Third District Court of Appeal

State of Florida

Opinion filed December 4, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-2102
Lower Tribunal No. 16-608

Nadine Tanis, et al.,
Appellants,

vs.

HSBC Bank USA, N.A., etc.,
Appellee.

An appeal from the Circuit Court for Miami-Dade County, Beatrice Butchko, Judge.

Pomeranz & Associates, P.A., and Mark L. Pomeranz (Hallandale), for appellants.

Greenberg Traurig, P.A., Kimberly S. Mello (Orlando), and Joseph H. Picone (Tampa), for appellee.

Before FERNANDEZ, LOGUE, and MILLER, JJ.

MILLER, J.

Appellants, Nadine Tanis and the Heirs in Estate of Hans Tanis (the "Heirs"), challenge an order overruling their joint verified objection to a judicial foreclosure sale. On appeal, appellants contend the failure to inform a non-record attorney of the rescheduled judicial sale date violated their right to procedural due process. Because appellants were adequately furnished with notice of the sale, and the ensuing objection was both unfounded and untimely, we affirm the exercise of discretion by the lower tribunal.

FACTS AND BACKGROUND

On February 16, 2007, Hans Tanis negotiated an adjustable rate promissory note in favor of IndyMac Bank, F.S.B. ("IndyMac"), a federally chartered thrift institution. The note was secured by a contemporaneously executed mortgage encumbering Mr. Tanis's residential property located in North Miami, Florida.

On March 9, 2012, Mr. Tanis conveyed the same property by quitclaim deed to Nadine Tanis. The following day, he passed away. Less than one year later, IndyMac declared a default under the terms of the note and mortgage.

In early-2016, appellee, HSBC Bank USA, National Association, as Trustee for Deutsche ALT-A Securities Mortgage Loan Trust, Series 2007-OA2 Mortgage Pass-Through Certificates (the "Trustee"), initiated the foreclosure proceedings below against Ms. Tanis and the Heirs. Attorney James Jean-Francois filed a notice of appearance and responsive pleadings on behalf of Ms. Tanis. Thereafter, the trial

court appointed an active member in good standing of the Florida Bar to serve as guardian ad litem on behalf of the Heirs (the "Guardian"). The Guardian filed an answer generally denying the allegations set forth within the complaint.

In 2017, after conducting a duly noticed non-jury trial, the lower court entered a final judgment of foreclosure in favor of the Trustee. A judicial foreclosure sale was subsequently slated for February 26, 2018. Three days prior to the scheduled sale, attorney Mark Pomeranz filed an emergency motion for continuance on behalf of Ms. Tanis and the Heirs. Pomeranz neither filed a notice of appearance nor sought to substitute as counsel of record.

The trial court granted the motion, in open court, and rescheduled the sale for May 29, 2018. The Trustee was the successful bidder at the sale. On June 1, 2018, the clerk of courts filed the certificate of sale and served the same on both Jean-Francois and the Guardian. On June 14, 2018, the clerk issued the certificate of title. On July 2, 2018, Pomeranz filed a verified objection to the sale, citing his failure to receive notice of the rescheduled sale date and the pursuit of "loss mitigation."[1] The lower tribunal convened a hearing on the objection and, ultimately, denied relief. The instant appeal ensued.

STANDARD OF REVIEW

[1] Neither Ms. Tanis nor the Heirs verified the objection.

"It may be stated generally that there is a measure of discretion in a court of equity, both as to the manner and the conditions of [a foreclosure] sale, as well as to ordering or refusing a resale." C. G. Ballentyne & Honolulu Rapid Transit & Land Co. v. Smith, 205 U.S. 285, 290, 27 S. Ct. 527, 529, 51 L. Ed. 803 (1907). Consequently, "[t]rial court[ ] judgments pertaining to set asides of judicial foreclosure sales are now, as they always have been, subject to review by way of an abuse of discretion standard." All Ctys. Surplus LLC v. Flamingo S. Beach I Condo. Ass'n, Inc., 211 So. 3d 1096, 1098 (Fla. 3d DCA 2017) (quoting Arsali v. Chase Home Fin. LLC, 121 So. 3d 511, 519 (Fla. 2013)). However, "[w]e review a claim of deprivation of procedural due process de novo." Pena v. Rodriguez, 273 So. 3d 237, 240 (Fla. 3d DCA 2019) (citation omitted).

