

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA THROUGH RELINQUISHMENT OF
JURISDICTION BY THE DISTRICT COURT OF FLORIDA
SECOND DISTRICT**

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

Plaintiff/Appellee.

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

Case Number: 2D15-1925

Vs.

**MOTION TO CANCEL EVIDENTIARY
HEARING**

ERIC WALL,
Defendant/Appellant.

COMES NOW Appellee/Plaintiff, U.S. BANK NATIONAL ASSOCIATION BUT NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE FOR THE RMAC TRUST, SERIES 2013-IT, by and through the undersigned counsel, and files this Motion to Cancel Evidentiary Hearing, and in support thereof states as follows:

1. A Final Judgment of Foreclosure and a Supplement to Judgment were entered in this case on November 12, 2014.
2. A Notice of Appeal of the Final Judgment was filed in this case on April 28, 2015.
3. On July 16, 2015, Appellant/ Defendant filed a Motion to Relinquish Jurisdiction with the Second District.
4. On August 3, 2015, Appellee/Plaintiff filed its Opposition to Appellant/Defendant's Motion for Relinquishment of Jurisdiction.
5. On August 6, 2015, the Second District granted Appellant/Defendant's Motion to Relinquish Jurisdiction.

6. On August 11, 2015, Appellant/Defendant filed a Motion for Clarification of the August 6, 2015 Order.
7. On August 12, 2015, Appellee/Plaintiff filed a Response to Appellant's Motion for Clarification.
8. On September 1, 2015, the Second District Clarified its Order. (Order attached hereto).
9. On September 15, 2015, Appellant filed a Notice of Evidentiary Hearing to be held on October 5, 2015. (Notice attached hereto).
10. Appellant/Defendant did not coordinate with Appellee/Plaintiff with the scheduling of the October 5, 2015 hearing.
11. On September 15, 2015, Appellant/Defendant served a subpoena for evidentiary hearing on Attorney Juliana Gaita, the attorney of record on behalf of the Appellee/Plaintiff to appear as a witness for the October 5, 2015 hearing. (Subpoena attached hereto).

DISCUSSION

Appellant/Defendant filed the subject Motion to Vacate Judgment dated April 15, 2015. Appellant/Defendant unilaterally set an emergency hearing date for April 20, 2015 on the subject motion. However, the motion was not heard due to several reasons. First, the hearing was improperly noticed. Second, the motion was improperly classified as an "emergency". Third, the motion was not set in front of the judge assigned to the case. Fourth, Appellant/Defendant misrepresented to the court that Appellee/Plaintiff agreed to the hearing, however, in reality, the Appellee/Plaintiff simply did not file an opposition to the subject motion and Appellant/Defendant interpreted that as consent to the hearing. Finally, the motion was set for a 15 minute hearing which was not enough time for the motion to be heard.

Appellant/Defendant then filed an appeal of the Final Judgment. After requesting the Second District to relinquish jurisdiction, the appeals court so granting, Appellant/Defendant unilaterally set an evidentiary hearing post-judgment and it attempting to elicit testimony not only from Appellee/Plaintiff, but Appellee/Plaintiff's counsel as well.

A. The Second District's Order is Clear, the Trial Court Must Enter a Ruling on the Subject Motion and Appellant/Defendant is Not Entitled to Set an Evidentiary Hearing because the Trial Court is Without Jurisdiction to Hear It

The Order that the Second District rendered in its decision to grant relinquishment contains the following language:

The appellant's motion to relinquish jurisdiction is granted to the extent that jurisdiction is relinquished for 45 days from the date of this order, during which the judge currently presiding in the division in which this case was tried shall enter an order on the appellant's motion to vacate the final judgment of foreclosure.

Accordingly, during the 45-day relinquishment period, this Court is limited to rendering a ruling on Appellant/Defendant's motion and nothing else. Under Florida Rule of Appellate Procedure 9.600(b), the appellate court can relinquish jurisdiction to the trial court to proceed with specifically stated matters while the appeal is pending. When the jurisdiction of the lower tribunal has been divested by an appeal from a final order, the court by order may permit the lower tribunal to proceed with specifically stated matters during the pendency of the appeal. Fla. R. App. P. 9.600(b). If the appellate court relinquishes jurisdiction for a specific purpose, the trial court has no jurisdiction to go beyond the scope of that specifically stated matter. *Hoffman v. Crosby*, 908 So.2d 1111 (Fla. 1st DCA 2005); *Palm Beach County v. Boca Development Associates, Ltd.*, 485 So.2d 449 (Fla. 4th DCA 1986).

