

Third District Court of Appeal

State of Florida

Opinion filed July 10, 2019.

Not final until disposition of timely filed motion for rehearing.

No. 3D18-2604

Lower Tribunal No. 18-20108

**Grand Palace View, LLC,
and Moises Wahnou,**
Appellants,

vs.

5 AIF Maple 2, LLC,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, William Thomas, Judge.

Manos • Schenk, PL, and Tom J. Manos, for appellants.

Ghidotti | Berger LLP, Chase A. Berger and Jason L. Duggar, for appellee.

Before EMAS, C.J., and LINDSEY, and GORDO, JJ.

LINDSEY, J.

Grand Palace View, LLC and Moises Wahnnon appeal a non-final order, entered prior to an answer to the complaint being filed, granting immediate possession of real property in an action for mortgage foreclosure, breach of contract, and breach of guaranty. Because a mortgagee in Florida generally has no right to possess the property before foreclosure and because the order to show cause procedures outlined in section 702.10, Florida Statutes (2018), were not followed, we reverse.

I. BACKGROUND

Appellee 5 AIF Maple 2, LLC (“Maple”) filed a three-count Complaint against Grand Palace View, LLC (“Grand Palace”) and Moises Wahnnon (“Wahnnon”), alleging causes of action for foreclosure, breach of contract, and breach of guaranty. Maple alleged that on December 8, 2017, Wahnnon and Grand Palace executed a note and mortgage in favor of an entity named ICG10 Capital, LLC (“ICG10”).¹ In the complaint Maple asserted that “Plaintiff is entitled to enforce the note and mortgage pursuant to Florida Statute 673.3011.”² Maple further alleged

¹ ICG10 is not the plaintiff in this lawsuit.

² **673.3011 Person entitled to enforce instrument.**—The term “person entitled to enforce” an instrument means:

- (1) The holder of the instrument;
- (2) A nonholder in possession of the instrument who has the rights of a holder; or
- (3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to s. 673.3091 or s. 673.4181(4).

A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

that Grand Palace and Wahnnon were in default on the note and mortgage and owed \$2,950,000.00 plus interest, expenses, fees, and costs. Shortly after filing the complaint, Maple filed a motion for possession of property. Within the time for the filing of an answer, Grand Palace and Wahnnon filed a motion to dismiss for lack of standing.

A non-evidentiary hearing on Maple's motion for possession of property took place on a five-minute motion calendar setting. The trial court deferred ruling on the motion, reasoning that the issue of standing had to be adjudicated first to determine whether Maple had a right to even file the lawsuit. Accordingly, the hearing was reset for a five-minute motion calendar on the motion to dismiss. At the second hearing, the trial court denied the motion to dismiss and then proceeded to address Maple's motion for immediate possession of property, even though that motion was not noticed for hearing that day. Maple argued that pursuant to the language of the mortgage contract, it was entitled to an automatic right of possession of the property upon a default by the mortgagor, and it did not have to wait for a foreclosure judgment or sale.

In response, Grand Palace and Wahnnon argued that such language was unenforceable under Florida law as Florida is a "lien-theory" state as opposed to a "title-theory" state. As such, the mortgagee only has lien rights on the secured property and may not exercise any writ of possession or ejectment until a foreclosure

sale has been certified by the Clerk of Court. Grand Palace and Wahnnon further asserted that courts cannot enforce illegal contracts on matters governed by statutes intended to protect the public. The court then inquired whether this was a commercial property or a residential property and mentioned the expedited foreclosure statute, seemingly referring to section 702.10, Florida Statutes. Counsel for Grand Palace and Wahnnon advised that the subject property is a residence and that Wahnnon resides there. Counsel for Maple disagreed and asserted that this is a commercial mortgage because the home was purchased in the name of an LLC and not in an individual's name, even though the guarantor on the note and mortgage lives in the house. The court then entered an order for possession of the property within thirty days reasoning that since Wahnnon signed the agreement as an LLC and had counsel, he was bound by his agreement.³

This timely appeal followed.

II. JURISDICTION

Florida Rule of Appellate Procedure 9.130(a)(3)(C)(ii) (Proceedings to Review Non-Final Orders and Specified Final Orders) provides:

(3) Appeals to the district courts of appeal of nonfinal orders are limited to those that:

....

(C) determine:

....

³ The trial court also granted a stay pending review by this Court.

(ii) the right to immediate possession of property, including but not limited to orders that grant, modify, dissolve, or refuse to grant, modify, or dissolve writs of replevin, garnishment, or attachment[.]

