IN THE SUPREME OF FLORIDA

CASE NO.: SC06-88
4DCA CASE NO.: 4D 04-1350

MICHAEL GLYNN

Petitioner,

vs.

FIRST UNION NATIONAL BANK,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON JURISDICTION ON DISCRETIONARY REVIEW FROM A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL

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INTRODUCTION AND STATEMENT OF CASE

Petitioner asks this Court to accept jurisdiction in this case to determine whether the Fourth District Court of Appeal erred in affirming an order denying Petitioner's Motion to Vacate a Foreclosure Judgment and his objection to sale. The Fourth District Court of Appeal, in affirming the order of denial in which it withdrew its per curiam opinion and issued a written opinion, based its affirmance on the failure of the Petitioner to raise as an affirmative defense lack of standing citing Kissman v. Panizzi, 891 So.2d 1147, 1150 (Fla. 4th DCA 2005). The court further acknowledged in their opinion that although Petitioner was represented, there was no transcript of the proceedings, no motion to dismiss, answer, or affidavits filed in opposition. Lastly, the Fourth District Court of Appeals confirmed that fraud was never brought or argued as a grounds to set aside the final judgment and was raised for the first time on appeal contrary to Rolfs v. First Union National Bank of Florida, 874 So.2d 680 (Fla. 4th DCA 2004).

Petitioner stretches to find a conflict with Contractors Unlimited, Inc. v. Nortax, 833 So.2d 286 (Fla. 5th DCA 2002) and the Supreme Court cases of Marianna & B.R. Co. v. Maund, 62 Fla. 538, 56 So. 670 (Fla. 1911) and Voges v. Ward, 123 So. 785 (Fla. 1929). Petitioner does not directly address the Fourth District Court of Appeals opinion regarding the affirmance. The

cases cited by Petitioner do not directly conflict with the Fourth District Court of Appeals' opinion in affirming the denial of the Petitioner's Motion to Vacate the Final Judgment of Foreclosure. Petitioner stretches to find the conflict and reverts to the record and commentary, devoid in the record, in attempting to create a conflict.

SUMMARY OF ARGUMENT

Florida rules and case law both provide that if the defense of lack of standing was not raised, it is waived. Petitioner fails to address this issue in which the Fourth District rendered their opinion. The District Court found the Petitioner did not raise standing, did not file a motion to dismiss, did not answer, nor file affidavits in opposition even though represented by counsel. Additionally, issues were raised for the first time on appeal and the file devoid of any transcripts regarding the commentary of events and statements made by the trial court.

None of the cases cited by the Petitioner exhibit direct conflict with the decision rendered by the Fourth District Court of Appeal. The Fourth District did not render a decision that conflicts with any case or rule of law. The Fourth District Court determined that the Petitioner failed to raise the defense of the lack of standing and brought forth issues for the first time on appeal – nothing more. There is no basis for the Court to take this case. There is no confusion in the law or conflict among districts or with this Court.

ARGUMENT

ISSUE I:

THE DISTRICT COURT FOLLOWED ESTABLISHED PRECEDENT IN DECIDING TO AFFIRM THE DENIAL OF THE MOTION TO VACATE THE JUDGMENT OF FORECLOSURE AND OBJECTION TO SALE BY THE TRIAL COURT

It is well established that the defense of lack of standing must be brought as an affirmative defense. Fl. R. Civ. Pro. 1.140 (b) and 1.140 (h), Schuster v. Blue Cross and Blue Shield of Florida, Inc., 843 So.2d 909 (Fla. 4th DCA 2003). Petitioner did not file a motion to dismiss, answer, or opposing affidavits even though they had counsel. Additionally, Petitioner did not raise the issue of fraud until he appealed contrary to Rolfs v. First Union Nat'l Bank, 604 So.2d 1269, 1270 (Fla 4th DCA 1992).

