

IN THE DISTRICT COURT OF FLORIDA
SECOND DISTRICT

ERIC WALL,
Appellant,

Case Number: 2D15-1925

Vs.

L.T. Case Number:
11-CA-3117

U.S. BANK NATIONAL
ASSOCIATION, BUT NOT IN ITS
INDIVIDUAL CAPACITY, BUT
SOLELY AS TRUSTEE FOR THE
RMAC TRUST, SERIES 2013-IT, et al.
Appellee.

**APPELLEES' OPPOSITION TO
APPELLANT'S MOTION TO
RELINQUISH JURISDICTION**

COMES NOW Appellees, U.S. Bank National Association, Not In Its Individual Capacity, But Solely As Trustee For The RMAC Trust Series 2013-IT, by and through undersigned counsel, respectfully requests this Honorable Court to deny Appellant's Motion for Relinquishment, and in support thereof, states as follows:

FACTS

1. On September 17, 2014 a trial on this matter took place.
2. On or about November 12, 2014, final judgment was entered in favor of Appellee.
3. On or about April 28, 2015, Appellants filed their Notice of Appeal with the trial court.

4. As evidenced by the extensive gap between the rendering of final judgment and the Notice of Appeal, (167 days) Appellants filed numerous post-trial motions. From the date of Final Judgment to the present, Appellant filed the following motions to the trial court:

- a. Motion to Quash Subpoena, Sanctions, and Request for Hearing which was Denied by Judicial Order on September 24, 2014.
- b. Amended Motion to Quash Subpoena which was Denied by Judicial Order on October 7, 2014.
- c. Motion for Rehearing which was denied by Judicial Order dated April 1, 2015.
- d. Motion to Require Witness and Attorneys to Submit to Post Judgment Depositions which was never ruled on.
- e. Motion to Supplement the Record which was never ruled on.
- f. Motion to Cancel Sale (granted in part) and Request for Evidentiary Hearing on Motion to Quash in which the sale was Canceled, and the hearing (denied in part) by Judicial Order dated April 7, 2015.
- g. Emergency Motion to Vacate Final Judgment of Foreclosure and Involuntarily Dismiss the Action in which the court declined to rule due to improper notice of the hearing and because the motion was not deemed an emergency.

5. Prior to judgment, in Defendant's Motion to Quash Subpoena, Motion to Strike Trial Testimony and Evidence, and in his Objection to Subpoena Duces Tecum Defendant objected to: first, the issuance of the subpoena, second, to the documents being produced, third, to the evidence being considered, and finally moved to have the trial reheard.
6. With each motion, Defendant has raised the same arguments, mainly that Plaintiff failed to strictly adhere to the proper process of serving a subpoena duces tecum.
7. On each motion, the court has failed to consider the inadvertence of Plaintiff's counsel as material and has consistently denied Defendants' various motions.

LEGAL ANALYSIS

I. This Court should not relinquish its jurisdiction because the trial court does not have jurisdiction to make a ruling on Appellant's Rule 1.540(b) Motion due to res judicata.

A. Relinquishment of Jurisdiction

Once the notice of appeal is filed, the lower court is relinquished of its jurisdiction. *See Hudson v. Hoffman*, 471 So. 2d 117, 118 (Fla. 2d DCA 1985). Relinquishment of jurisdiction applies to matters which are tied to the question or issue on appeal; the trial court maintains jurisdiction over those issues which are

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purely collateral. *See Palma Sola Harbour Condo, Inc. v. Huber*, 374 So. 2d 1135, 1136 (Fla. 2d DCA 1979). Appellant's request for relinquishment of jurisdiction in order to conduct an evidentiary hearing is not a collateral issue to the matters which are tied to the appeal.

In *Howell v. Jackson*, this Court held:

Fla. R. App. P. 9.020(h)(3) provides that a party who files a notice of appeal is deemed to have abandoned his own pending post-trial motions. Under Fla. R. App. P. 9.020(h)(1), the final judgment is not deemed rendered until the post-trial motions have been disposed of by written order. These two provisions of the rule defining rendition mean that a party who files a notice of appeal is deemed to have abandoned his own pending post-trial motions, but the notice of appeal has no effect on pending post-trial motions filed by another party directed at the party filing the notice of appeal.

810 So. 2d 1081 (Fla. 4th DCA 2002). The instant case is distinguishable from *Howell* because in that case, the appellee had pending *post-trial* motions. As the party filing the Notice of Appeal, Appellant has effectively abandoned all of his pending post trial motions. Appellee had no post-trial motions pending therefore Appellant relinquished any rights he had to have his pending motions heard in the lower court.

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B. Res Judicata

Res judicata has been defined as a principal that precludes subsequent action on the same issues raised in previous pleadings or actions and ruled upon by the court. *Tyson v. Viacom, Inc.*, 890 So. 2d 1205, 1208-09 (Fla. Dist. Ct. App. 2005) (Citing *Huff Groves Trust v. Caulkins Indiantown Citrus Co.*, 810 So. 2d 1049, 1050 (Fla. 4th DCA 2002) (quoting *Kimbrell v. Paige*, 448 So. 2d 1009, 1012 (Fla. 1984)). Res Judicata will not apply in matters where the issue being raised is different and unique from previous matters. *Tyson v. Viacom, Inc.*, 890 So. 2d 1205, 1208-09 (Fla. Dist. Ct. App. 2005). Res Judicata may also be applied in Florida to subsequent pleadings in the same case where there has already been a final order. *See Sibley v. Sibley*, 885 So. 2d 980, 982 (Fla. Dist. Ct. App. 2004) (Citing *Utterback v. Starkey*, 669 So. 2d 304, 305 (Fla. 3d DCA 1996)).

