 So. 2d 311 (Fla. 2003) 5

DeClaire v. Yohana,
453 So. 2d 375 (Fla. 1984) 11, 25

Derma Lift Salon, Inc. v. Swanko,
419 So. 2d 1180, 1180-81 (Fla. 3d DCA 1982) 9, 10

Docktor v. McCrocklin,
669 So. 2d 1129, 1129 (Fla. 4th DCA 1996) 17

English v. McCrary,
348 So.2d 293 (Fla. 1977). 7, 8

Eposito v. Horning,
416 So. 2d 896 (Fla. 4th DCA 1982) 11

Epstein v. Ferst,
35 Fla. 498, 17 So. 414 (Fla. 1895). 11

Falkner v. Amerifirst Federal Savings and Loan,
489 So. 2d 758 (Fla. 3d DCA 1986) 11

Frisard v. Frisard,
497 So. 2d 885 (Fla. 4th DCA 1986) 23

Gary J. Rotella & Assoc., P.A. v. Andrews,
821 So. 2d 468 (Fla. 4th DCA 2002) 17-18

Gonzalez v. Totalbank,
472 So. 2d 861 (Fla. 3d DCA 1985) 11

Haft-Gaines Co. v. Reddick,
350 So. 2d 818 (Fla. 4th DCA 1977) 10

Hernandez v. Page,
580 So. 2d 793 (Fla. 3d DCA 1991) 16

Hinote v. Ford Motor Co.,
958 So. 2d 1009 (Fla. 1st DCA 2007) 13

In re Estate of Beeman,
391 So. 2d 276 (Fla. 4th DCA 1980) 22, 23

McCrea v. Deutsche Bank National Trust Company,
993 So. 2d 1057 (Fla. 2d DCA 2008) 25

Malone v. Percival,
875 So. 2d 1286 (Fla. 2d DCA 2004) 21, 22

Markin v. Markin,
877 So. 2d 785 (Fla. 4th DCA 2004) 8

Moforis v. Moforis,
977 So. 2d 786 (Fla. 4th DCA 2008) 23

Murphy v. WISU Properties, Ltd.,
895 So. 2d 1088 (Fla. 3d DCA 2004) 17

Nationsbank, N.A. v. Ziner,
726 So. 2d 364 (Fla. 4th DCA 1999) 17

OneWest Bank, F.S.B. v. David A. Dusi,
No. 09-013118-CI-11 (Fla. 6th Jud. Cir. 2010) 20

Paladin Properties v. Family Inv. Enter.,
952 So. 2d 560 (Fla. 2d DCA 2007) 22

Parker v. Tinsley,
32 So. 3d 748 (Fla. 1st DCA 2010) 25

Paterson v. Brafman,
530 So. 2d 499 (Fla. 3d DCA 1988) 15

Peltz v. District Court of Appeal, Third Dist.,
605 So. 2d 865 (Fla. 1992) 8

Premier v. Davalle,
994 So. 2d 360 (Fla. 3d DCA 2008) 16

Rountree v. Rountree,
72 So. 2d 794 (Fla. 1954) 12

Sanders v. Laird,
865 So. 2d 649 (Fla. 2d DCA 2004) 8

Shelby Mutual Insurance Co. v. Pearson,
236 So.2d 1 (Fla. 1970) 22-23

Shtalenkov v. Deatherage,
943 So. 2d 200 (Fla. 3d DCA 2006) 16

Silvers v. Wal-Mart Stores, Inc.,
763 So. 2d 1086 (Fla. 4th DCA 1999) 9, 13

Sragowicz v. Sragowicz,
603 So. 2d 1323 (Fla. 3d DCA 1992) 8

Stone v. Stone,
691 So.2d 649 (Fla. 3d DCA 1997) 10

Tsokos v. Sunset Cove Investments, Inc.,
936 So. 2d 667 (Fla. 2d DCA 2006) 8

Valcarcel v. Chase Bank USA, N.A.,
Case No. 4D10-379 (Fla. 4th DCA November 24, 2010) 13

Vaught v. Mcneil,
16 So. 3d 897 (Fla. 1st DCA 2009) 16

Winn-Dixie Stores, Inc. v. Dolgencorp. Inc.,
964 So. 2d 261 (Fla. 4th DCA 2007) 15

STATUTES AND RULES

Article 5, §4(b)(3), Florida Constitution 5

Section 28.222(c)(3), Florida Statutes (2006) 14, 15

Section 28.29, Florida Statutes (2006) 15

Section 695.11, Florida Statutes (2006) 14, 15

Section 695.01(1), Florida Statutes (2010) 26

Rule 9.030(b)(3), Fla. R. App. Pro. (2010) 5

Rule 9.100(e), Fla. R. App. Pro. (2010) 5

Rule 9.110, Fla. R. App. Pro. (2010) 24

Rule 1.070, Fla. R. Civ. Pro. (2010) 2, 3, 4, 15, 16, 17

Rule 1.420, Fla. R. Civ. Pro. (2010) 11, 12, 18, 20

Rule 1.530, Fla. R. Civ. Pro. (2010) 9, 10, 13, 21, 22, 24, 25

Rule 1.540, Fla. R. Civ. Pro. (2010) 6, 11, 21, 22, 23, 24, 25, 26

OTHER AUTHORTIES

Fla. Jur.2d *Actions* §220 (1997) 11

PRELIMINARY STATEMENT

Petitioner Christopher B. Phillips will be referred to as "Phillips". Respondent Citibank, N.A. will be referred to as "Citibank". Presiding trial court judge Honorable George Jirotka will be referred to as "trial court judge". The Appendix will be referred to as "App., Tab ___ at ___".

