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Countrywide Home Loans, Inc. v. Kim, 898 So.2d 250 (Fla. 4th DCA 2005)

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BCML Holding, LLC v. Wilmington Trust, N.A., 201 So.3d 109 (Fla. 3rd DCA 2015)

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Maki v. NCP Bayou 2, LLC, 368 So.3d 1081 (Fla. 6th DCA 2023)

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446 So.2d 1107
Thomas A. DOZIER, as Personal Representative of the Estate of Floretta Snyder, and Mary R. Fletcher, Appellants,
v.
Suzanne SMITH, Appellee.
No. 83-1092.
District Court of Appeal of Florida, Second District.
Feb. 15, 1984.
Rehearing Denied March 21, 1984.

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Charles E. Early of Early & Early, Sarasota, for appellants.

James R. Hutchens of McDaniel, Ball & Hutchens, P.A., Sarasota, for appellee.

OTT, Chief Judge.

Thomas Dozier, as personal representative of the Estate of Floretta Snyder, and Mary R. Fletcher appeal from a probate court order revoking a will duly admitted to probate on the ground of forgery. We hold that the evidence was insufficient as a matter of law to support the court's finding of a forgery.

Floretta Snyder died on September 23, 1981. She was survived by one daughter, two brothers, and five sisters. A will, dated July 28, 1981, was duly admitted to probate. The decedent's entire estate was left to appellant Mary Fletcher, one of decedent's five sisters. The will was drafted by appellant Fletcher's husband, attorney Philip Fletcher. Thomas Dozier, a lawyer who handled the estate of the testator's deceased husband, was named as executor.

Appellee, the decedent's daughter, petitioned for revocation of the will. Appellee filed a five-count petition for revocation of probate of will: Count I, forgery and not the true signature of decedent; Count II, lack of testamentary capacity or mental competence of decedent; Count III, will not executed in accordance with section 735.502, Florida Statutes (1981); Count IV, will procured by undue influence; Count V, execution procured by fraud. After discovery and prior to pretrial conference, the appellee voluntarily withdrew all counts except Counts I and III--forgery and failure to comply with the formalities of execution required by law. At trial, no testimony was offered to show that the requirements of section 732.502, Florida Statutes (1981), were not met. After a trial without jury, the probate court revoked the will as a forgery and ordered the matter to proceed intestate.

According to attorney Fletcher, his sister-in-law entered his law office on July 28, 1981, demanding that he draw a will for her prior to an upcoming flight to Las Vegas with her sister, appellant Fletcher. When informed that the sole beneficiary was his wife, attorney Fletcher informed the decedent that he could not draft the document but finally consented. He instructed her to see attorney Thomas Dozier about redrafting the will upon her return from Las Vegas. While the decedent waited, attorney Fletcher used a typewriter to fill in the blank spaces of a commercial will form himself. He read the will to the decedent and placed it in front of her. She indicated that the will was satisfactory. Art Barth, Jay Baerveldt, and Thomas Paine entered the room. The decedent signed the will with a felt tip pen. Ms. Baerveldt, Mr. Paine, and attorney Fletcher then signed the will as witnesses. The signatures of the testator and the witnesses to the will were notarized by Barth, but not in such a manner as to make the document self-proving. [1]

Both Ms. Baerveldt and Mr. Paine arrived at attorney Fletcher's office on July 28, 1981, to attend to their own business. Both were employees of appellant Fletcher in another business operation at the time the will was executed. Mr. Paine had been discharged by appellant Fletcher prior to

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the time of trial. Both were familiar with the decedent and testified that the decedent personally published and executed the will in their presence.

Mr. Barth was called as a witness by appellee. Apart from the will execution ceremony, he had never met the decedent. He assumed her identification as correct based on the attorney's introduction and the fact that everyone else seemed to know her. At trial, he identified the decedent from a photograph taken during her Las Vegas vacation in August, 1981. Strangely, Mr. Barth was called as a witness at trial by appellee and there was no effort to establish him as a hostile witness.

Appellee presented the testimony of two handwriting experts, George Mesnig and Richard Casey, who testified unequivocably that the signature of the decedent on the will was a forgery. Mr. Mesnig indicated that use of a felt tip pen tends to hide the possibility of a forgery.

Ordway Hilton, a handwriting expert of notable acclaim, concluded that the signature of the decedent found on the will was "most probably" written by the same person that wrote the decedent's established exemplars. The second of appellants' handwriting experts, Ronald Dick, was not able to reach a definite conclusion, but indicated that the evidence leaned quite heavily toward the signature being genuine.

Irene Laurie, a close friend of the decedent, stated that the decedent came to her home during the week prior to her death and indicated that the Fletchers were "trying to get [her] to make out a will."

There was other limited but conflicting evidence on the consistency of the will with the decedent's previously expressed dispositional intentions. In that regard, it was uncontradicted that appellant Fletcher was the only one of decedent's siblings who had maintained any relationship with decedent for years. Appellee and decedent had not maintained a close relationship, since appellee had been taken away from decedent when a small child. However, such testimony was incidental and sketchy at best, as the trial court ruled it was irrelevant to the issue of forgery.

The probate court granted appellee's petition for revocation of probate of the will. In doing so, the probate court relied on the two expert witnesses presented by appellee, the unusual circumstances of the will execution--the fact that the will was prepared by the husband of the sole beneficiary named in the will, the decedent signed the will with a felt tip pen, the unnecessary repetition of the bequest to appellant Fletcher in the second paragraph, and the unnecessary use of a notary public--and the failure of the testator to mention her siblings or lineal descendant in the will.

The decision of the probate court is affirmed if there is substantial competent evidence to support the finding of the probate judge and the judge did not misinterpret the legal effect of the evidence as a whole. In re Estate of Krugle, 134 So.2d 860 (Fla. 2d DCA 1961).

In Krugle, a will admitted to probate was challenged on the ground that it was a forgery. The probate court found that the will admitted to probate was a forged instrument. On appeal, this court stated that a handwriting expert's testimony that a document was a forgery, standing alone, and without corroboration by circumstances indicative of forgery or fabrication, was legally insufficient to overcome the testimony of unimpeached eyewitnesses. 134 So.2d at 862. Finding the lack of such corroborating circumstances, this court reversed the factual finding of the probate court.

We believe the instant case falls within the rule of Krugle. Although the circumstances of the will execution cited by the probate court may be considered superfluous or even peculiar, we find that they and the other evidence do not suggest a forgery or fabrication of the decedent's signature. The circumstances may, somewhat remotely, suggest undue influence, a will inconsistent with a previous expression, or overreaching or other breach of ethical or legal standards. However, appellee

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expressly withdrew such issues and agreed that the only issues to be tried were whether or not the signature was genuine and whether the will was executed with the requisite testamentary formalities. We find that the testimony of the two handwriting experts is the only evidence of forgery. The expert testimony, standing alone, is insufficient to overcome the unimpeached testimony of the several eyewitnesses as a matter of law. None of the other evidence presented by appellee even remotely dealt with whether or not decedent signed the will or was the person presented to the witnesses and the notary as the testator. Moreover, there was no significant impeachment of the testimony or truth and veracity of the eyewitnesses or the notary.