In his Motion for Relinquishment of Jurisdiction, Appellant heavily relies on *Lurie v. Auto-Owners Ins. Co.*, 605 So. 2d 1023 (Fla. 1st DCA 1992). In *Lurie*, counsel discovers that a juror had a disqualifying profession which, if known, would have resulted with that juror being stricken from the panel. *Lurie*, 605 So. 2d at 1024. In the First District's reasoning, it stated that when seeking relinquishment for further proceedings during the pendency of an appeal from a final order, the burden is on the moving party to show entitlement for relief. *Id.*

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The *Lurie* Court further reasoned “the presumption is, however, that judicial economy would be best served by leaving jurisdiction in the appellate court until the issuance of a mandate”. *Id.*

Appellant employs three possible outcomes, reasoned in *Lurie*, in which to base its argument for relinquishment. In granting the motion, Appellant argues that the same three factors are relevant in the case at bar: (1) “if the Homeowner’s motion is granted, the judgment vacated, and no appeal taken from that order, then this appeal will be dismissed as moot; (2) if the motion is denied and no appeal is taken, the appeal continues as scheduled; and (3) if an appeal is taken from the order on the Homeowner’s motion, that appeal can either be disposed of prior to disposition of this appeal or consolidated with it.”

Appellee can address all three of Appellant’s possible outcomes with a single response: the possible outcomes are not available options because Appellant has already submitted a motion to vacate judgment with the trial court, alleging the same “misconduct” as the proposed motion at bar. The trial court has already ruled against Appellant on this issue multiple times and to grant relinquishment of jurisdiction is the antithesis of judicial economy.

To further distinguish *Lurie* from the case at bar, in *Lurie*, counsel was informed by a juror after trial of a disqualifying trait, and there was no mention in

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the opinion that the moving party had filed any motions with the trial court concerning this issue. The instant matter is a foreclosure action, which is under equity jurisdiction and therefore, jury trials are prohibited. The *Lurie* court granted relinquishment of jurisdiction because the parties invoked their right to a trial by jury and the proper relief in that case was to relinquish jurisdiction of the appellate court so as to have an untainted jury verdict, which is the obvious remedy under the facts. The instant case was not only tried without a jury, but a jury is not even an option for a foreclosure action. Additionally, Appellant has had numerous opportunities to petition the lower court to vacate final judgment and they were repeatedly denied. Due to this critical difference, *Lurie's* applicability and probative value here are minimal at best. Procedure dictates that the only remedy available to Appellant now is appellate review.

Appellant has filed six post-final judgment motions, all based on the same exact issue as the instant motion. If dissatisfied with the court's ruling on a Rule 1.540(b) motion, a party's remedy is by appeal, not by filing successive motions to vacate containing the same general grounds or even new ones, which could have been raised in the first motion. *Taylor v. Greenpoint Mortg. Corp.*, 939 So. 2d 137, 139 (Fla. 4th DCA 2006). The trial court has ruled again and again against Appellant on his contention that evidence procured from an alleged mistake of

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subpoena procedure was admitted in error. An astounding 167 days elapsed between the rendition of final judgment and the filing of the Notice of Appeal. Additionally, this is the very ground in which Appellant appeals to this Honorable Court. Appellant is attempting to take a seventh bite at the apple in which to bring back to this court for affirmation.

To reiterate the presumption of *Howell*, judicial economy would be best served by leaving jurisdiction in the appellate court until an issuance of a mandate. Appellant has not met its burden of proving his entitlement for the relief he seeks. There was no mention in his Motion for Relinquishment of Jurisdiction of why the trial court's previous post-judgment rulings were insufficient, although they were based on the same facts alleged previously in the trial court and now before the appellate court. Res judicata bars Appellant from another ruling based on the same facts as previously alleged. The next logical step in the interest of judicial economy would be for appellant review of the lower decisions, not the addition of yet another ruling. Judicial economy has been taxed to its limit in this case, and in order to ensure judicial economy moving forward, this Honorable Court should deny Appellants Motion for Relinquishment of Jurisdiction.

WHEREFORE, Appellees, U.S. Bank National Association, Not In Its Individual Capacity, But Solely As Trustee For The RMAC Trust Series 2013-IT, respectfully

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request this Honorable Court deny Appellant's Motion for Relinquishment of Jurisdiction, and any other relief this Honorable Court finds just and proper.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this motion is written in 14 point “Times New Roman” font.

Respectfully Submitted,
JULIANA GAITA, P.A.
By: /s/ Juliana Gaita, Esq.
Juliana Gaita, Esq.
FBN 76893

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail and e-mail, where available, this 31st day of July, 2015, to the following parties:

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Respectfully Submitted,
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