STATEMENT OF THE CASE AND FACTS

Citibank filed a mortgage foreclosure action against the homestead property of Phillips on February 26, 2009, which was subsequently dismissed by the trial court *sua sponte* on August 27, 2009 for failure to perfect service on certain defendants to the lawsuit. At the inception of the case, Citibank issued four (4) summonses. While personal service was perfected on Phillips, certain other defendants named in the lawsuit were never served. Moreover, on information and belief, it is the procedure of the Pinellas County Clerk of the Court to periodically run a report to determine which outstanding summonses, such as those issued to the unserved defendants here, have not been returned. Also on information and belief, the Clerk of the Court will then send a notice, pursuant to Fla. R. Civ. Pro. 1.070, to the plaintiff who caused the summonses to be issued in order to determine whether those summonses should remain outstanding.

Pursuant to this procedure, the Pinellas County Clerk of Court sent ***three*** notices to Citibank on July 15, 2009 which in no uncertain terms alerted Citibank that it was "hereby notified that *the Court, on its own motion,* ***will dismiss the above styled case***, without further notice, for failure to show good cause why the service was not obtained." (Emphasis added). App., Tab 1 at 1. Notwithstanding the unadorned language of these notices, Citibank elected to take no further action with respect to the unserved defendants.

As a result of Citibank's failure to perfect service against the unserved defendants and its failure to show why good cause why service was not obtained, the trial court issued a Master Order Dismissal Calendar No. 070609-020 (hereinafter "the Master Order") on August 27, 2009. App., Tab 2. The Master Order provides, in pertinent part, the following:

> ***ORDERED AND ADJUDGED THAT THE CASES***, AS INDICATED ON THE ATTACHED LISTING, ***ARE HEREBY DISMISSED WITHOUT PREJUDICE*** PURSUANT TO RULE 1.070(I) OF THE FLORIDA RULES OF CIVIL PROCEDURE.[1] (Emphasis added).

App., Tab 2 at 1. Citibank's case against Phillips was included on the attached listing. App., Tab 2 at 9-10. Significantly, because the Master Order met the statutory definition of a final judgment or dismissal, it was recorded in the Official Records Book 16685, Page 2181, Public Records of Pinellas County, Florida.

The clear, operative and unambiguous language of the Master Order thus dismissed the instant case without prejudice and without leave to amend. The Master Order should therefore be treated as a final order subject only to a timely filed motion for rehearing or a timely filed appeal. When the time allotted for

---

[1] Although the Master Order cites Rule 1.070(i), it appears that this is a scrivener's error, and that the Master Order was actually referring to Rule 1.070(j) as the Master Order reads "it appearing that service has not been obtained upon the Defendant(s) in the following causes within 120 days after filing the initial pleading..."

rehearing or appeal had passed, the trial court's jurisdiction over the case terminated.

Despite the dismissal of its case, Citibank elected to proceed with the lawsuit as if no dismissal had ever been ordered by the Court. This included filing its Motion for Summary Judgment. In response, Phillips filed his Motion to Effectuate Dismissal of This Action Pursuant to Fla. R. Civ. Pro. 1.070(j) and This Court's Order on August 27, 2010. App., Tab 3. This motion sought only to have the trial court recognize that its jurisdiction had terminated when it entered its order. In further support of his position, Phillips filed a Supplemental Memorandum of Law in Support of His Motion on October 5, 2010. App., Tab 4. Thereafter, a hearing on the matter was held on December 2, 2010 before the trial court judge. Citibank filed no responsive documents with the trial court and only appeared at the hearing via telephone.

The trial court did not announce its ruling at the hearing, but Phillips received a one page form Order from the court which summarily denied his motion on December 7, 2010. App., Tab 5. In this Writ, Phillips asserts that trial court's December 7th order materially conflicts with the plain language of the Master Order, and, because no order was ever entered correcting the Master Order within the time period allotted for correction, the trial court does not have jurisdiction to render a judgment either for or against Citibank. Therefore, a writ of prohibition is

necessary to ensure that the trial court does not do what it apparently intends to – proceed with the instant case despite the fact that the trial court's jurisdiction has terminated.

STANDARD OF REVIEW

As the issue presented by Phillips is a pure question of law, the instant case is subject to the *de novo* standard of review. *See D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003) (providing that "[t]he standard of review for...pure questions of law...is *de novo*").

NATURE OF RELIEF SOUGHT

Phillips seeks to have an order entered prohibiting the trial court judge from holding any further hearings or entering any further orders based on the analysis that the trial court's jurisdiction terminated after the Master Order was entered.

BASIS FOR INVOKING JURISDICTION OF THE COURT

This Court has jurisdiction over the original proceeding of prohibition pursuant to Article 5, §4(b)(3) of the Florida Constitution and Rules 9.030(b)(3) and 9.100(e) of the Florida Rules of Appellate Procedure.

SUMMARY OF THE ARGUMENT

A writ of prohibition barring the trial court from entertaining any further motions or issuing any further orders is necessary because the clear language of the Master Order dismissed the instant case without prejudice and without leave to

amend. As such, the Master Order was a final appealable order subject to the further jurisdiction of the trial court only upon a timely filed motion for rehearing or on the trial court's own motion during the time period for rehearing. When the time for rehearing lapsed, the trial court lost all jurisdiction in the case and the parties were placed as if no lawsuit was ever filed.

