IN DISTRICT COURT OF FLORIDA
SECOND DISTRICT

SUSAN HODGINS,

Appellant,

vs.

U.S BANK TRUST, N.A., et al.

Appellees.
_____/

Case Number: 2D15-5155

L.T. Case Number:
2014CA000710XXCICI

APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE

Appellant, Susan Hodgins ("the Homeowner"), responds to this Court's December 31, 2015 order to show cause why her appeal against U.S. Bank Trust, N.A. ("the Bank") should not be dismissed and states:

INTRODUCTION

The facts of this case illustrate very clearly much of what is wrong in the current practice of foreclosure cases in Florida's trial courts. And while many cases present trial or appellate issues where reasonable minds could differ, this case features facts and application to long existing law that are so grossly erroneous that no reasonable mind could differ and appellate intervention is necessary. In this case, the most basic elements of a simple foreclosure were ignored or missed by the Bank. The Bank failed to join the parties who owned the property and who are absolutely essential to foreclosure. Next, the Bank failed to provide a proper legal description to tell the court what property it sought to foreclose.

The Homeowner did not seek to hold anything back from the Bank or the Defendant. In fact, as to the failure to join the necessary and independent Defendant, this was both raised as an affirmative defense in the Answer filed nearly nine (9) months before trial[1] and raised clearly by Defendant throughout the non-jury trial that was held before Hon. Cynthia Newton on September 4, 2015.

Indeed, at the close of evidence, the Homeowner made the same arguments that Bank's counsel was alerted to in pleadings and during the opening statement when she argued that the case should be dismissed, in part, because the Bank failed to join the indispensible parties to its mortgage foreclosure count and failed to present any evidence to support its mortgage reformation count:[2]

> MR. WEIDNER (counsel for the Homeowner): In any case, we'll get into that. The point is, they have not established the elements they need in their case in chief currently based on their own pleading. When you read the mortgage, Judge, that mortgage contains the parties that they need to join. They did not join them.
>
> Secondarily, as to this issue of legal description. Their complaint admits that they have a problem with their legal description. And they have just asked you to reform something or take notice of a legal description that there was absolutely no testimony at all about what legal description they want you to reform.

[1] This affirmative defense was imedded into the Homeowner's motion for rehearing. (App. 84).

[2] Transcript of Trial Before Judge Cynthia Newton, September 4, 2015 (App. 1).

After trial and at the court's direction, the Homeowner supplemented her oral argument with a written closing statement arguing that there was no evidence regarding the mortgage reformation count presented at trial and that the Bank failed to join indispensible parties to the foreclosure action.[3] Importantly, the Homeowner supplemented this closing the next day with the Fourth District's decision in *CitiBank, N.A. v. Villanueva*, 174 So. 3d 612 (Fla. 4th DCA 2015)[4] since the holding of that case was directly on point with the Homeowner's failure to join indispensible parties argument.

The Post Trial Conduct of the Bank Illustrates What Is Wrong With Foreclosures

Incredibly, rather than dispute any of the points the Homeowner made at trial, the Bank appears to concede those points in their post-trial filings. It is the post trial filings and the conduct of the Bank post-trial that deserves the most attention of this court. A careful examination of the Bank's Trial Memorandum of Law and particularly the response to the most important argument regarding the failure to joint indispensible parties and the failure to provide a correct legal description found at page three (3) of the Bank's Memorandum detail where the

[3] Defendant's Closing Argument and Motion for Involuntary Dismissal, September 8, 2015 (App. 3-7).

[4] Defendant's Notice of Filing Supplemental Authority, September 9, 2015 (App. 20-21).

Bank concedes these points, then asks the court to ignore them, "in the interests of justice, as well as judicial resources."[5]

In support of its arguments that the court should ignore long-standing law and the Bank's own responsibility to prepare for and present evidence and argument at trial, the Bank attaches to this memorandum several documents that the Bank asks the court to consider in support of its argument that a judgment should be entered. Surely this Court can understand that allowing a party to submit to a trial court judge unauthenticated and inadmissible documents and evidence never shown to or presented to the adverse party in no way serves any interest of justice....it is entirely the opposite.[6]

In response to the gross abuse of the Homeowner's right to confront evidence used against her found in the Bank's Memorandum, the Homeowner immediately moved to strike portions of the Bank's trial memorandum arguing that a closing argument is limited to facts or evidence adduced at trial, not hidden documents that were not subject to the test of cross-examination.[7]

Turning again to the substantive arguments contained within these competing post trial filings, as to the Homeowner's indispensible party argument,

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[5] Plaintiff's Trial Memorandum, September 8, 2015 (App. 24).