LEGAL ANALYSIS

"Under Florida law, actions involving foreclosure of property are brought in courts of equity." Arsali, at 517; see § 702.01, Fla. Stat. (2019) ("All mortgages shall be foreclosed in equity."). Hence, "[a]n objection to a foreclosure sale 'must be based upon a cause which is adequate to justify the equitable relief' of setting aside the sale." Residential Mortg. Servicing Corp. v. Winterlakes Prop. Owners Ass'n, Inc., 169 So. 3d 253, 256 (Fla. 4th DCA 2015) (quoting Skelton v. Lyons, 157 So. 3d 471, 473 (Fla. 2d DCA 2015)).

In adjudicating a postsale objection, the court is tasked with ensuring that "no wrong has been accomplished in and by the manner in which [the sale] was conducted." Pewabic Mining Co. v. Mason, 145 U.S. 349, 356, 12 S. Ct. 887, 888, 36 L. Ed. 732 (1892). Accordingly, those equitable factors sufficient to support relief from a sale include "gross inadequacy of consideration, surprise, accident, or mistake . . . , and irregularity in the conduct of the sale." Lawrence v. Nationstar Mortg., LLC, 197 So. 3d 150, 151 (Fla. 4th DCA 2016) (alteration in original) (quoting Moran-Alleen Co. v. Brown, 98 Fla. 203, 203, 123 So. 561, 561 (1929)).

Despite the materiality of equitable considerations, the exercise of judicial discretion is tempered by the statutory time limits embodied within chapter 45, Florida Statutes (2019). Section 45.031(5), Florida Statutes (2019), provides, "[i]f no objections to the sale are filed within [ten] days after filing the certificate of sale, the clerk shall file a certificate of title." Thereafter, upon the filing of the certificate of title, "the sale shall stand confirmed." § 45.031(6), Fla. Stat.

In the instant case, appellants concede their objection was untimely and the sale was duly confirmed, but contend they are exempted from the previously expounded time limits. Specifically, they claim the failure to serve Pomeranz with notice of the rescheduled sale date deprived them of procedural due process.

"No person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const.; see Amend. XIV, § 1, U.S. Const. "Due process

mandates that in any judicial proceeding, the litigants must be afforded the basic elements of notice and opportunity to be heard." E.I. DuPont De Nemours & Co. v. Lambert, 654 So. 2d 226, 228 (Fla. 2d DCA 1995) (citing Cty. of Pasco v. Riehl, 635 So. 2d 17 (Fla. 1994); Cavalier v. Ignas, 290 So. 2d 20 (Fla.1974)); see Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246, 64 S. Ct. 599, 606, 88 L. Ed. 692 (1944) ("The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.").

We first examine whether appellants were legally entitled to receive notice through Pomeranz. As correctly asserted by the Trustee, although the trial court granted the emergency motion to postpone the foreclosure sale at the behest of Pomeranz, "[i]t is the notice of appearance of an 'additional attorney' in accordance with [the Rules of Judicial Administration] which grants [an] additional attorney official recognition in the eyes of the court and the other parties."[2] Pasco Cty. v. Quail Hollow Props., Inc., 693 So. 2d 82, 84 (Fla. 2d DCA 1997). Because appellants were represented from the inception of litigation by Jean-Francois and the Guardian, Pomeranz was obligated to file a notice of appearance as co-counsel or obtain an order authorizing his substitution as counsel in order to secure the formal

[2] Under well-established jurisprudence, both the emergency motion and objection to the sale were nullities, as Pomeranz had not appeared as counsel of record. See Bortz v. Bortz, 675 So. 2d 622 (Fla. 1st DCA 1996).

status of counsel of record. See Fla. R. Jud. Admin. 2.505(e). In the absence of such action, the Trustee and clerk were entitled to notice the existing counsel of record, Jean-Francois and the Guardian, and neither entity toiled under a further duty to apprise Pomeranz of future case activity. See Niki Unlimited, Inc. v. Legal Servs. of Greater Miami, 483 So. 2d 46, 48 (Fla. 3d DCA 1986); see also Fla. R. Civ. P. 1.080; Fla. R. Jud. P. 2.516.