To the extent that the clear language of the Master Order was entered in error, such was a judicial error since it was reached in the intentional or purposeful exercise of the trial court's judicial function. Moreover, while judicial errors may be corrected on motion or on the trial court's own initiative within ten (10) days of rendition of the order or by appellate review within thirty (30) days of rendition, such a correction was not done in this case. Even if this Court holds that the error was correctable under Fla. R. Civ. Pro. 1.540(b), the applicable subsection of that Rule requires that corrections be made within one (1) year of rendition of the order, which was also not done in this case. Accordingly, relief under Rule 1.540(b) is also not available based on the facts of this case.

Finally, a writ of prohibition is necessary to prevent the resulting harm that would result if the trial court is allowed to move forward with this case. Since the trial court lacks any jurisdiction to make a judgment either for or against Citibank, such a judgment would be void and subject to correction upon a motion to vacate at any time. The effect of a void judgment entered in favor of Citibank would be

to cast a cloud over the title of the subject real property which would cause irreparable harm to Phillips, to subordinate lien holders, to judgment creditors that might have attached to the subject property and to innocent third parties who might purchase the property after any final judgment were entered and after a certificate of title were issued.

ARGUMENT

I. A WRIT OF PROHIBITION SHOULD BE ENTERED BECAUSE THE CLEAR LANGUAGE OF THE MASTER ORDER DISMISSED THE CASE WITHOUT PREJUDICE AND WITHOUT LEAVE TO AMEND

A writ of prohibition should be entered because the trial court lacks jurisdiction to take any further action as the instant case has been dismissed without prejudice and without leave to amend. Prohibition is utilized by "a superior court, having appellate and supervisory jurisdiction over an inferior court or tribunal possessing judicial or quasi-judicial power, [to] prevent such inferior court or tribunal from exceeding jurisdiction or usurping jurisdiction over matters not within its jurisdiction." *English v. McCrary*, 348 So.2d 293 (Fla. 1977). Moreover, prohibition is a preventive, as opposed to corrective, remedy in that it may only be invoked to forestall an improper action which has not yet occurred. *City of Sanibel v. Maxwell*, 925 So. 2d 486, 487 (Fla. 2d DCA 2006) (providing that prohibition "is preventive and not corrective in that it commands the one to

whom it is directed not to do the thing the supervisory court is informed the lower tribunal is about to do" (quoting *English*, 348 So. 2d at 296-97).

Prohibition may be employed to prevent a lower tribunal from acting without jurisdiction or in excess of its jurisdiction. *See e.g. Peltz v. District Court of Appeal, Third Dist.*, 605 So. 2d 865 (Fla. 1992); *Sanders v. Laird*, 865 So. 2d 649 (Fla. 2d DCA 2004); *Sragowicz v. Sragowicz*, 603 So. 2d 1323 (Fla. 3d DCA 1992); *Markin v. Markin*, 877 So. 2d 785 (Fla. 4th DCA 2004); *City of Palm Bay v. Palm Bay Greens, LLC*, 969 So. 2d 1187 (Fla. 5th DCA 2007). In addition, prohibition is a proper vehicle through which to challenge the subject-matter jurisdiction of the lower court. *Aviateca, S.A. v. Friedman*, 678 So. 2d 387 (Fla. 3d DCA 1996). The issuance of a writ of prohibition, therefore, prevents the resulting harm which would be realized if a lower tribunal issues a judgment without possessing jurisdiction over the case.

Most importantly to this case, prohibition is also an appropriate remedy where a trial court does not have jurisdiction once it has made a ruling or finding which precludes it from entering any further orders. *See Tsokos v. Sunset Cove Investments, Inc.*, 936 So. 2d 667 (Fla. 2d DCA 2006) (prohibition granted to prevent trial judge from finding nonparties to be in civil contempt of a judgment approving a settlement agreement because the final judgment did not expressly prohibit a third party from purchasing the property after the closing date

incorporated into the final judgment); *City of Sanibel*, 925 So. at 486 (writ of prohibition granted because trial court was without jurisdiction to grant motion for leave to amend as it was filed more than thirty days after dismissal which marked an end to the judicial labor in the case); *Agency for Persons with Disabilities v. F.G.*, 917 So. 2d 887 (Fla. 3d DCA 2005) (writ of prohibition granted as trial court lacks constitutional or statutory jurisdiction to order the officers of the Agency for Persons with Disabilities to appear and produce records as to why an individual was receiving Medicare benefits as such matters was within their exclusive authority).

A. The Dismissal Without Prejudice Divested the Trial Court of All Jurisdiction Over the Case.

When the trial court issued its Master Order dismissing the case without prejudice and without leave to amend, it issued a final appealable order which divested itself of all jurisdiction over the case save only a timely filed motion for rehearing under Fla. R. Civ. Pro. 1.530 or upon the court's own initiative within the time allowed for a rehearing motion, neither of which were filed in this case. *See Silvers v. Wal-Mart Stores, Inc.*, 763 So. 2d 1086, 1086 (Fla. 4th DCA 1999) (providing that "[a]n order dismissing an action without granting leave to amend is a final appealable order"); *Derma Lift Salon, Inc. v. Swanko*, 419 So. 2d 1180, 1180-81 (Fla. 3d DCA 1982) (providing, in pertinent part, that "[t]he trial court's order of dismissal ...was a final appealable order...subject to the further

jurisdiction of the trial court only upon a timely filed motion for rehearing under Florida Rule of Civil Procedure 1.530...or on its own initiative within the time period allowed for a rehearing motion").

As no motion for rehearing was ever filed, and because the trial court failed to alter the order within the time period allowed for a rehearing motion, the trial court therefore lacks any jurisdiction to render a judgment either for or against Citibank. If such a judgment is entered, it would be void and subject to a motion to vacate at any time.