Accordingly, the judgment of the probate court is REVERSED with instructions to deny appellee's petition to revoke probate of the will and to reinstate the probate of the will.

GRIMES and CAMPBELL, JJ., concur.

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1 See section 732.503, Florida Statutes (1981), for the requirements to make a will or codicil self-proving.

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72 So.2d 657
MORRISON et al.
v.
BYRD et al.
Supreme Court of Florida, En Banc.
May 11, 1954.
Rehearing Denied June 5, 1954.

Adams & Wade, Crestview, for appellants.

Jerry Sullivan, Pensacola, for appellees.

DREW, Justice.

Dock Byrd acquired title to 160 acres of land in Okaloosa County, Florida, shortly before the turn of the century. There he lived until his death in 1933, intestate. Surviving him, as lawful heirs, were seven children, one of whom bore the name of D. W. Byrd.

D. W. Byrd continued to reside on the homestead. In 1937 he acquired a tax deed thereto. On August 2, 1943, he and his wife sold the land to Esther S. Morrison, and conveyed title by warranty deed, which was immediately recorded. According to the record Mrs. Morrison promptly returned the same for taxes and has paid the taxes thereon since said time. She entered into the actual possession of the land and for more than seven years prior to the institution of this suit for partition by the remaining heirs of Dock Byrd, she cultivated a large portion of the tract, improved the fences and built new fences around the cultivated portion of the land, filled in gullies and used the unenclosed portion for wood and grazing and maintained the same against trespassers. Such, she alleged, constituted adverse possession under color of title and a defense to the action.

The lower court, after testimony was taken, held inter alia:

'The defendant, Esther Steele Morrison, claims title through D. W. Byrd, one of the surviving heirs of Dock Byrd, who, on December 6, 1937, obtained a tax deed to the property, subsequently, on August 2, 1943, conveying to Mrs. Morrison who is joined by her husband as a defendant. The defendant resist partition on the further ground of adverse possession for a period sufficient to vest title in Mrs. Morrison based upon the conveyance to her from one of the heirs, D. W. Byrd as above indicated.

'It appears by the evidence that the original owner through whom plaintiffs claim died in 1933, prior to the effective date of F.S. § 95.22 [F.S.A.] which contains a provision to the effect that the seven year statute of limitations mentioned in the first paragraph of the statute shall not apply in a case where the person through whom claim is made died prior to the effective date of the statute, that date being July 1, 1941, but that the twenty year limitation of Section 1 of Chapter 10168, Acts of 1925, C.G.L. 4659, should apply.

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'Even if the seven-year statute of limitations is applicable the evidence fails to establish adverse possession in the light of adjudicated cases on the subject and under the circumstances here presented. No notice was brought home to any of the heirs except one who made claim to Mr. Morrison for his share of the purchase price but Mr. Morrison disregarded the claim on the theory that the complaining heir had no interest to be recognized, relying solely upon the validity of the tax deed issued to his wife's grantor, one of the heirs. It also appears that the heir who obtained the tax deed and conveyed to Mrs. Morrison was left by the other heirs in possession of the property with the right to use and occupy the same but with no right to dispose of their interests. In short, Mr. and Mrs. Morrison in purchasing the property relying upon the validity of the tax deed to their grantor did so at their peril. See Williams v. Clyatt, 53 Fla. 987, 43 So. 441, followed in Andrews v. Andrews, 155 Fla. 654, 21 So.2d 205; Spencer v. Spencer, 160 Fla. 749, 36 So.2d 424, and other cases.'

The statute referred to by the Chancellor below is, as he held, not applicable to the question before the Court for the obvious reason that, at the time of the death of Dock Byrd the period within which an action could be brought was twenty years.

The statute governing the question before the lower court is Section 95.16, Florida Statutes 1951, F.S.A. The primary and controlling questions are whether the deed to Mrs. Morrison constitutes color of title and, if so, whether her possession was of the character designated in Section 95.17, Florida Statutes 1951, F.S.A.

It is well settled in this State that the attempt of D. W. Byrd to divest his co-tenants of title by the process of the tax deed was wholly ineffectual, and, if this were litigation between the co-tenants over that question of ownership, the cases cited by the eminent Chancellor below would be controlling. Each of the cited cases involved a claim of title by a co-tenant, who had acquired the title to the whole through a tax deed, against his other co-tenants.

While the law on the foregoing question is well settled and no longer open to question in this State, it is equally well settled that a deed purporting to convey the entire interest from one who holds only an undivided interest therein may constitute color of title, and the grantee may acquire title by adverse possession against the other co-tenants. Futch v. Parslow, 64 Fla. 279, 60 So. 343; Robinson v. Herrman, 101 Fla. 865, 132 So. 827. Under some circumstances this is true, even as between co-tenants. See Futch v. Parslow, supra. In this case, while Mrs. Morrison lived in the neighborhood and knew there were other heirs, she was a complete stranger to the title. As to why she took the deed from only one heir, her husband testified that they thought the tax deed was sufficient to divest the other co-tenants of any interest in the property. We hold, under the facts in this record, that the deed from D. W. Byrd did constitute color of title.

On the question of adverse possession, we are compelled to hold, in the light of undisputed evidence in the record, that the conclusion of the lower court that 'the evidence fails to establish adverse possession in the light of the adjudicated cases on the subject and under the circumstances here presented' is a misinterpretation of the legal effect of the evidence. We hold that such evidence established title by adverse possession under color of title in the appellant within the provisions of Sections 95.16, 95.17, supra.

The cause is reversed with directions to enter an appropriate decree favorable to the defendants.

ROBERTS, C. J., and TERRELL, SEBRING, HOBSON and MATHEWS, JJ., concur.

THOMAS, J., dissents.

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472 So.2d 544
10 Fla. L. Weekly 1655
Christopher SAPP, Appellant,
v.
GENERAL DEVELOPMENT CORPORATION, a Delaware Corporation, Appellee.
No. 84-2342.
District Court of Appeal of Florida, Second District.
July 3, 1985.

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William L. Blackwell of Blackwell & Beal, P.A., Naples, for appellant.

Jesus M. Hevia of Wotitzky, Wotitzky, Wilkins, Frohlich & Jones, Punta Gorda, for appellee.

GRIMES, Judge.

This is an appeal from a summary judgment entered against a claim for a prescriptive easement.

Appellant, Christopher Sapp, filed suit for the declaration of a prescriptive easement over the property of appellee, General Development Corporation. He also sought an injunction and damages. The complaint alleged in part that: (1) Sapp owns a parcel of real property which is completely surrounded by General Development's property; (2) Sapp's only access to his property is by a dirt road which crosses General Development's property; (3) Sapp and his predecessors in title have made continuous uninterrupted use of this roadway for over twenty years; (4) on April 12, 1984, General Development began tearing up the road, rendering it unusable to Sapp; (5) General Development began hauling away fill dirt which Sapp had previously placed on the roadway; and (6) by virtue of General Development's conduct in blocking access to Sapp's property, Sapp was prevented from irrigating and caring for a grapefruit grove located thereon. As one of its affirmative defenses, General Development contended that because Sapp either had a common law or statutory way of necessity across its property, he could not claim a prescriptive easement. The court ultimately entered a summary judgment for General Development on this premise.