Because the non-final order on appeal concerns immediate possession of property, we have jurisdiction.

III. STANDARD OF REVIEW

The trial court's order would result in the immediate transfer of possession and ownership of the subject property, even though issues remain on the foreclosure claim. Because the issue presented is purely one of law, the correct standard of review is *de novo*. See We Help Cmty. Dev. Corp. v. Ciras, LLC, 144 So. 3d 578, 581 (Fla. 4th DCA 2014) (“Because the parties’ arguments turn on an interpretation of section 702.10(2)(f), our standard of review is *de novo*.”); Shubh Hotels Boca, LLC v. Fed. Deposit Ins. Corp., 46 So. 3d 163, 165 (Fla. 4th DCA 2010).

IV. ANALYSIS

“[A]ll deeds of conveyance conveying or selling property for the purpose, or with the intention, of securing the payment of money, shall be deemed and held as mortgages, and shall be subject to the same rules of foreclosure and the same regulations and restrictions as are prescribed by law in relation to mortgages.” Folks v. Chesser, 145 So. 602, 602-03 (Fla. 1932). The law generally recognizes two theories of mortgages: the title theory and the lien theory. Martyn v. First Fed. Sav. & Loan Assoc., 257 So. 2d 576, 577 (Fla. 4th DCA 1971). Under the title theory,

the mortgagee has title at law, meaning that, while not in possession, the mortgagee is actually the owner. Id. “[U]nder the lien theory, the mortgagee has neither title nor the right of possession.” Id. Florida has followed the lien theory since 1853. Id. As such, under Florida law, a mortgage is considered a “lien on the property . . . and not a conveyance of the legal title or of the right of possession.” § 697.02, Fla. Stat. (2018).

Moreover, section 702.10, Florida Statutes, was originally enacted in 1992 to accelerate the foreclosure process. Amended in 2013, the current version of the statute creates an order to show cause procedure that applies in two situations. Section 702.10(1) allows a lienholder in a foreclosure action to request an order to show cause for the entry of a final judgment. Section 702.10(2) allows the plaintiff to request an order to make payments during the pendency of the proceedings or an order to vacate the premises. Importantly, section 702.10(2) is unavailable for actions involving owner-occupied residential real estate. Specifically, section 702.10(2) provides as follows:

702.10. Order to show cause; entry of final judgment of foreclosure; payment during foreclosure. —

. . . .

(2) Except as provided in paragraph (i), in any action for foreclosure, *other than owner-occupied residential real estate*, in addition to any other relief that the court may award, the plaintiff may request that the court enter an order directing the mortgagor defendant to show cause why an order to make payments during the pendency of

the foreclosure proceedings or an order to vacate the premises should not be entered.

(Emphasis added). The statute then sets forth the following requirements for the order to show cause:

(a) The order shall:

1. Set the date and time for hearing on the order to show cause. However, the date for the hearing may not be set sooner than 20 days after the service of the order. If service is obtained by publication, the date for the hearing may not be set sooner than 30 days after the first publication.

2. Direct the time within which service of the order to show cause and the complaint shall be made upon each defendant.

3. State that a defendant has the right to file affidavits or other papers at the time of the hearing and may appear personally or by way of an attorney at the hearing.

4. State that, if a defendant fails to appear at the hearing to show cause and fails to file defenses by a motion or by a verified or sworn answer, the defendant is deemed to have waived the right to a hearing and in such case the court may enter an order to make payment or vacate the premises.

5. Require the movant to serve a copy of the order to show cause on the defendant in the following manner:

a. If a defendant has been served with the complaint and original process, service of the order may be made in the manner provided in the Florida Rules of Civil Procedure.

b. If a defendant has not been served with the complaint and original process, the order to show cause, together with the summons and a copy of the complaint, shall be

served on the defendant in the same manner as provided by law for original process.

Id.

Here, the order granting Maples's motion for possession was entered at a five-minute motion calendar during a hearing noticed for Grand Palace and Wahnnon's motion to dismiss. Thus, it is undisputed that the order to show cause requirements of section 702.10(2) were not met. However, what was disputed was whether the case involved owner-occupied residential real estate or commercial real estate. Without taking evidence or considering the requirements of section 702.10, the trial court found, based on the arguments of counsel, that the subject property was a commercial property and that Maple was entitled to immediate possession prior to Grand Palace and Wahnnon having filed an answer to the complaint. This was error. Accordingly, we reverse and remand for proceedings consistent herewith.

Reversed and remanded.