1. The Effect of a Dismissal Without Prejudice is to Leave All Parties as if No Lawsuit Has Been Filed.

Both the immediate and ultimate effect of the Master Order was to deprive the trial court of any subject-matter jurisdiction over the case and place all parties to the lawsuit as if no suit had been filed. This is because once a plaintiff suffers a dismissal of his or her cause of action the court is without further jurisdiction and has no right to render any judgment either in the plaintiff's favor or against him or her. *See Derma Lift Salon, Inc.*, 419 So. 2d at 1180-81; *Haft-Gaines Co. v. Reddick*, 350 So. 2d 818 (Fla. 4th DCA 1977). *See also Stone v. Stone*, 691 So.2d 649 (Fla. 3d DCA 1997) (holding that "[b]ecause the petitioner voluntarily dismissed the underlying action, the trial court lacked subject matter jurisdiction to enter the subsequent orders adjudicating matters set forth in the underlying action"); *84 Lumber Co. v. Cooper*, 656 So.2d 1297, 1298-99 (Fla. 2d DCA 1994)

(holding that dismissal pursuant to Fla. R. Civ. Pro. 1.420(a) divests trial court of subject matter jurisdiction).

Indeed, after the final dismissal of a claim or complaint, either with or without prejudice, the trial court is without further "case jurisdiction" and cannot render a judgment of any kind in the case. *See Capital Bank v. Knuck*, 537 So.2d 697 (Fla. 3d DCA 1989); Fla. Jur.2d *Actions* §220 (1997). Jurisdiction, specifically subject-matter jurisdiction, is critical to a trial court because a judgment entered without jurisdiction is void. *See Eposito v. Horning*, 416 So. 2d 896, 898 (Fla. 4th DCA 1982) (providing that "*jurisdiction is not a question a court can take or leave, and* ***a judgment entered without jurisdiction is void***"). (Emphasis added). *See also Gonzalez v. Totalbank*, 472 So. 2d 861 (Fla. 3d DCA 1985) (holding a final default judgment void for lack of jurisdiction). The importance of jurisdiction is heightened because a void judgment is subject to correction upon a motion to vacate at any time. Fla. R. Civ. Pro. 1.540(b); *DeClaire v. Yohana*, 453 So. 2d 375 (Fla. 1984); *Falkner v. Amerifirst Federal Savings and Loan*, 489 So. 2d 758 (Fla. 3d DCA 1986); *Gonzalez v. Totalbank*, (472 So. 2d 861Fla. 3d DCA 1985).

For its part, a judgment of dismissal without prejudice, that is, one not involving the merits of the case, leaves the parties as if no suit had been instituted. *Epstein v. Ferst*, 35 Fla. 498, 17 So. 414 (Fla. 1895). Such a judgment is not *res*

judicata and hence is no bar to a subsequent action on the same subject matter. *Rountree v. Rountree*, 72 So. 2d 794, 796 (Fla. 1954). Therefore, Fla. R. Civ. 1.420(b) allows the refiling of a complaint which has been dismissed without prejudice because the dismissal does not act as an "adjudication on the merits"; however, the plaintiff is still required to refile the case, pay the court the applicable filing fee, and reserve the defendant.

By the clear language of the Master Order, the instant case was dismissed without prejudice and without leave to amend. The plain language of the Master Order provides, in pertinent part, that "***the cases**, as indicated on the attached listing, **are hereby dismissed** without prejudice*." (Emphasis added). App., Tab 2 at 1. This lucid, operative and unambiguous legal language is bolstered by the Clerk of Court's July 15, 2009 notices sent prior to the Master Order which warned Citibank "*that the Court, on its own motion, will **dismiss the above styled case***, without further notice, for failure to show good cause why the service was not obtained." (Emphasis added). App., Tab 1 at 1.

Therefore, the plain language of the Master Order, which is supported by the plain language of the Clerk of the Court's notice, unequivocally dismissed the instant case without prejudice and without leave to amend. The Master Order thus dissolved the jurisdiction of the trial court and any judgment entered by the trial court after the issuance of the Master Order would be void for lack of jurisdiction.

2. The Master Order was a Final Order Which Could Only Be Reviewed on Appeal.

Once the trial court entered the Master Order, it entered a final, appealable order which could only be reviewed by the trial court upon a timely file motion for rehearing pursuant to Fla. R. Civ. Pro. 1.530 or on the trial court's own initiative. A dismissal without prejudice and without leave to amend is a final appealable order. *See Silvers*, 763 So. 2d 1086 at 1086; *Valcarcel v. Chase Bank USA, N.A.*, Case No. 4D10-379 (Fla. 4th DCA November 24, 2010). This is because an "order of dismissal is clearly final when, for instance, the claim could only be pursued by filing a new complaint." *Hinote v. Ford Motor Co.*, 958 So. 2d 1009, 1010 (Fla. 1st DCA 2007) (citing *Delgado v. J. Byrons, Inc.*, 877 So. 2d 822 (Fla. 4th DCA 2004)). As the Master Order clearly dismissed the case without prejudice and without leave to amend, it is axiomatic that the Master Order is a final order.

Trial courts may only review final orders upon a timely filed motion for rehearing pursuant to Fla. R. Civ. Pro. 1.530 or on the trial court's own initiative during the time period allowed for such a motion. Rule 1.530(b) provides, in pertinent part, that "[a] motion...for rehearing shall be served *not later than 10 days* after...the date of filing of the judgment in a non-jury action." (Emphasis added).