Where a grantor conveyed land to which there was no access except over the remaining land of the grantor, the common law presumed that the parties intended for the grantee to have an access easement over the land of the grantor. Dixon v. Feaster, 448 So.2d 554 (Fla. 5th DCA 1984). This implied grant of a way of necessity has been codified as section 704.01(1), Florida Statutes (1983). The legislature also provided a statutory way of necessity to enable the owner of landlocked property to have access across his neighbor's land when title to both properties is not deraigned from a common grantor. § 704.01(2), Fla.Stat. (1983). The servient owner is entitled to compensation for a statutory way of necessity. § 704.04, Fla.Stat. (1983).

One of the requirements of obtaining an easement by prescription is twenty years of adverse use by the dominant owner without permission of the servient owner. Crigger v. Florida Power Corp., 436 So.2d 937 (Fla. 5th DCA 1983). The inconsistency between a prescriptive use and a

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common law way of necessity is evident because the latter is based on the presumption of an implied grant. The contradiction with respect to a statutory way of necessity is not quite so clear.

General Development relies upon this court's decision in Hanna v. Means, 319 So.2d 61 (Fla. 2d DCA 1975). In that case the Meanses filed suit claiming alternatively either a common law way of necessity or an easement by prescription over the Hannas' lands. The court denied both claims but held that the Meanses had a statutory way of necessity. On appeal, the court first rejected the Hannas' contention that the Meanses were not entitled to a statutory way of necessity because a more reasonable way of access existed over another owner's property. The court then considered the Meanses' cross-appeal in which they urged that the trial judge should have granted them a prescriptive right of way across the Hannas' lands. This court reasoned that the Meanses were not entitled to a prescriptive easement because they had failed to prove an adverse claim of right. However, the court went on to say:

Apart from that issue, however, we can dispose of appellees' contention ... as a matter of law, simply under the well-settled rule that a prescriptive right never accrues in a way of necessity so long as the necessity continues....

319 So.2d at 63-64 (footnote omitted).

Sapp correctly points out that on this record, General Development did not prove that title to both properties was deraigned from a common source. Sapp then seeks to limit the quoted statement from Hanna v. Means to the case of a common law way of necessity by arguing that a person is not entitled to a statutory way of necessity until the court determines its existence. However, the statute belies his position. Section 704.01(2) provides that "a statutory way of necessity ... exists when any land ... shall be shut off or hemmed in ... so that no practical route of egress or ingress shall be available therefrom to the nearest practicable public or private road." (Emphasis added.) The landlocked owner "may use and maintain an easement ... over and upon the lands which lie between said shut-off or hemmed-in lands and such public or private road by means of the nearest practical route." Moreover, "the use thereof ... shall not constitute a trespass; nor shall a party thus using the same be liable in damages for the use thereof; provided that such easement shall be used only in an orderly and proper manner."

In order to obtain an easement by prescription, the use must be such that the owner has a legal right to prevent it through an action for trespass or ejectment. Downing v. Bird, 100 So.2d 57 (Fla.1958). Yet, under section 704.01(2), the servient owner cannot establish a claim of trespass against the dominant owner. Assuming the use is not unreasonable, the only recourse available to the servient owner is to seek compensation under section 704.04. At this point, a lawsuit is filed, and the court is then called upon to determine "all questions including the type, extent and location of the easement and the amount of compensation." That portion of section 704.04 which provides that "[t]he easement shall date from the time the award is paid" refers only to the court-ordered easement rather than to the statutory way of necessity which existed all of the time.

In practical terms, a landlocked owner always has either a common law way of necessity or a statutory way of necessity, depending upon the status of his title, even though the precise location may not be known. At such time as he commences using a way of access across adjoining property, the location becomes presumptively established, subject always to a redetermination by the court upon a contention of unreasonable use. Consequently, the use under either a common law or statutory way of necessity is not adverse and cannot form the basis of a claim for a prescriptive easement. [1]

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We recognize that this court in both Anderson v. Toole, 329 So.2d 33 (Fla. 2d DCA 1976), and Baya v. Central & Southern Florida Flood Control District, 166 So.2d 846 (Fla. 2d DCA 1964), appeared to treat prescriptive easements as alternatives to ways of necessity. However, there was no issue raised in either case with respect to whether a landowner with a way of necessity has the right to claim a prescriptive easement.

By virtue of having demonstrated that his property was landlocked, Sapp established that he had a way of necessity. Therefore, he was not entitled to claim a prescriptive easement. We do find, however, that he may have a cause of action for injunctive relief [2] or damages. As we interpret section 704.04, a servient owner cannot arbitrarily block the use of a statutory way of necessity. He can, of course, register an objection to the further uncompensated use of the way. If the parties cannot agree upon appropriate compensation, either of them may obtain a determination by the court. Since General Development has not refuted Sapp's contention that it closed the road and effectively denied access to Sapp, the court should have considered Sapp's claim for an injunction and damages.

We affirm the court's determination that Sapp cannot obtain a prescriptive easement. We reverse the summary judgment insofar as it precludes Sapp from attempting to prove his right to an injunction and damages and remand for further proceedings.

RYDER, C.J., and SCHEB, J., concur.

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1 A different case might be presented if the landlocked owner were seeking a second route across adjoining property.

2 The claim for injunction may now be moot because the record suggests that another means of access became available to Sapp after this lawsuit was filed. See Jonita, Inc. v. Lewis, 368 So.2d 114 (Fla. 1st DCA 1979).

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689 So.2d 1052
22 Fla. L. Weekly S95
BANCFLORIDA, etc., Petitioner,
v.
Robert T. HAYWARD, et ux., et al., Respondents.
No. 86646.
Supreme Court of Florida.
Feb. 27, 1997.

Robert C. Grady of Katz, Barron, Squitero & Faust, P.A., Miami, and Herbert Stettin of Herbert Stettin, P.A., Miami, for Petitioner.

Mark V. Silverio and Cynthia Byrne Hall of Silverio & Hall, Miami, and Glenn J. Holzberg, Miami, for Respondents.

GRIMES, Justice.

We review BancFlorida v. Hayward, 659 So.2d 1329, 1333 (Fla. 3d DCA 1995), in which the court certified the following question as being of great public importance:

Where a lender requires a pre-qualified contract purchaser before it will lend on the construction loan which creates a purchase money mortgage, does the contract purchaser's prior equitable lien against the purchase money mortgagor have priority over the lender's subsequent purchase money mortgage?

We have jurisdiction under article V, section 3(b)(4) of the Florida Constitution.