Nonetheless, this does not end our analysis, as appellants' "right to be heard ha[d] little reality or worth unless" they were informed of the sale. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950). Crucially, here, "[t]here is no averment that [appellants] did not have **actual notice** of the proceedings against [them] in time to protect [their] rights." McQuiddy v. Ware, 87 U.S. 14, 18, 22 L. Ed. 311 (1873). As borne out by the record below, notice of the rescheduled sale was filed with the court and published in the Daily Business Review for two consecutive weeks, in full conformity with prevailing statutory requirements. See § 45.031(2), Fla. Stat. ("Notice of sale shall be published once a week for [two] consecutive weeks in a newspaper of general circulation, as defined in chapter 50, published in the county where the sale is to be held. The second publication shall be at least [five] days before the sale.").

While "[i]t is true that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected

to convey a warning," here, the record supports other indicia of notice. Mullane, 339 U.S. at 316, 70 S. Ct. at 658. Firstly, it is indisputable that, having been represented from the advent of litigation, appellants were well-informed of the pendency of the action. See Fla. R. Jud. Admin. 2.516(b) ("When service is required or permitted to be made upon a party represented by an attorney, service must be made upon the attorney unless service upon the party is ordered by the court."). Indeed, as evidenced by the service list, both Jean-Francois and the Guardian were furnished with the certificate of sale, thus, notice was conclusively imputed to appellants. See Fla. R. Jud. Adm. 2.505(h) ("[A]ny notice by or to the attorney or act by the attorney in the proceeding shall be accepted as the act of or notice to the client."); Voss v. Household Realty Corp., 687 So. 2d 972, 972 (Fla. 3d DCA 1997) ("We need not consider whether the lack of such notice may, under the law, justify the relief granted or any of the other arguments for reversal because the record demonstrates that appropriate notice was in fact given to the attorney who had filed an appearance in the trial court on behalf of the appellee."); see also Grainger v. Wald, 29 So. 3d 1155, 1158 (Fla. 1st DCA 2010) ("[R]egardless of whether the attorney served was labeled the 'probate' or the 'personal injury' attorney, the record reflects that [appellee] had actual notice . . . [Appellee] received all process that was due.").

Secondly, as the trial court concomitantly cancelled the initial sale and assigned the new sale date, in a single, written order, the rescheduled sale date was both reasonably anticipated as forthcoming and readily ascertainable. See Emerald Coast Utils. Auth. v. Bear Marcus Pointe, LLC, 227 So. 3d 752, 757-58 (Fla. 1st DCA 2017) (imputing a duty upon counsel to actively check the court's electronic docket where it was known "the trial court would be issuing" an order on a pending motion); Contreras v. Mendez, 194 So. 3d 396, 397 (Fla. 3d DCA 2016) (This "is a case in which the defendant initially appeared and defended, permitted his counsel to withdraw, and then neglected to monitor the publicly-available docket or assure that an address of record for service of papers was current and reliable. We have repeatedly cautioned . . . that such behavior is fraught with peril.") (citations omitted).

Thirdly, we have not been furnished with a transcript of the hearing conducted below on the objection. Thus, we decline to import error in the absence of a demonstration of the same. See Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979) ("In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error . . . Without a record of the trial proceedings, the appellate court can not properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory.").

CONCLUSION

In conclusion, adhering to both the time parameters imposed by our legislative branch and the adage that "it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto," as appellants were apprised of the pendency of the action, thus afforded an opportunity to object, we ascertain no abuse of discretion in the ruling of the trial court. Mason, 145 U.S. at 356, 12 S. Ct. at 888; see Igbinadolor v. Deutsche Bank Nat'l Tr. Co., 215 So. 3d 192 (Fla. 3d DCA 2017) ("We . . . dismiss the appeal as untimely filed as to the March 31, 2016 foreclosure sale, where no objection was filed within ten days of date of sale pursuant to section 45.031(8), Florida Statutes."); Ryan v. Countrywide Home Loans, Inc., 743 So. 2d 36, 38 (Fla. 2d DCA 1999) ("[B]ecause [appellee] did not file a timely motion challenging the judicial sale . . . the trial court was without authority to set aside the sale.").

Affirmed.