Therefore, in order for either Citibank or the trial court to challenge the finality of the Master Order, it had to do so within ten (10) days of rendition of

same. Since this was not done by either Citibank or the trial court, all jurisdiction of the trial court over the matter ceased ten (10) days after rendition of the Master Order.

3. The Recordation of the Master Order Acted as a Final Judgment within meaning of Fla. Stat. §28.222(3)(c) (2006) and effected the rights and interests of individuals and entities that were not parties to the suit.

The fact that the Master Order in question was recorded in the Official Records of Pinellas County provides further support for the position that the Master Order acts as a final order of dismissal. The Master Order was recorded by the Pinellas County Clerk of Court on August 27, 2009 in the Official Records Book 16685, Page 2181, Public Records of Pinellas County, Florida. The Master Order must therefore be treated as a final judgment pursuant to Fla. Stat. §28.222(3)(c) (2006). Section 28.222(3)(c) reads, in pertinent part, that "*[t]he clerk of the circuit court shall record* the following kinds of instruments presented to him or her for recording, upon payment of the service charges prescribed by law:....*[j]udgments*, including certified copies of judgments, entered by any court of this state or by a United States court having jurisdiction in this state and assignments, releases, and satisfactions of the judgment." (Emphasis added). Moreover, pursuant to Fla. Stat. §695.11 (2006), when an instrument such as a final judgment is recorded, it becomes a "notice to all persons". *See also Winn-Dixie Stores, Inc. v. Dolgencorp. Inc.*, 964 So. 2d 261, 267 (Fla. 4th DCA 2007);

Paterson v. Brafman, 530 So. 2d 499, 500-01 (Fla. 3d DCA 1988) (providing that, "those who subsequently deal with real property are placed on constructive notice of the relevant contents of a property recorded instrument, such as the final judgment of dissolution involved here"). Finally, ***only orders of dismissals and final judgments*** of courts in civil actions ***must be recorded*** in the public records while ***all other orders are to be recorded only on written direction of the court.*** Fla. Stat. §28.29 (2006).

The recording of the Master Order in the Official Records of Pinellas County is therefore the recording of a judgment under §28.222(3)(c) and thus was a "notice to all persons" that the subject real property was no longer subject to the active litigation. The Master Order must therefore be treated as a "dismissal" under §28.29; considering the Master Order as anything short of this would diminish the Master Order's effect and contravene the purposes of §§28.222(3)(c), 28.29 and 695.11.

B. Rule 1.070(j) Provides the Trial Court With Only Three (3) Options When Service Has Not Been Effectuated.

When the trial court dismissed the instant lawsuit without prejudice, it executed one of the remedies offered to it under Fla. R. Civ. Pro. 1.070(j), which provides, in pertinent part, that

> ***[i]f service of an initial process an d initial pleading is not made upon a defendant within 120 days after filing of the initial pleading***

> directed to that defendant ***the court, on its own initiative after notice*** or on motion, shall direct that service be effected within a specified time or ***shall dismiss the action without prejudice*** or drop that defendant as a party; provided that if the plaintiff shows good cause or excusable neglect for the failure, the court shall extend the time for service for an appropriate period. (Emphasis added).

Hence, Rule 1.070(j) provides the trial court with three, *and only three*, options when a plaintiff has not properly served a defendant within 120 days after filing the initial pleading. These options are: (1) direct that service be effected within a specified time; (2) drop that defendant as a party; or (3) dismiss the action without prejudice. *Chaffin v. Jacobson*, 793 So. 2d 102, 103-04 (Fla. 2d DCA 2001). *See also Premier v. Davalle*, 994 So. 2d 360 (Fla. 3d DCA 2008); *Vaught v. Mcneil*, 16 So. 3d 897 (Fla. 1st DCA 2009).

Furthermore, while the trial court is not required to dismiss the action without prejudice if neither good cause nor excusable neglect is show for failure to effectuate service and is instead left to exercise its discretion, "this discretion is not limitless." *Shtalenkov v. Deatherage*, 943 So. 2d 200, 201 (Fla. 3d DCA 2006). *See e.g. Hernandez v. Page*, 580 So. 2d 793, 795 (Fla. 3d DCA 1991) (holding that because the record demonstrated that certain settlement negotiations, which was the only excuse offered for failure to serve defendants within 120 days, occurred before a second action was filed, "the trial court did not abuse its discretion in finding that plaintiffs failed to demonstrate good cause for failure to comply with

Rule 1.070(j)"); *Docktor v. McCrocklin*, 669 So. 2d 1129, 1129 (Fla. 4th DCA 1996) (reversing a denial of a motion to dismiss an amended complaint naming appellant as a defendant where "[t]here [was] nothing in this record showing any reason why the mortgagee did not timely serve process, much less anything amounting to good cause").

Finally, and most importantly to this case "although Rule 1.070(j) permits the refiling of the suit after it has been dismissed without prejudice, ***the net effect of a dismissal under this Rule is to preclude the...part[ies] from proceeding further by amendment*** in the dismissed suit." *Murphy v. WISU Properties, Ltd.*, 895 So. 2d 1088, 1095 (Fla. 3d DCA 2004). (Emphasis added).

Therefore, the trial court's election to dismiss the instant case without prejudice was a remedy authorized under Rule 1.070(j) which estopped Citibank from moving forward with its case absent the refiling of its lawsuit.