Shores Contractors, Inc. (developer) was in the business of developing lots and constructing single-family homes in several subdivisions. American Newlands owned the real property in these subdivisions. The developer held an option to acquire individual lots from American Newlands. The developer arranged for BancFlorida (bank) to provide funds for the acquisition of the individual lots and for the construction of single-family homes on those lots. The most frequent

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method of lot acquisition and construction [1] required that the developer obtain a written purchase and sale agreement on a particular lot from a prequalified purchaser. The bank would then make a construction loan to the developer, with a portion of the proceeds being paid directly to American Newlands in exchange for deeds of the lots to the developer. None of the payments made by the purchasers on their contracts with the developer were used to acquire the lots.

Unfortunately, the developments failed, and the homes were not completed. The developer filed suit against the bank, alleging that breach of the construction loan agreements caused the failure. In turn, the bank sought foreclosure of its mortgages on the lots. Thereafter, the contract purchasers intervened and claimed equitable liens on the lots described in their purchase and sale agreements. The bank responded by claiming the superiority of its mortgages.

By agreement of all parties, summary final judgment of foreclosure was entered which permitted the bank to foreclose on the lots. They were sold at foreclosure sale, and the bank was the successful purchaser. By stipulation, the properties were then sold in bulk by the bank to a third party and the net proceeds were deposited in an escrow account pending the ultimate disposition of the competing claims.

The trial court entered summary judgment in favor of the contract purchasers, holding that they held equitable liens on the lots which were entitled to priority over the bank's mortgages. The premise for the trial court's holding was that before the bank loaned any money to Shores for construction of the homes, the bank had actual notice of the purchase and sale agreements and the deposits paid by the contract purchasers to the developer. The court rejected the bank's contention that its mortgages were purchase money mortgages.

Contrary to the finding of the trial court, the Third District Court of Appeal held that the bank's mortgages were purchase money mortgages. Nevertheless, it affirmed the judgment in favor of the contract purchasers on the following rationale:

In the case at issue, knowledge is part and parcel of the same transaction in which the purchase money mortgage was created. BancFlorida structured this transaction and required the existence of pre-qualified contract purchasers before it would lend any money to Shores under the construction loan line of credit. It is well settled law in Florida that purchase money mortgage priorities may be subject to the equities of the particular transaction. Van Eepoel Real Estate Co. v. Sarasota Milk Co., 100 Fla. 438, 129 So. 892 (1930). Thus, we agree with the reasoning of Caribank [v. Frankel, 525 So.2d 942 (Fla. 4th DCA 1988)] that BancFlorida's actual knowledge of the contract purchasers' equitable liens against Shores, which arose before BancFlorida executed purchase money mortgages to Shores as part of the construction loan, and indeed, at BancFlorida's insistence, gave the equitable liens priority over the purchase money mortgages.

BancFlorida v. Hayward, 659 So.2d at 1333.

At the outset, we agree with the court below that the bank's mortgages were purchase money mortgages. Traditionally, a purchase money mortgage was a mortgage given by the purchaser of real property directly to the seller to secure some or all of the purchase price. 1 Paul C. Gibson, Florida Real Estate Transactions § 4:01 (1996). However, it is well settled that where the proceeds of a third-party mortgage loan are used to purchase property, the mortgage on that property is also considered to be a purchase money mortgage. Cheves v. First Nat'l Bank, 79 Fla. 34, 83 So. 870 (1920); Sarmiento v. Stockton, Whatley, Davin & Co., 399 So.2d 1057 (Fla. 3d DCA 1981). 2 Ralph E. Boyer & William H. Ryan, Florida Real Estate Transactions § 32.22 (1996), explains:

The most common real property security transaction involves a "purchase money" loan from a bank, savings and loan association, or other lender, that enables the borrower to purchase the subject property.

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The seller receives the loan proceeds, less whatever may be due to the seller's purchase money lender, if any, and conveys title to the purchaser. The purchaser, then being the owner, executes and delivers a mortgage in favor of the lender. As long as a mortgage is executed in conjunction with a purchase and given as security for a portion of the purchase price, it is a purchase money mortgage, even though the money is advanced by a third party and the mortgage is executed in the third party's favor.

The determination that a mortgage is a purchase money mortgage is important because purchase money mortgages take priority over all prior claims or liens that attach to the property through the mortgagor. Id. As this Court explained in Van Eepoel Real Estate Co. v. Sarasota Milk Co., 100 Fla. 438, 450-51, 129 So. 892, 897 (1930):

[A] purchase-money mortgage, made simultaneously with the conveyance to the mortgagor, takes precedence over any lien arising through the mortgagor, even though the latter be prior in point of time.

This rule applies even though the purchase money mortgagee was put on constructive notice of the prior lien by virtue of its recording in the public records. Thus, a purchase money mortgage has been recognized to be senior to prior recorded judgment liens, Citibank Mortgage Corp. v. Carteret Sav. Bank, 612 So.2d 599 (Fla. 4th DCA 1992); Sarmiento; Associates Discount Corp. v. Gomes, 338 So.2d 552 (Fla. 3d DCA 1976), and a prior recorded welfare lien. Pinellas County v. Clearwater Fed. Sav. & Loan Ass'n, 214 So.2d 525 (Fla. 2d DCA 1968).

Presumably, the rule giving superiority to purchase money mortgages came about because of the recognition that the prior lienholder is no worse off than before. Without the proceeds from the purchase money mortgage loan, the property would not have been acquired. However, purchase money protection applies only to the amount of the proceeds actually used to acquire the property and its existing improvements. Carteret Sav. Bank v. Citibank Mortgage Corp., 632 So.2d 599 (Fla.1994).

When these principles are applied to the instant case, it is clear that the court below erred in holding that the claims of the contract purchasers were superior to the bank's purchase money mortgages. That court relied heavily upon the fact that the bank had actual notice of the purchase and sale agreements. However, purchase money mortgages have superiority over prior recorded liens, and actual notice is simply the equivalent of constructive notice.

We cannot answer the certified question as worded because it presupposes that the contract purchasers had a prior equitable lien on the lots. However, at the time the purchase and sale agreements were executed, the developer did not own the lots but merely held an option to purchase. Under Florida law, an option to purchase property creates neither an equitable interest nor an equitable remedy. Wolfle v. Daugherty, 103 Fla. 432, 137 So. 717 (1931). Therefore, the developer had no real property interest upon which an equitable lien could attach.

The contract purchasers rely heavily upon Caribank v. Frankel, 525 So.2d 942 (Fla. 4th DCA 1988). On facts analogous to those in the instant case, the district court of appeal held that a contract purchaser had a prior lien over a subsequent purchase money mortgage given by the developer to purchase the lot he had contracted to sell. It may be that the law applicable to the priority of purchase money mortgages discussed above was never raised because the opinion makes no mention of it. In any event, on its facts Caribank was erroneously decided.