Numerous cases allow for a trial court to conduct an evidentiary hearing on relinquished jurisdiction from the district courts of appeal. However, it is because the courts explicitly granted such hearings. In *King v. Cutter Lab.*, the Florida Supreme Court held “We only relinquish jurisdiction for the purpose of this limited evidentiary hearing. Upon the entry of its order making a determination of whether the market share alternate theory of liability applies, either party may seek review of the trial court's decision in this Court.” 714 So. 2d 351, 353 (Fla. 1998). In *Berry v. Scotty's, Inc.*, the Second District held:

Accordingly, in granting Mr. Berry's motion for attorneys' fees, we relinquish jurisdiction of the matter to the appeals referee for thirty days. In the event the parties are able to stipulate to an amount, they shall file that stipulation with this court. If the parties cannot stipulate to an award, then the appeals referee shall hold an evidentiary hearing, and thereafter file with this court a recommended order, with findings and conclusions consistent with the Rowe principles. If it appears that the proceedings will require more than thirty days, then the parties shall notify this court of the status. Upon receiving the parties' stipulation or the appeals referee's recommended order, this court, consistent with our statutory duty to "fix" the amount, will issue an order setting the amount of the award.

789 So. 2d 1008 (Fla. 2d DCA 1998). In *Shamrock Jewelers, Inc. v. Robert L. Schillaci, RLS, Inc.*, the Fourth District held:

We follow that procedure in this case, and relinquish jurisdiction to the circuit court for 60 days to obtain a final order and file a copy of it with this court. Failure to do so will result in a sua sponte dismissal of this appeal. If Shamrock obtains a final order, an amended notice of appeal shall be filed in the circuit court. We note that on remand, the trial court is not required to enter a final order of dismissal; rather, the court is free to take a closer look at the record and reconsider whether there was "record activity" within the meaning of Rule 1.420(e).

126 So. 3d 1073 (Fla. 4th DCA 2011). Finally, in *Carraher v. State*, the Fifth District held: “[W]e grant the motion for a second evidentiary hearing and again relinquish jurisdiction to the trial court for forty-five days so that the trial court can conduct a properly noticed evidentiary hearing and make findings of fact on the record regarding Carraher's claim of prior indigency” 401 So. 2d 889 (Fla. 5th DCA 1981).

As made clear by the Florida Rules of Appellate Procedure, this Court is bound by the parameters of the Order granting relinquishment of jurisdiction rendered by the Second District. To allow this hearing to go forward would be in direct violation of the Order. The Second District did not intend to allow for such proceedings, and in fact, did not articulate any leave to conduct hearings in the subject Order – even in its Order Clarifying the Order for Relinquishment—and therefore this Court is without jurisdiction to hold such hearings. (Plaintiff has filed a Motion for Clarification with the Second District, please see subsection D below).

B. Even if Appellant/Defendant was Entitled to Schedule an Evidentiary Hearing, the Hearing Should Be Cancelled Due to Lack of Coordination with Appellee/Plaintiff.

Appellant/Defendant unilaterally set the Evidentiary Hearing without consulting Appellee/Plaintiff counsel. Never mind that Appellee/Plaintiff counsel is located in Boca Raton, which requires ample notice to ensure that counsel may be present at hearings, it is unreasonable for Appellant/Defendant to unilaterally set this hearing without proper coordination. Furthermore, Attorney Gaita has a personal conflict, a hearing in Palm Beach to adopt one of her foster sons the day after the evidentiary hearing is scheduled with family traveling for the occasion. It is unduly burdensome to require Attorney Gaita to appear under subpoena for this hearing which is not even permitted under the Order. This is the second attempt to set the hearing this way to put Appellee/Plaintiff at a material disadvantage. The preamble of the Florida Rules of Professional conduct requires all attorneys practicing in this jurisdiction to abide by the local rules of each court, among other authorities. By setting this hearing in front of Judge Babb,

Appellant/Defendant furthermore violated local rules which require coordination for evidentiary hearings. This is the second attempt to set the hearing this way to put Appellee/Plaintiff at a material disadvantage. The preamble of the Florida Rules of Professional conduct requires all attorneys practicing in this jurisdiction to abide by the local rules of each court, among other authorities.

C. An Evidentiary Hearing Would Be Moot Because Appellees Have Agreed to Vacate the Judgment without Any Findings of Fact

Appellee/Plaintiff is eager to resolve this matter once and for all. Appellant/Defendant has made every attempt to prolong litigation in this matter, to a great expense to Appellee/Plaintiff. For this reason, Appellee/Plaintiff is willing to consent to an order to vacate judgment with no findings of fact made in order to finally reach a resolution. Therefore, granting an evidentiary hearing in this matter is unnecessary and would be a further drain on judicial resources.(See correspondence sent to Appellant/Defendant counsel dated___).