C. The Master Order Keeps with Rule 1.070(j)'s Purpose.

Dismissing Citibank's lawsuit without prejudice also kept with the express purpose of Rule 1.070(j). Specifically, "[t]he purpose of rule 1.070(j) is to prevent a plaintiff from filing a lawsuit but taking no action to move forward on the claim." *Nationsbank, N.A. v. Ziner*, 726 So. 2d 364, 366 (Fla. 4th DCA 1999). Additionally, the Rule "is not intended to be a trap for the unwary, nor a rule to impose a secondary statute of limitations based on time of service...***We***

understand the rule to be an administrative tool to efficiently move cases through the courts." *Gary J. Rotella & Assoc., P.A. v. Andrews*, 821 So. 2d 468, 470 (Fla. 4th DCA 2002) (quoting *Sneed v. H.B. Daniel Constr. Co.*, 674 So. 2d 158, 159 (Fla. 5th DCA 1996). (Emphasis added). Even a cursory glance at the docket here reveals that Citibank has done precious little, either before the issuance of the Master Order or after it, in moving this case along. In fact, Citibank received a notice from the Clerk of the Court on July 7, 2010 that the trial court would dismiss the case pursuant to Fla. R. Civ. Pro. 1.420(e) for lack of prosecution unless Citibank undertook some action in the matter. App., Tab 6. Therefore, dismissing Citibank's cause without prejudice kept with the sound purpose of the Rule.

D. Other Circuit Courts and Plaintiff Law Firms Have Construed the Master Order to Be a Final Order of Dismissal.

Phillips' position that the Master Order dismissed his case without prejudice is a position shared by other Circuit Courts in the Sixth Judicial Circuit as well as Plaintiff law firms in this State. Specifically, a master order that was identical in every aspect to the Master Order at issue here was issued in the case of *Countrywide Home Loans, Inc. v. Jack E. Hamersma, et al.*, Case No. 08-13605-CI-08 (Fla. 6th Jud. Cir. 2010). App., Tab 7. Subsequent to the issuance of the master order in that case, the Honorable David Demers, the presiding judge, entered an order on September 10, 2010 which provided that the master order of

dismissal dismissed the *Hamersma* case without prejudice. App., Tab 8. As Judge Demers noted in his order, "[b]ecause the applicable period for re-hearing or appeal of this court's Final Order have tolled, ***this court is without jurisdiction to take any further action in this matter***." (Emphasis added). App., Tab 7 at 1.

Thus, Judge Demers ruled there, as Phillips argues here, that the clear language of the Master Order has but one effect: to divest the trial court of all jurisdiction subject to a timely filed motion for rehearing.

Additionally, on information and belief, Pinellas County has issued thousands of master orders of dismissals for failure to perfect service identical to the one at issue here. In the vast majority of those cases, Phillips believes that Plaintiff law firms have treated those master orders as Phillips asserts it should be treated and have ceased litigation. If this Court does not treat the Master Order here as a final order of dismissal, then the cases in which Plaintiff law firms have treated as dismissed will suddenly be resurrected and returned to active litigation.

E. The Master Order is Virtually Identical to Other Mass Final Orders of Dismissal Issued in Pinellas County.

The Master Order must also be treated as a final order of dismissal because it is nearly identical in both form and content to other mass final orders of dismissal issued in Pinellas County. By way of example, this Court should take note of Pinellas County Master Order of Dismissal Calendar No. 090210-11 which

was issued on December 6, 2010 and dismissed several cases pursuant to Fla. R. Civ. Pro. 1.420(e) for failure to prosecute. App., Tab 8.

This Court must take into account that the language of the second paragraph of Master Order of Dismissal Calendar No. 090210-11 is nearly identical to the language of the second paragraph of the Master Order at issue here, in that it reads "***it is ordered that the cases, as indicated on the attached listing, are dismissed*** for lack of prosecution." (Emphasis added). App., Tab 8 at 1. Additionally, Master Order of Dismissal Calendar No. 090210-11 includes an attached listing identical in form to the listing attached to the Master Order at issue in this case. App., Tab 8 at 2-8. Finally, Master Order of Dismissal Calendar No. 090210-11 was recorded in the Official Books of Pinellas County just as the Master Order at issue here was.

The only difference between the Master Order here and Master Order of Dismissal Calendar No. 090210-11 is the way the two orders are reflected on the dockets of the cases which the respective orders control. For example, the docket for *OneWest Bank, F.S.B. v. David A. Dusi*, Case No. 09-013118-CI-11 (Fla. 6th Jud. Cir. 2010), a case which was affected by Master Order of Dismissal Calendar No. 090210-11, reveals that the case has been dismissed. App., Tab 9 at 1. No such corresponding dismissal can be found on the docket of Phillips' case.

To treat the Master Order as anything short of a full dismissal would therefore repeal or diminish the effect of other identical final orders of dismissal

such as Master Order of Dismissal Calendar No. 090210-11. Doing so would be inequitable to the litigants of those cases.

II. A WRIT OF PROHIBITION SHOULD BE ENTERED BECAUSE IF THE CIRCUIT COURT MEANT TO ONLY DROP CERTAIN DEFENDANTS FROM THE LAWSUIT, THE CLEAR LANGUAGE OF THE ORDER WAS A MISTAKE

While "[a] trial court may correct a clerical error 'at any time on its own initiative' pursuant to Florida Rule of Civil Procedure 1.540(a)...judicial errors, which include errors that affect the substance of a judgment, must be corrected within ten days pursuant to Florida Rule of Civil Procedure 1.530(g), or by appellate review." *Malone v. Percival*, 875 So. 2d 1286, 1288 (Fla. 2d DCA 2004) (quoting *Bolton v. Bolton*, 787 So. 2d 237, 238-39 (Fla. 2d DCA 2001)). Therefore, if the trial court meant to only drop certain defendants from the instant lawsuit rather than dismiss the entire case without prejudice, the clear language of the Master Order which unequivocally dismissed the case without prejudice was an error which could only be corrected within ten (10) days of rendition.