We also reject the contract purchasers' argument for estoppel predicated upon this Court's decision in Van Eepoel Real Estate Co., 100 Fla. at 438, 129 So. at 892. That case involved a dispute between a purchase money mortgagee and a mechanic's lienor. A purchase money mortgage had been executed prior to the time the mechanic commenced work on the property. However, the mortgage was not recorded until after the work was done. Under these circumstances, the court held that the mortgagee was estopped to claim priority because of its failure to record the mortgage until after the mechanic had completed his work without any

Page 1055

knowledge of the existence of the mortgage. These facts are inapposite to the instant case. Here, there is no contention that the purchase money mortgages were not timely recorded, and the bank did nothing to mislead the contract purchasers.

The legal principles applicable to the remaining four lots in litigation are different but the outcome is the same. The developer had already acquired these lots through the execution of recorded purchase money mortgages at the time the purchase and sale contracts were executed. Thereafter, the bank entered into construction loan agreements with the developer which required that the previous bank mortgage be satisfied out of the funds advanced under the new loan. The construction loan agreement required a new first mortgage lien in favor of the bank to be placed on the subject property. Obviously, the parties intended that the bank would preserve the same security it held for its earlier loan. Under these circumstances, the bank was entitled to the priority established by its original mortgage under the doctrine of equitable subrogation.

In Schilling v. Bank of Sulphur Springs, 109 Fla. 181, 147 So. 218 (1933), a third-party purchase money mortgage was utilized by the mortgagor to acquire certain property. Three years later, the purchase money mortgage matured, and the mortgagor went to the bank in order to obtain a mortgage loan to satisfy the purchase money mortgage. However, there was a judgment lien against the mortgagor which predated the purchase money mortgage. The bank loaned the money to the mortgagor to satisfy the original purchase money mortgage and recorded a new mortgage. On these facts, this Court held that equity required that the bank be subrogated to the rights of the original third-party money mortgage. We held that equity would not displace the purchase money mortgage since the result would leave the holder of the judgment lien in no worse position than if the original purchase money mortgage had not been discharged. See also Federal Land Bank v. Godwin, 107 Fla. 537, 145 So. 883 (1933)(new mortgage given by same mortgagee as renewal of old mortgage held to take priority over intervening mortgage).

Accordingly, we hold that the bank's mortgages on the twenty-two lots have priority over the claims of the contract purchasers but only to the extent that the bank's funds were used to purchase the lots. The bank loses its priority with respect to the additional construction monies advanced to the developer.

We quash the decision below and remand for further proceedings pursuant to this opinion.

It is so ordered.

OVERTON, SHAW, HARDING, WELLS and ANSTEAD, JJ., concur.

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1 Eighteen of the twenty-two lots in issue in this suit were acquired and financed in this manner.

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621 So.2d 736
18 Fla. L. Week. D1436
William E. POSNANSKY and Adele D. Posnansky, Appellants,
v.
BRECKENRIDGE ESTATES CORPORATION, a Florida corporation, and
Glendale Federal Bank, F.S.B., Appellees.
No. 92-1675.
District Court of Appeal of Florida, Fourth District.
June 16, 1993.
Opinion Modifying Decision on Rehearing Aug. 18, 1993.

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William E. Blyler, Coral Springs, for appellants.

Linda Conahan and Sabrina Weiss, English, McCaughan & O'Bryan, P.A., Fort Lauderdale, and William Berger and Jaana T. Moisio of Goldberg & Young, P.A., Fort Lauderdale, for appellee-Glendale Federal Bank, F.S.B.

PER CURIAM.

This appeal is from a final judgment in an action to foreclose a vendee's lien. We affirm the judgment in favor of Defendant Glendale Federal Bank, which proved it held a lien superior to Plaintiffs', but we reverse and remand for the entry of a final judgment of foreclosure against Defendant Breckenridge Estates Corporation, which at the time of filing suit was the owner of the property to which the lien attached. [1]

The Plaintiffs' vendee's lien arose when they contracted with Breckenridge for the latter to build and sell them a home, and Breckenridge defaulted on the contract and refused to return the Plaintiffs' deposit, which had not been escrowed. [2] They filed suit to foreclose, naming Glendale and others as junior lienors. A default was entered against Breckenridge, and the case proceeded on the question of the relative priority of the Plaintiffs' lien as against Glendale's mortgage. Dispositive of that issue was the fact that the Plaintiffs had executed an agreement to subordinate any interest they had under the contract to Glendale's mortgage lien.

After entering final judgment in favor of Glendale, the trial court denied Plaintiffs' request for a final judgment against Breckenridge. We see no error in the trial court's ruling as to Glendale; however, the trial court erred in failing to enter judgment against Breckenridge.

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On review of the record, we conclude that the enforceability of the Plaintiffs' lien did not become an issue at trial until Glendale filed its written "final argument" with the trial court, taking the position that a lien may not be enforced against a property which has subsequently been foreclosed by a senior mortgagee. [3] However, Glendale never disputed the existence of the lien. There is no counterclaim, and no affirmative defense or other pleading raises this issue. We also note that Glendale took no action to compel the Plaintiffs to exercise their right of redemption or have the same barred. The Plaintiffs were given no opportunity prior to their motion for rehearing to attempt to rebut Glendale's argument. It appears they never consented to trying the question of whether they should have intervened in Glendale's foreclosure action, and whether they lost any rights in the instant case by failing to do so. Therefore, it was improper for the trial court to refuse on that basis to enter a judgment in their favor against Breckenridge after its default, and no other basis for failing to do so appears in the record. Accordingly, we remand for the trial court to enter a final judgment of foreclosure against Breckenridge.

Having determined that the only issue in this case involving Glendale was one of priority, resolved in its favor, this opinion should not be construed as resolving any other issues raised in this appeal with respect to the title to the property. Nothing contained in the opinion should be construed as restricting any right of Glendale Federal to reforeclose its mortgage against Appellants.

GLICKSTEIN, C.J., and HERSEY and STONE, JJ., concur.

ON MOTION FOR REHEARING

PER CURIAM.

Appellants' motion for rehearing is denied except that our opinion of June 16, 1993 is modified for clarification. We strike the last sentence of the opinion and substitute the following sentence: [

HERSEY, GLICKSTEIN and STONE, JJ., concur.

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1 While this action was pending in the trial court, Glendale acquired title at foreclosure sale pursuant to a foreclosure action it previously had filed (and to which it failed to make the Plaintiffs herein party Defendants).

2 The concept of a vendee's lien is premised on the doctrine of equitable conversion. All that is required of the non-defaulting buyer of a defaulting seller, in order to claim an equitable lien to secure the payments made, is that he establish his right to recover the money paid under the contract. The buyer is entitled to claim the lien even if the contract provides that he is entitled only to the return of his deposit. Sparks v. Charles Wayne Group, 568 So.2d 512 (Fla. 5th DCA1990).