[6] Plaintiff's Trial Memorandum, September 8, 2015 (App. 27-30, 38-49).

[7] Defendant's Motion to Strike Portions of Plaintiff's Trial Memorandum of Law, September 9, 2015, ¶ 1 (App. 61).

the Bank admitted that the subject property was jointly owned by the Homeowner and Nicholas Hodgins – an individual who the Bank admitted was not named in the complaint or served with process.[8] And as for the Homeowner's reformation argument, the Bank incredulously argued that "[t]he correct legal description is undisputed" and attached several purported "exhibits" – an unauthenticated purported "final judgment" and several unauthenticated quit claim deeds – that it never introduced into evidence.[9] In fact, the Bank went so far as to argue that two of the unauthenticated deeds "must also be reformed"[10] despite never even pleading for this in its complaint.

In what may be one of the most bizarre and ill-conceived filings your undersigned has seen in any foreclosure case yet, the Bank filed a post-trial motion seeking to add Nicholas Hodgins alleging that it "later discovered" Mr. Hodgins had an interest in the property despite acknowledging that this interest stemmed from a quit claim deed recorded sixteen years ago.[11] Even more bizarre, the Bank suggests that the fact that your undersigned attorney represented the improperly

[8] Plaintiff's Trial Memorandum, September 8, 2015 (App. 24; 38-49). The Bank's "memorandum" also referenced and attached a purchase and assumption agreement (Exhibit A) which it also did not bother to admit into evidence at trial as "evidence" of its standing. (App. 22; 27-30).

[9] Plaintiff's Trial Memorandum, September 8, 2015 (App. 24-25).

[10] Plaintiff's Trial Memorandum, September 8, 2015 (App. 25).

[11] Motion to Add Party Defendant Nicholas Hodgins, September 8, 2010, ¶¶ 2, 4 (App. 59).

omitted defendant in a prior proceeding offered some excuse for the Bank's failure to join this party in the instant case.[12]

It should be noted once again that this bizarre statement ignores the fact that undersigned counsel did in fact alert the Bank by specifically pleading this as an affirmative defense. Despite these clear defects in the Bank's case, the trial court nevertheless entered judgment in its favor[13] while also entering an order granting the Bank's motion to add Mr. Hodgins as a party and "abating" the action until Mr. Hodgins is served.[14] As suggested, this Court should indeed direct its attention squarely to the Bank's Trial Memorandum, but also to their, "Motion to Add Party Defendant." The relief sought in this motion and the attached final judgment that was entered make no sense whatsoever and quite frankly no attorney should be filing pleadings and asking for relief from a judge that leads a judge into procedural error that only compounds the longer this case remains pending. Rather than lead this judge into this continuing error, the Bank should have conceded their many errors and joined the Homeowner and asking that this case be dismissed.

When the Bank failed to do so the Homeowner timely moved for rehearing, requesting that the trial court vacate its judgment and involuntarily dismiss the

[12] Plaintiff's Trial Memorandum, September 8, 2015 (App. 24).

[13] Final Judgment, September 11, 2015 (App. 67-74).

[14] Order Adding Party Defendant, September 11, 2015 (App. 75).

action.[15] Importantly, the Homeowner never requested a new trial, nor did the Bank ever file a motion for rehearing requesting a new trial.