A. If the Circuit Court Committed a Mistake in the Master Order, Same was a Judicial Error and the Time Period for Correcting Judicial Errors Has Run.

To the extent that the clear language in the Master Order was entered in error by the trial court, the error was judicial in nature and therefore had to have been corrected within ten (10) days of rendition of the Master Order. In defining

what constitutes a judicial error, the Second District has explained that "[t]he key fact is ***whether or not the court reached a decision in the intentional or purposeful exercise of its judicial function***. If the pronouncement reflects a deliberate choice on the part of the court, the act is judicial; errors of this nature are to be cured by appeal." *Paladin Properties v. Family Inv. Enter.*, 952 So. 2d 560 (Fla. 2d DCA 2007) (quoting *In re Estate of Beeman*, 391 So. 2d 276, 280 (Fla. 4th DCA 1980). (Emphasis added). Put another way, "[t]he 'clerical mistakes' referred to by Rule 1.540(a) are only 'errors or mistakes arising from accidental slip or omission, and not errors or mistakes in the substance of what is decided by the judgment or order.'" *Malone*, 875 So. 2d at 1288 (citing *Town of Hialeah Gardens v. Hendry*, 376 So.2d 1162, 1164 (Fla. 1979) (which quotes *Keller v. Belcher*, 256 So.2d 561, 563 (Fla. 3d DCA 1971)).

Moreover, in *Shelby Mutual Insurance Co. v. Pearson*, 236 So.2d 1 (Fla. 1970), the Florida Supreme Court explained that:

> [o]ne of the goals of our system of jurisprudence is that litigation be finally terminated as quickly as due process allows. To this end, we have provided in Florida Rule Civil Procedure 1.530 that motions and petitions for correction by the trial court be made within ten days after rendition of the judgment or order. Unless a proper motion or petition is filed within the allotted time, the judgment or order of the trial court becomes absolute. Except as provided in Rules 1.530 and 1.540, Florida Rules of Civil Procedure, the trial court has no authority to alter, modify or vacate an order or judgment. If a motion to alter or vacate is timely filed, or if the trial court acts timely on its own initiative pursuant to Rule 1.530, the trial court's jurisdiction

> continues until the motion or petition is disposed of, or the rehearing or new trial is conducted, assuming one is ordered.

Id at 3 (footnotes omitted). *See also Moforis v. Moforis*, 977 So. 2d 786, 788 (Fla. 4th DCA 2008) (providing that "[i]n *Shelby Mutual Insurance Co.*[, *supra*]...the Supreme Court of Florida rejected the argument that the trial court has jurisdiction to correct its own judgments at any time").

Examples from Florida case law help to illustrate the difference between a judicial error and a clerical mistake. In *Estate of Beeman, supra*, the Fourth District held that an amended order denying attorney's fees entered after the trial court's mistake of granting an award of attorney's fees was a judicial error. *Id.* at 281. In *Malone, supra*, the Second District held that: (1) a change in the amount of child support required to be paid; (2) additional enforcement procedures with respect to a conveyance of real property; and (3) a requirement that a former husband annually document the maintenance of a life insurance policy were all substantive, rather than clerical, changes. *Id.* at 1288. *See also Curbelo v. Ullman*, 571 So. 2d 443 (Fla. 1990) (holding that the trial court's failure in determining damages without a jury was a judicial error); *Frisard v. Frisard*, 497 So. 2d 885 (Fla. 4th DCA 1986) (holding that Rule 1.540(a) does not authorize a Circuit Court to amend a final judgment by adding a reservation of jurisdiction for the taxation of attorney fees in favor of an ex-wife, where the entry of a written judgment

containing a provision materially different from that announced in court at trial was a substantive, rather than clerical, error).

Finally, pursuant to Fla. R. Civ. Pro. 1.530(b) and (g), a party or the trial court, respectively, have ten (10) days from the rendition of a final order to correct any mistake in the final order. Fla. R. App. Pro. 9.110 also permits a party to appeal a final order issued by a lower tribunal although the appeal must be made within thirty (30) days of rendition of the order.

Here, the Master Order clearly reflects a deliberate choice on the part of the trial court where the court reached a decision in the intentional or purposeful exercise of its judicial function. Therefore, to the extent that the clear language of the Master Order was a mistake on the part of the trial court, such a mistake amounts to a judicial error which could only be corrected by the filing of a motion for rehearing or on the court's own initiative within ten (10) days of rendition of the Master Order or by appeal within thirty (30) days of rendition. Since the Master Order was issued on August 27, 2009, the time period allotted for either rehearing or appeal has passed and Citibank may only move forward by refiling its lawsuit.

B. Even if This Court Construes the Circuit Court Error's As Being Correctable Under Fla. R. Civ. Pro. 1.540(b), the Time Period for Correcting Under This Rule Has Also Run.