3 On appeal, Glendale argued that the Plaintiffs should be estopped from asserting their unrecorded lien because they failed to intervene in Glendale's foreclosure. However, the general rule is that in order for a foreclosure action to affect a junior lien, the junior lienholder has to be made a party to it; failure to join the holder of a junior lien leaves the holder in the same position as if no foreclosure took place. Kurz v. Pappas, 116 Fla. 324, 156 So. 737 (1934); Crystal River Lumber Co. v. Knight Turpentine Co., 69 Fla. 288, 67 So. 974 (1915); Marks Bros. Paving Co. v. Ouellet, 124 So.2d 514 (Fla. 3d DCA1960). (The owner of the property may re-foreclose in a later action against the omitted junior lienor. Trueman Fertilizer Co. v. Lester, 155 Fla. 338, 20 So.2d 349 (1944).) Exceptions to this general rule have been made when an unforeclosed junior lienor comes before the court requesting equity with unclean hands, one factor in which may be the failure to intervene in a prior foreclosure of which he had notice. Riley v. Grissett, 556 So.2d 473 (Fla. 1st DCA1990); Sponder v. Equity Capital Co., 248 So.2d 251 (Fla. 3d DCA), cert. denied, 252 So.2d 804 (Fla.1971). See also Orr v. Allen-Hanford, Inc., 158 Fla. 34, 27 So.2d 823 (1946). For a variety of reasons apparent from the record, the equities in this case appear to favor the Plaintiffs, who did not delay in bringing their action and did not initially understand their position to be that of junior lienors who properly could intervene in Glendale's action. Furthermore, while the Plaintiffs' lien was unrecorded, it is undisputed that Glendale had actual notice of it; therefore, as to them it had the same effect as if it had been of record. Caribank v. Frankel, 525 So.2d 942 (Fla. 4th DCA1988).

306 So.3d 1285 (Mem)

JAK CAPITAL, LLC, Appellant,
v.
Katrina ADAMS, John Adams, and Marketking, LLC, Appellees.

Case No. 2D19-4371

District Court of Appeal of Florida, Second District.

Opinion filed December 9, 2020.

Ryan W. Owen and David L. Boyette of Adams and Reese LLP, Sarasota, for Appellant.

Robson D.C. Powers and Alvaro C. Sanchez of Burandt, Adamski, Feichthaler & Sanchez, PLLC, Cape Coral, for Appellees Katrina and John Adams.

No appearance for Appellee MarketKing, LLC.

VILLANTI, Judge.

JAK Capital, LLC, appeals the amended final judgment that stripped its mortgage from a house owned by Katrina Adams, quieted title to the house in favor of the Adamses, and denied JAK Capital's claim for foreclosure of the mortgage. Because the trial court misapplied the law in entering the amended final judgment, we reverse and remand for entry of a foreclosure judgment in favor of JAK Capital.

Background

The record before this court shows that in July 2010, Katrina Adams inherited a home in Lee County from her father. She and her husband, John Adams, moved into the home shortly thereafter. At that time, there was a relatively small mortgage remaining on the property in favor of HSBC, which the Adamses assumed.

In early 2015, Katrina[1] met Thomas Errico, who was a regular at the restaurant where Katrina worked. Over the course of several discussions, Katrina learned that Errico owned and operated a

[306 So.3d 1286]

business called MarketKing, LLC, that flipped houses, and she expressed an interest in learning about that business. Ultimately, the two discussed going into business together, with Katrina contributing capital while Errico taught her the ins and outs of running that type of business.

As part of the process of "going into business together," Errico requested various documents from Katrina, allegedly to show her creditworthiness and her ability to contribute capital. The documents he requested—and that she produced without question in early 2016—included insurance information on her house, a payoff statement from HSBC, and some other financial information. In addition, Katrina obtained a survey of her home and had it appraised, and she provided the survey and appraisal to Errico as well. Katrina testified at the bench trial that she provided all of this information to Errico to show him that she had equity in her house from which she could make her capital contribution and also to show that she was financially responsible.

After receiving all of this information from Katrina, Errico provided the Adamses with a packet of documents to review and sign. Both Katrina and John testified that they understood these documents to be a "draft" of the business plan for the new business. However despite the documents allegedly being only a "draft" rather than the final version, both Katrina and John signed the documents and returned them to Errico. One of these documents turned out to be a mortgage on Katrina's house.

Errico, through MarketKing, then used the mortgage signed by the Adamses to obtain a $150,000 loan from JAK Capital. MarketKing gave a promissory note to JAK Capital for $150,000 and secured that note with the mortgage on Katrina's house.[2] As part of the closing on that loan, which occurred in mid-March 2016, JAK Capital paid off the existing HSBC mortgage loan on Katrina's house in the amount of $15,928.41. After various other closing costs were paid, the remainder of the funds were paid to MarketKing.

The loan in question was a two-year, interest-only loan with a balloon payment of the principal due in April 2018. During 2016 and 2017, JAK Capital received only sporadic interest payments on the loan from MarketKing. In late 2017, JAK Capital sent a letter to MarketKing and the Adamses stating its intent to begin foreclosure proceedings on the house. In response, the Adamses filed a single-count complaint against JAK Capital seeking to quiet title to the house. In their complaint, the Adamses alleged that they had never signed the mortgage and that their signatures on the mortgage were forged by Errico.

JAK Capital filed a counterclaim for foreclosure of the mortgage.[3] In the Adamses' affirmative defenses to this counterclaim, they alleged only that their signatures on the mortgage were forgeries.

[306 So.3d 1287]

Nowhere in either their complaint or their affirmative defenses to the counterclaim did they allege that they were tricked, fooled, deceived, or otherwise defrauded into signing the mortgage by either Errico or JAK Capital.

During the bench trial, however, both Katrina and John admitted that they signed the "draft" business plan documents from Errico without knowing what they were, claiming that the mortgage must have been included in the "draft" business plan without their knowledge. While Katrina continued to assert that she had not signed the mortgage, John testified that he might have signed the mortgage by mistake while they were signing all the other "draft" business plan documents. JAK Capital presented testimony from a handwriting expert that the Adamses' signatures on the mortgage were authentic.

After hearing the testimony and reviewing all of the documents admitted into evidence, the trial court found that the mortgage was the product of fraud and deceit by MarketKing through Errico and that the Adamses' signatures, and therefore the mortgage to which they were affixed, were not given "knowingly, intelligently and voluntarily." Thus, while the trial court did not find that the Adamses' signatures were forgeries, it refused to enforce the mortgage on the basis that it was procured by fraud. Having made this ruling, the trial court entered final judgment in favor of the Adamses and denied relief to JAK Capital on its counterclaim for foreclosure. JAK Capital now appeals this final judgment.

Analysis

In this appeal, JAK Capital contends that the trial court erred by stripping its mortgage from the house, quieting title in the Adamses' favor, and denying its claim for foreclosure of the mortgage for two separate reasons. We conclude that both of these reasons require reversal of the amended final judgment.