D. Appellee/Plaintiff has Filed a Motion for Clarification with the Second District to Resolve the Matter of Whether this Court is Able to Have an Evidentiary Hearing and Until the Second District Clarifies its Order, No Evidentiary Hearing Should Take Place

Appellee/Plaintiff filed a Motion for Clarification with the Second District on September 23, 2015. According to case law cited above, evidentiary hearings were specifically included in motions for relinquishment of jurisdiction, however the Order in this case does not provide for such. Therefore, it is Appellee/Plaintiff's position that this Court may not hold an evidentiary hearing unless directed by the Second District in its Order relinquishing jurisdiction, and has asked the Second District to so clarify.

WHEREFORE Appellee/Plaintiff U.S. BANK NATIONAL ASSOCIATION BUT NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE FOR THE RMAC TRUST, SERIES 2013-IT, respectfully requests this Honorable Court to CANCEL the Evidentiary Hearing scheduled for October 5, 2015, and any other relief deemed just and proper.

Respectfully Submitted,
JULIANA GAITA, P.A.

By: /s/ Juliana Gaita, Esq.
Juliana Gaita, Esq.
Florida Bar No. 76893
2701 Boca Raton Blvd., Suite 107
Boca Raton, FL 33431
T: 561-869-3703
F: 866-292-0295
Eservice@gllawcenter.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail, where available, and U. S. first class mail, on this 24th day of September, 2015.

MATTHEW D. WEIDNER, Esq.
WeidnerLaw, P.A.

250 Mirror Lake Dr. N.
St. Petersburg, FL 33701
service@mattweidnerlaw.com

Respectfully Submitted,
JULIANA GAITA, P.A.
By: /s/ Juliana Gaita, Esq.
Juliana Gaita, Esq.
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Boca Raton, FL 33431
Tel.: 561-869-3703
Fax: 866-292-0295
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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

August 6, 2015

CASE NO.: 2D15-1925

L.T. No. : 11-CA-3117

Eric Wall

v.

U. S. Bank National Association

Appellant / Petitioner(s),

Appellee / Respondent(s).

BY ORDER OF THE COURT:

The appellant's motion to relinquish jurisdiction is granted to the extent that jurisdiction is relinquished for 45 days, during which Judge Kimberly Sharpe Byrd shall enter an order on appellant's motion to vacate final judgment of foreclosure. The clerk of the circuit court shall supplement the record with the order within 10 days of its entry. The appellant shall file a status report within 45 days of this order.

A party aggrieved by any order entered by the trial court must file a notice of appeal within 30 days of its rendition. See Fla. R. App. P. 9.110(b); 9.130(b). If the present appeal survives, the parties should consider moving for its consolidation with the new appeal.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Michael P. Fuino, Esq.
Paula S. O'Neil, Clerk

Francis E. Friscia, Esq.
Hon. Kimberly Sharpe Byrd

Juliana Gaita, Esq.

ds


James Birkhold
Clerk



IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

September 1, 2015

CASE NO.: 2D15-1925

L.T. No. : 11-CA-3117

Eric Wall

v.

U. S. Bank National Association

Appellant / Petitioner(s),

Appellee / Respondent(s).

BY ORDER OF THE COURT:

Upon consideration of the appellant's motion for clarification and the appellees' response, the appellant's motion for clarification is granted to the extent that the order rendered on August 6, 2015, is rescinded, and the following is substituted in its place. In all other respects the appellant's motion is denied.

The appellant's motion to relinquish jurisdiction is granted to the extent that jurisdiction is relinquished for 45 days from the date of this order, during which the judge currently presiding in the division in which this cause was tried shall enter an order on appellant's motion to vacate the final judgment of foreclosure. See Paladin v. Family Investment Enterprises, 952 So.2d 560, 562 (Fla. 2d DCA 2007). The clerk of the circuit court shall supplement the record with the order within 10 days of its entry. The appellant shall file a status report within 45 days of this order.

A party aggrieved by any order entered by the trial court must file a notice of appeal within 30 days of its rendition. See Fla. R. App. P. 9.110(b); 9.130(b). If the present appeal survives, the parties should consider moving for its consolidation with the new appeal.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.