Assuming, *arguendo*, that this Court decides that any mistake on the part of the trial court is correctable under Fla. R. Civ. Pro. 1.540(b), the time period for correcting a mistake under this Rule has also passed. While nothing in the record indicates that this may be the case, the only applicable provision of Rule 1.540(b) is subsection (1), which allows for the correcting of a final order or judgment because of "mistake, inadvertence, surprise, or excusable neglect." Additionally, Rule 1.540(b) allows a trial court to correct a judgment on its own motion under the circumstances enumerated within the Rule. *See McCrea v. Deutsche Bank National Trust Company*, 993 So. 2d 1057, 1058 (Fla. 2d DCA 2008); *Commonwealth Land Title Ins. Co. v. Freeman*, 884 So. 2d 164, 167 (Fla. 2d DCA 2004). However, Rule 1.540(b) was not "intended to serve as a substitute for the new trial mechanism prescribed by Rule 1.530 nor as a substitute for appellate review of judicial error." *Curbelo*, 571 So. 2d at 444 (Fla. 1990) (quoting *Fiber Crete Homes, Inc. v. Division of Administration*, 315 So. 2d 492, 493 (Fla. 4th DCA 1975). *See also Parker v. Tinsley*, 32 So. 3d 748 (Fla. 1st DCA 2010).

To correct a mistake under Rule 1.540(b)(1), the correction must be done within one (1) year of rendition of the order. *See* Fla. R. Civ. Pro. 1.540(b). In fact, in *DeClaire v. Yohana*, 453 So. 2d 375, 378-79 (Fla. 1984) the Florida Supreme Court approved a chart which indicated that relief from judgments or

orders on the basis of mistake must be made within one (1) year of entry of the judgment or order.

Therefore, even if this Court determines that the clear language in the Master Order was a mistake correctable under 1.540(b)(1), since over one (1) year has passed since the entry of the Master Order, neither the trial court nor Citibank may correct the error under that Rule.

III. A WRIT OF PROHIBITION SHOULD BE ENTERED BECAUSE ALLOWING THIS CASE TO PROCEED FURTHER WOULD CAST A CLOUD OVER THE TITLE TO THE SUBJECT REAL PROPERTY

Perhaps the most important reason for issuing a writ of prohibition is to prevent the resulting harm of clouded title which would be cast if this case is allowed to proceed further. As previously demonstrated, because the trial court has lost all jurisdiction over this matter, any judgment entered by it would be void. From a pure title perspective, then, the void judgment would make any conveyance of title from this judgment unmarketable. This is because

> [n]o conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease of a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration without notice, unless the same be recorded according to law.

Fla. Stat. §695.01(1) (2010).

The recording of the Master Order into the Official Records of Pinellas County at Book 16685, Page 2181 acted as a "notice" that the subject foreclosure

lawsuit had been lifted as an impediment to transfer of the subject real property. To then subsequently allow the trial court to grant a judgment in favor of Citibank and then allow the subject real property to be sold would abrogate the effect of this official notice and allow a conveyance of the property to a party who would have no claim to it. A writ of prohibition is consequently necessary to avoid this harm.

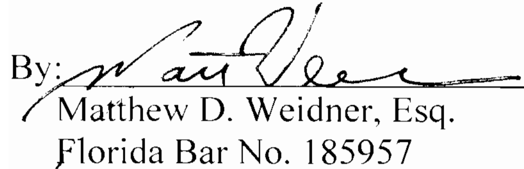
CONCLUSION

Based on the foregoing arguments and authorities, Phillips respectfully requests that this Court issue a writ of prohibition preventing the trial court from entertaining any further motions or entering any further orders in this case.

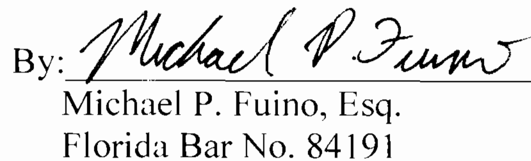
Dated December 29, 2010

Respectfully Submitted,

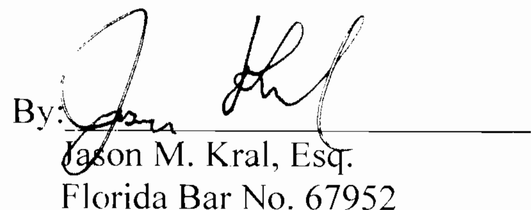
Matthew D. Weidner, P.A.
Counsel for Petitioner
1229 Central Avenue
St. Petersburg, FL 33705
Telephone: (727) 894-3159
Facsimile: (727) 894-2953
Email: weidner@mattweidnerlaw.com



By: ____________________
Matthew D. Weidner, Esq.
Florida Bar No. 185957



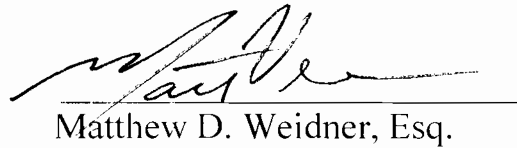
By: ____________________
Michael P. Fuino, Esq.
Florida Bar No. 84191



By: ____________________
Jason M. Kral, Esq.
Florida Bar No. 67952

CERTIFICATE OF SERVICE

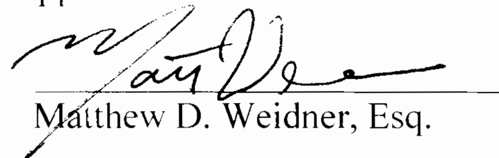
I HEREBY CERTIFY that a copy of the foregoing has been furnished by Regular U.S. Mail on this 29th day of December 2010 to: Kimberly Shanley, Esq., Law Offices of David J. Stern, P.A., 900 South Pine Island Road, Suite 400, Plantation, FL 33324-3920; and Hon. George Jirotka, 315 Court Street, Clearwater, FL 33756.



Matthew D. Weidner, Esq.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this petition complies with the font requirements set forth in Rule 9.210(a)(2), Fla. R. App. P.



Matthew D. Weidner, Esq.