The Fourth District Court of Appeals relied upon Kissman v. Panizzi, 891 So.2d 1147, 1150 (Fla. 4th DCA 2005) in rendering its opinion as the court there stated, "There is no question that lack of standing is an affirmative defense that must be raised by the Defendant and that the failure to raise it generally results in waiver." The First District Court of Appeal in Chemical Residential Mortgage v. Rector, 742 So.2d 300 (Fla. 1st DCA 1998) *review denied*, also reversed an order vacating a final judgment of foreclosure where the mortgagors failed to timely respond to the complaint

and waived any denial of the complaint's allegations that the mortgagee was the owner and holder of the note and that they had defaulted on the note and mortgage. Petitioner purposely omits discussion of the case of Kissman v. Panizzi, 891 So.2d 1147 (Fla 4th DCA 2005), as the District Court's decision does not conflict with the cases cited by Petitioner nor any rule of law.

Petitioner weaves the record, commentary, and statements allegedly made by the trial judge, without transcripts, in an effort to confuse the issues and create conflict and afford importance to the case. Petitioner boldly states the Fourth District Court of Appeals' decision directly and expressly conflicts with the Fifth District Court of Appeals' decision in Contractors Unlimited, Inc. v. Nortax, 833 So.2d 286 (Fla. 5th DCA 2002) with the point of law that when suing on an instrument, it (the Plaintiff) must attach and own the cause of action. The decision rendered by the Fourth District Court of Appeals rested on the waiver of defenses, *not* on the failure to attach an instrument. In fact, the copies of the instruments sued upon, the note and mortgage in this case, were attached to the complaint.

The Fourth District Court of Appeals found that the records reflected that Respondent was in possession of the note at the time it was lost and that the trial court re-established the note pursuant to Florida Statutes 71.011. Lastly, the District Court acknowledged the fact that although the

assignment from its servicing agent was not executed until after suit was filed, equitable transfer to Respondent occurred prior to the filing of the complaint.

As a result, the District Court followed firmly established case law, Johns v. Gillian, 134 Fla. 575, 184 So. 140 (1938), stating that any form of assignment of a mortgage that transfers real and beneficial interest in the securities unconditionally to an assignee will entitle him to an action in foreclosure, ***or*** if no written assignment, the Plaintiff could foreclose in equity upon proof of purchase of the debt. More recently the case of Jeff-Ray Corporation v. Jacobson, 566 So.2d 885 (Fla. 4th DCA 1990), cited by Petitioner for the premise that a foreclosure action cannot be based on an alleged assignment of mortgage that did not exist until four months after the complaint, relying on Marianna & B.R. Co. v. Maund, 62 Fla. 538, 56 So. 670 (Fla. 1911), was further explained and aligned with Marianna, in WM Specialty Mortgage , LLC v. Salomon, 874 So.2d 680 (Fla. 4th DCA 2004). The Fourth District Court in WM Specialty, in reliance upon Johns v. Gillian, 134 Fla. 575, 184 So. 140 (1938), reversed the lower court as it dismissed the complaint, stating that the lender may be able to show that equitable transfer of the mortgage occurred prior to the filing of the complaint and prior to the formal execution of the assignment of mortgage.

CONCLUSION

For the foregoing reasons, First Union would suggest that no conflict exists and respectfully requests that this Court decline to exercise its discretionary jurisdiction under Art. V. § 3 (b) (3) of the Constitution of Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief on Jurisdiction was mailed this ____ day of February, 2006, via U. S. Mail, to: JOHN PENSON, ESQ., 9999 N.E. 2nd Ave., Ste 300, Miami Shores, FL 33138; DENNIS ROSE, ESQ., 9495 SW 72nd Street, Suite B-285, Miami, FL 33173; JOHN DOE and JANE DOE, 6800 SW 3rd St, Margate FL 33063; CITY OF TAMARAC c/o Vanessa T. Steinerts, 7525 NW 88th Ave., Tamarac, FL 33321.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Answer Brief on Jurisdiction is in compliance with Fla.R.App.9.210(a)(2) font requirements. The answer brief has been written in Times New Roman 14 point font.

_____

Patricia A. Arango