Served:

Michael P. Fuino, Esq.
Paula S. O'Neil, Clerk

Francis E. Friscia, Esq.
Hon. Kimberly Sharpe Byrd

Juliana Gaita, Esq.

ec


Christina McAdams
Interim Clerk



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

U.S. BANK NATIONAL ASSOCIATION,

CASE NO. 2011-CA-3117-ES-J4

PLAINTIFF,

v.

ERIC WALL,

DEFENDANT.

_____ /

DEFENDANT'S NOTICE OF EVIDENTIARY HEARING

PLEASE TAKE NOTICE that the undersigned counsel will call up for hearing the following:

MATTER: Defendant's Motion to Vacate Final Judgment of Foreclosure
DATE: October 05, 2015
TIME: 12:00 p.m.
PLACE: Honorable Linda Babb
38053 Live Oak Avenue
Room 106D
Dade City, Fl 33523

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact New Port Richey (813) 847-8110; Dade City (352) 521-4274 Extension 8110; TDD 1-800-955-8771 via Florida Relay Service at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time scheduled appearance is less than 7 days.

*****NOTICE TESTIMONY AND EVIDENCE MAY BE TAKEN AT THIS HEARING*****

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email on this 15th day of September, 2015 to **Juliana Gaita, Esq.**, at Juliana@gllawcenter.com and eservice@gllawcenter.com and **Francis E. Friscia, Esq.**, at fiscia@frpalegal.com

By: /s/ Matthew D. Weidner
MATTHEW D. WEIDNER, Esq.
WeidnerLaw, P.A.
Attorney for Defendant(s)
250 Mirror Lake Dr. N.
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(727) 954-8752
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FBN: 0185957

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

U.S. BANK NATIONAL ASSOCIATION,

CASE NO. 2011-CA-3117-ES-J4

PLAINTIFF,

v.

ERIC WALL,

DEFENDANT.

SUBPOENA FOR EVIDENTIARY HEARING

THE STATE OF FLORIDA:

TO: Juliana Gaita, Esq.
JULIANA GAITA, P.A.
2701 Boca Raton Blvd., Suite 107
Boca Raton, FL 33431

YOU ARE COMMANDED to appear before the Honorable Linda Babb, Judge of the Court, at the Robert D. Sumner Judicial Center, 38053 Live Oak Avenue, Room 106D, Dade City, Fl 33523 on October 5, 2015 at 12:00 p.m., to testify in this action. **If you fail to appear, you may be in contempt of court.**

You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to this subpoena as directed.

DATED on September 15, 2015

Matthew D. Weidner, Esq.
For the Court

By: /s/ Matthew D. Weidner
Matthew D. Weidner, Esq.
WeidnerLaw, P.A.
Attorney for Defendants
250 Mirror Lake Dr. N.
St. Petersburg, FL 33701
(727) 954-8752
service@mattweidnerlaw.com
FBN: 0185957

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this September 15, 2015 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties.

Weidner Law, P.A.
Counsel for Defendant
250 Mirror Lake Dr., N.
St. Petersburg, FL 33701
Telephone: (727) 954-8752
Designated Email for Service:
service@mattweidnerlaw.com

By: s/ Matthew D. Weidner
Matthew D. Weidner, Esq.
Florida Bar No. 0185957

SERVICE LIST

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GARY GASSEL, P.A.
2191 RINGLING BOULEVARD
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TELEPHONE (941) 952-9322 FACSIMILE (941) 365-0907

August 5, 2015

Matthew Weidner, Esquire
250 Mirror Lake Drive N
St Petersburg FL 33701

Re: U.S. Bank National Association v. Eric Wall Et. Al
Case No. 2011 CA-003117

Dear Matthew:

I have been asked to write you on this file by the Plaintiff. You and I have been in discussions for the last several months in a good faith effort to resolve this matter. Plaintiff has made one repeated offer after another to resolve this matter. As each offer is made the same is initially received and then rejected.

It seems that your client only wants to litigate this matter and will reject even the most advantageous offer which is contrary to a fair resolution.

With that said my client will consent to the entry of an order that will vacate the Final judgment and supplemental order entered in the trial court. The appeal would then be moot and dismissed. Thereafter the matter will then be reset for trial.

There is no base for you to refuse this offer and failure to accept to the same will be further evidence that your client is intent on continuing the litigation at any cost and will be evidence of our intent to resolve the matter and used in opposition to any claim for attorney's fees on behalf of Mr. Wall.

Upon receipt, if you have any further questions please feel free to call me. I remain

Very truly yours,

Gary I. Gassel

GIG:rd
cc Plaintiff
Juliana Gaita, Esquire