First, because the Adamses never pleaded fraud as a defense to the mortgage, the trial court erred as a matter of law by providing them with relief on this unpleaded basis. Florida Rule of Civil Procedure 1.110(d) identifies fraud as an affirmative defense that must be specifically pleaded or it is waived. In addition, "the circumstances constituting fraud ... shall be stated with such particularity as the circumstances may permit." Fla. R. Civ. P. 1.120(b) ; see also Morgan v. W.R. Grace & Co.–Conn., 779 So. 2d 503, 506 (Fla. 2d DCA 2000) ; Zikofsky v. Robby Vapor Sys., Inc., 846 So. 2d 684, 684 (Fla. 4th DCA 2003) ("[T]o raise an affirmative defense of fraud, the 'pertinent facts and circumstances constituting fraud must be pled with specificity, and all the essential elements of fraudulent conduct must be stated.' " (quoting Cocoves v. Campbell, 819 So. 2d 910, 912 (Fla. 4th DCA 2002))). When a defense listed in rule 1.110(d) is not pleaded, or is not pleaded with sufficient specificity, it is deemed waived and cannot form the basis for relief. See, e.g., Derouin v. Universal Am. Mortg. Co., LLC, 254 So. 3d 595, 601 (Fla. 2d DCA 2018) (providing that "[l]itigants in civil controversies must state their legal positions within a particular document, a pleading, so that the parties and the court are absolutely clear what the issues to be adjudicated are" and thus "[a]n issue that has not been framed by the pleadings, noticed for hearing, or litigated by the parties is not a proper issue for the court's determination" (first quoting

[306 So.3d 1288]

Bank of Am., N.A. v. Asbury, 165 So. 3d 808, 809 (Fla. 2d DCA 2015) ; and then quoting Gordon v. Gordon, 543 So. 2d 428, 429 (Fla. 2d DCA 1989))). In short, the trial court cannot award relief on the basis of a defense that has not been pleaded. Id.

Here, the only allegation made in the Adamses' complaint to quiet title and raised in their affirmative defenses to JAK Capital's counterclaim was that their signatures on the mortgage were forged. They specifically alleged that they never signed the mortgage. They did not allege in any pleading at any time that they signed the mortgage by mistake or because Errico misled them into believing that they were signing some other documents or because Errico hid the mortgage in a stack of other documents to trick or deceive them into signing it. The specific fraud that they alleged—but did not prove—was that Errico forged their signatures on the mortgage without their knowledge. Since the Adamses never alleged that they were defrauded into signing the mortgage, the trial court erred by providing them with relief on that basis.

In this appeal, the Adamses argue that their allegations of forgery were sufficient to allege a claim of fraud, and they cite several cases for their theory that forgery is a species of fraud. See, e.g., Padilla v. Padilla, 278 So. 3d 333, 335 (Fla. 3d DCA 2019). However, rule 1.120(b) requires that the circumstances comprising the fraud be alleged with particularity. While forgery may be a species of fraud, the Adamses never alleged that Errico defrauded them into signing the mortgage. Their only allegation was that they did not sign the mortgage at all. Having failed to prove the allegations they made, the Adamses may not save the judgment by claiming that they could have alleged something else but did not.

Moreover, the record is clear that the issue of fraud—rather than forgery—was not tried by consent. "An issue is tried by consent 'when there is no objection to the introduction of evidence on that issue.' " Derouin, 254 So. 3d at 603 (quoting Fed. Home Loan Mortg. Corp. v. Beekman, 174 So. 3d 472, 475 (Fla. 4th DCA 2015)). Here, when the Adamses moved at the close of evidence to "conform the pleadings to the evidence," JAK Capital objected, and the trial court denied the motion. Further, JAK Capital objected in its written closing argument to the court's consideration of any claim of fraud other than forgery. Hence, it is clear from the record that the issue of fraud by any means other than forgery was neither pleaded nor tried by consent. The Adamses were not entitled to a judgment in their favor on the basis of a fraud they failed to allege, and the amended final judgment in their favor must be reversed on this basis.

Second, even if the issue of fraud had been properly before the court, the Adamses did not prove that they were entitled to relief on that basis against JAK Capital. To be entitled "[t]o set aside a mortgage on the ground of fraud or duress practiced or exercised in its procurement," the party seeking to avoid the mortgage carries the burden to prove that "such fraud or duress [was] participated in to some extent by the mortgagee." Sheppard v. Cherry, 118 Fla. 473, 159 So. 661, 662 (1935) (citing Smith v. Commercial Bank, 77 Fla. 163, 81 So. 154, 155 (1919)); see also Baron v. Estate of Clare, 372 So. 2d 1005, 1006-07 (Fla. 4th DCA 1979). In the absence of evidence of such fraud by the holder of the mortgage, the mortgage will be valid and enforceable.

For example, in Baron, Ronald Baron loaned $7500 to Granville Clare, who provided

[306 So.3d 1289]

a mortgage on real estate he owned as security. 372 So. 2d at 1006. After Clare died, his heirs attempted to invalidate the mortgage, arguing that Clare had been incompetent and "unable to transact any business" at the time he purportedly signed the mortgage. Id. The heirs produced evidence that showed that two individuals who had been caring for Clare at the time had obtained Clare's signature on the mortgage by fraud and had converted the proceeds received from Baron for their own use. Id. However, the evidence showed that Baron was completely unaware of the actions of Clare's caretakers and had not participated in the fraud in any way. Id. Despite no evidence that Baron had been involved in the scheme, the trial court refused to enforce the mortgage, finding that it was "permeated with fraud." Id. The Fourth District reversed this ruling, holding that the trial court erred in refusing to enforce the mortgage held by Baron "because there is simply no evidence that [Baron] was engaged in any fraudulent conduct to the detriment of [Clare]." Id. at 1007. In the absence of such evidence, Baron was entitled to enforce the mortgage against Clare. Id. at 1006-07.

Like the trial court in Baron, the trial court here erred in refusing to enforce the mortgage held by JAK Capital when there was no evidence that JAK Capital engaged in any fraud or deceit. The trial court in this case refused to enforce the mortgage because it found that the Adamses had been defrauded into giving the mortgage. However, the trial court did not find that the holder of the mortgage—JAK Capital—had participated in the fraud to any extent, nor would there have been any evidence to support such a finding had it been made. Instead, all of the evidence showed that if any fraud occurred, it was perpetrated by Errico. In the absence of any evidence whatsoever that JAK Capital participated in committing the fraud, it was entitled to enforce the mortgage, and the trial court erred by holding otherwise.