And while the trial court did vacate its judgment in the order under review, it did not grant the Homeowner the relief she requested – dismissal.[16] The order also required "the parties" (and thus, presumably, the Homeowner) to "provide process to Nicholas Hodgins," concluding simply that "[w]hen appropriate, the Parties shall contact this Court to set a date for hearing to determine which issues shall be reheard."[17] Quite frankly none of this is based in any rule and it does not make any sense, so the Homeowner sought clarification. After her motion for clarification[18] was denied,[19] the Homeowner timely appealed.[20]

ARGUMENT

I. The order is not entirely favorable to the Homeowner – in fact, it is hardly favorable to the Homeowner at all.

It is undisputed that the trial court did not grant the Homeowner the relief she requested in her motion for rehearing since it did not dismiss the case. But even worse, the order actually grants the Bank a second bite at the apple after a

[15] Defendant's Motion for Rehearing, September 28, 2015 (App. 76-92).

[16] Order Granting in Part/Denying in Part Defendant's Motion for Rehearing, October 15, 2015 (App. 93-94).

[17] *Id*. at App. 93.

[18] Defendant's Motion for Clarification, October 23, 2015 (App. 95-97).

[19] Order Denying Motion for Clarification, October 30, 2015 (App. 98).

[20] Notice of Appeal, November 11, 2015 (App. 99-100).

failure of proof during trial. At best, then, the order is only partially favorable to the Homeowner and, at worse, entirely adverse. Clearly all of these continued proceedings are entirely adverse to Nicholas Hodgins who suffered a Final Judgment being recorded against him in the Official Records having had no opportunity to participate in the proceedings whatsoever. Under any scenario, the Homeowner has standing to appeal all that has gone wrong, and continues to go wrong in this case.

At most, the order is only partially favorable to the Homeowner since it did not grant her the dismissal she sought.

In *Holiday Isle, LLC v. McLeod*, 987 So. 2d 812 (Fla. 1st DCA 2008), the First District dismissed an appeal for lack of standing because while the appellant did not prevail on its request for dismissal, it successfully prevailed on its request to compel arbitration. *Id*. Here, however, the Homeowner's motion for rehearing requested only one remedy: dismissal of the action.[21] And in her motion for clarification, the Homeowner argued that any relief other than dismissal or affirmance of the judgment falls short of the rehearing rule, especially where the relief fashioned in the order was not requested by either party.[22]

[21] Defendant's Motion for Rehearing, September 28, 2015 (App. 90).

[22] Defendant's Motion for Clarification, October 23, 2015, ¶ 2 (App. 96).

Thus, at best, the order is only partially favorable to the Homeowner. And since a partially favorable order means that (at least) a portion of the order is adverse to the Homeowner's interests, she has standing to appeal. *Gomez Lawn Serv., Inc. v. The Hartford*, 98 So. 3d 212, 217 (Fla. 1st DCA 2012) (holding employer had standing to appeal order at least partially adverse to its interests).

The order is actually entirely adverse to the Homeowner because it permits the Bank a second bite at the apple.

In reality, however, the order is entirely adverse to the Homeowner since it allows the Bank a second bite at the apple after a full trial on the merits. And when viewed in this light, it is not hard to see how the order is actually adverse to the Homeowner. In all of her post-trial filings, including her closing statement;[23] her motion to strike the Bank's trial memorandum;[24] and her motion for rehearing,[25] the Homeowner extensively briefed how the Bank failed to prove its case at trial. If given a second bite at the apple, then, the Bank will be fully informed of its past mistakes and will know exactly how to attack the Homeowner's case.

But litigants are not permitted a "mulligan" or "do-over" when it comes to trial. *Pain Care First of Orlando, LLC v. Edwards*, 84 So. 3d 351, 355 (Fla. 5th

[23] Defendant's Closing Argument and Motion for Involuntary Dismissal, September 8, 2015 (App. 3-7).

[24] Defendant's Motion to Strike Portions of Plaintiff's Trial Memorandum of Law, September 9, 2015 (App. 61-66).

[25] Defendant's Motion for Rehearing, September 28, 2015 (App. 76-92).

DCA 2012) (Reversing damages award but finding new trial unwarranted because "[h]aving proceeded to judgment on legally insufficient proof, Appellee does not get a do-over."); *J.J. v. Dep't of Children & Families*, 886 So. 2d 1046, 1050 (Fla. 4th DCA 2004) ("No statute or rule permitted the trial court to give the [plaintiff] a "do-over" after a three and a half-day trial."). Therefore, when the trial court contended that the Homeowner's motion had merit, it should have dismissed the case.

Finally, by granting relief the Bank never even requested, the trial court gave the impermissible appearance of acting as the Bank's advocate. *Nationstar Mortg., LLC v. Marquez*, __ So. 3d __, 2015 WL 8932416, at * 3, n. 2 (Fla. 3d DCA December 16, 2015) ("A trial judge should rule on objections and motions made by counsel and never suggest or advise counsel how to try his or her case."). Thus, the trial court has effectively disqualified itself from considering the Bank's second bite of the apple anyway.

II. The order is more than an order denying a motion to dismiss.

Additionally, the order is more than a simple denial of a motion to dismiss. Indeed, it is an order reviewable under Fla. R. App. P. 9.130(a)(4) and (5) since it is, in essence, an order granting a new trial in a non-jury case. *Burris Chem., Inc. v. Whitted*, 485 So. 2d 37 (Fla. 4th DCA 1986) ("An order granting a motion for new trial in a civil case is appealable as a final judgment to the extent possible."). *See*

also CMR Distributors Inc. v. Resolution Trust Corp., 593 So. 2d 593, 594 (Fla. 3d DCA 1992) (holding that order under review was appealable under Fla. R. App. P. 9.130(a) because even though it denied a motion to dismiss the complaint, the order "effectively restrains, prior to entry of judgment, the funds of the guarantors" and therefore was an order granting an injunction.).

And not only is the under reviewable under Rule 9.130(a)(4) and (5), but it also should be reversed because the trial court lacked jurisdiction to order a new trial since this remedy was not requested by the parties or ordered by the trial court within 15 days after the judgment was filed.

By fashioning relief not requested by either party, the trial court acted in excess of its jurisdiction.

It is black letter law that if a party wishes to request a new trial or rehearing, it must do so within 15 days after the return of the verdict in a jury action or the date of filing of the judgment in a non-jury action. Fla. R. Civ. P. 1.530(b). Likewise, while a trial court has inherent authority to order a rehearing or a new trial for any reason that it might have granted a rehearing or new trial on a party's motion, this order must also be made within 15 days after entry of a final judgment or dismissal. Fla. R. Civ. P. 1.530(d); *Helmich v. Wells Fargo Bank, N.A.*, 136 So. 3d 763, 764-765 (Fla. 1st DCA 2014). But the trial court did not court enter an order ordering a new trial within 15 days after the judgment was filed. Thus, it

lacked jurisdiction to *sua sponte* order a new trial. *See Jankowski v. Dey*, 64 So. 3d 183, 189 (Fla. 2d DCA 2011) ("In addition, the circuit court erred in entering what amounted to an order amending the Former Wife's final judgment for attorney's fees several months after the judgment became final by redirecting payment of the award—in part—to DeCort and Stahl.").

Even worse, however, is the fact that the Bank never requested a new trial and the Homeowner did not request one in her motion for rehearing. But the trial court was without jurisdiction to grant relief not requested in the Homeowner's motion. *See Worthington v. Worthington*, 123 So. 3d 1189 (Fla. 2d DCA 2013) (trial court abused its discretion where post-judgment orders exceeded the scope of the relief requested in the motions). *See also Wachovia Mortg. Corp. v. Posti*, 166 So. 3d 944, 945 (Fla. 4th DCA 2015) ("A trial court is without jurisdiction to award relief that was not requested in the pleadings or tried by consent."); *Planned Parenthood v. MMB Properties*, 148 So. 3d 810, 812 (Fla. 5th DCA 2014) ("First, it is apparent that the trial court erred as a matter of law when it enjoined Planned Parenthood from providing sonographic and other diagnostic imaging services because MMB never requested this relief in its pleadings or in its motion for temporary injunction."); *Hordis Bros. Inc. v. Sentinel Holdings, Inc.*, 562 So. 2d 715, 716 (Fla. 3d DCA 1990) ("While it is undisputed that Hordis has a

manufacturing plant in Hillsborough County, it was error to issue an attachment where that relief was not requested in the motion.").

CONCLUSION

For the reasons and authorities cited herein, the Homeowner respectfully requests that the Court discharge its show-cause order.

Dated: January 11, 2016

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this January 11, 2016 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.

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