In this appeal, as they did in the trial court, the Adamses argue that JAK Capital should not be entitled to enforce the mortgage because it never took any steps to confirm that the Adamses had actually consented to the mortgage. However, on the facts here, JAK Capital had no such obligation. When faced with a mortgage that is regular on its face—such as the mortgage here—a bank or other lender has no obligation to question the legitimacy of that document. See Dines v. Ultimo, 532 So. 2d 1131, 1132 (Fla. 4th DCA 1988) (finding that the bank could enforce its mortgage despite the fraud perpetrated on the homeowners by their son in obtaining their signatures when the mortgage was in the proper legal form and there was nothing to alert the lender to anything out of the ordinary). Given the facial regularity of the mortgage, the Adamses' only avenue of relief would be to prove that JAK Capital "deliberately refused to examine that which it was his duty to examine, or made representations as to a condition which had not been examined without knowing whether it was true or false, and it proved to be untrue." Ocean Bank of Miami v. Inv-Uni Inv. Corp., 599 So. 2d 694, 697 (Fla. 3d DCA 1992). But the Adamses offered no such evidence in this case, and the trial court made no finding that JAK Capital had deliberately refused to investigate a document the authenticity of which it knew or should have known was questionable. Simply put, JAK Capital had no obligation to go behind the Adamses' signatures on the mortgage when the document was regular on its face.

In sum, the trial court erred by entering final judgment in favor of the Adamses on

[306 So.3d 1290]

a claim of fraud that they neither pleaded nor proved. We therefore reverse the amended final judgment, reverse the corresponding judgment for attorney's fees and costs entered in favor of the Adamses, and remand for the trial court to enter final judgment granting foreclosure in favor of JAK Capital. On remand, the trial court should consider the evidence presented at the bench trial concerning the amount of the Adamses' indebtedness to JAK Capital, taking such other evidence as is necessary to enforce the terms of the mortgage.

Reversed and remanded with directions.

BLACK and ATKINSON, JJ., Concur.

Notes:

[1] We identify the Adamses by their first names only for clarity when they took actions independent of each other.

[2] JAK Capital's principal testified at trial that JAK Capital was in the business of making business loans that were secured by Florida real property. When asked whether it was unusual to have a note signed by one party and a mortgage provided by another, he testified: "[T]hat's not unusual. I mean, we make business loans, and sometimes there's, you know, people that are involved in the business that are willing to, you know, put up some real estate as collateral for the loan."

[3] JAK Capital's counterclaim also alleged alternative counts for an equitable lien and equitable subrogation. Given our resolution of this appeal, we need not address those counts.

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463 So.2d 306
Cheryl Yates SWEAT, Appellant,
v.
Maria YATES, as Personal Representative of the Estate of William C. Yates, Appellee.
No. AY-257.
District Court of Appeal of Florida, First District.
Dec. 17, 1984.
Rehearing Denied Feb. 27, 1985.

John R. Forbes and Mark S. Kessler, Jacksonville, for appellant.

William H. Maness of Maness & Kachergus, Jacksonville, for appellee.

NIMMONS, Judge.

Appellant Sweat appeals from a summary judgment. We reverse the summary judgment because there is a genuine issue as to the validity of the deed in question.

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The facts are undisputed. On September 18, 1982, William G. Yates signed a deed to property owned by him. The deed purported to convey the property to Yates and his daughter, Cheryl Yates Sweat, as joint tenant with right of survivorship. Yates entered the hospital on September 19, 1982. The next day, September 20, 1982, two persons, who had not been witnesses to the signing of the deed, signed their names to the deed as witnesses.

Yates died on Saturday, September 25, 1982. Sweat recorded the deed on Monday, September 27, 1982. Thereafter, two persons said to have been present when Yates signed the deed added their names as witnesses and the deed was re-recorded on October 5, 1982. Sweat took possession and claimed ownership of the property.

On July 2, 1983, Marie Yates, as personal representative of the Estate of William Yates, filed a complaint seeking cancellation of the deed. Mrs. Yates moved for summary judgment on the basis that the deed was void as a matter of law because it was not executed in the presence of two subscribing witnesses as required by Section 689.01, Florida Statutes. In granting summary judgment, the trial court concluded that "the deed in question was not duly executed and delivered in the lifetime of the purported grantor and was, therefore, null and void and of no legal effect." Contrary to the trial court's ruling, we find that the record in this case does not demonstrate that there is no genuine issue as to the validity of the deed.

Section 689.01, Florida Statutes, does not require that witnesses must subscribe in the presence of the grantor or in the presence of each other, nor does it require that the subscribing witnesses sign the document before delivery is accomplished. See Medina v. Orange County, 147 So.2d 556 (Fla. 2nd DCA 1962). Moreover, a deed takes effect from the date of delivery, and the recording of a deed is not essential to its validity as between the parties or those taking with notice. The failure of Sweat to record the subject deed before the grantor died did not render the deed void. The recording statute has always been primarily intended to protect the rights of bona fide purchasers of property and creditors of property owners, rather than the immediate parties to the conveyance. Fong v. Batton, 214 So.2d 649 (Fla. 3rd DCA 1968).

The only finding of the trial court that could possibly support the summary judgment was a finding that the deed was unwitnessed, but this finding is rebutted by the trial court's additional finding that there were two persons "said to have been present at the time and place Yates signed the deed" who added their names as witnesses. Since there is some evidence that there were two witnesses to the signing of the deed, there exists a genuine issue as to the validity of the deed.

Accordingly, the summary judgment is Reversed and the case is Remanded for further proceedings consistent with this opinion.

JOANOS and WIGGINTON, JJ., concur.

230 So.3d 550

WELLS FARGO BANK, N.A., as Trustee for Carrington Mortgage Loan Trust, Series 2006 FRE1 Asset–Backed Pass–Through Certificates, Appellant/Cross–Appellee,
v.
Calvin RUTLEDGE, Appellee/Cross–Appellant,
and
Bruce Dias; Harbor Towers Owners Association, Inc. ; Mary Lynne Dias; Unknown Tenant(s) in Possession of the Subject Property, Appellees.

Case No. 2D16–244

District Court of Appeal of Florida, Second District.

Opinion filed October 20, 2017
Rehearing Denied November 28, 2017

Shaib Y. Rios of Brock & Scott, PLLC, Ft. Laudersale (withdrew after initial briefing); Morgan L. Weinstein of Van Ness Law Firm, PLC, Deerfield Beach (substituted as counsel of record), for Appellant/Cross–Appellee.

John C. Dent., Jr., and Jennifer A. McClain of Dent & McClain, Chartered, Sarasota, for Appellee/Cross–Appellant Calvin Rutledge.

No appearance for remaining Appellees.

KHOUZAM, Judge.

This appeal/cross-appeal involves two parallel foreclosure actions against Bruce and Mary Lynne Dias, one initiated by Wells Fargo Bank in December 2010 and the other initiated by Harbor Towers Owners Association in February 2011. In Harbor Towers' suit, summary judgment was entered in favor of Harbor Towers and the property was sold at public auction to Calvin Rutledge. The summary judgment in that suit was later vacated as void as to Wells Fargo, which had been improperly joined as a party.

In Wells Fargo's suit, summary judgment was entered in favor of Rutledge, who had been added as a party to the Wells Fargo suit after he bought the property. Concluding that the uncontroverted evidence showed Mary Lynne Dias's signature on the note and mortgage was forged, rendering the documents void, the court granted Rutledge title free and clear of Wells Fargo's claims. Though Wells Fargo challenged Rutledge's standing to raise the forgery defense, the court did not explicitly address the standing argument in its summary judgment order. This court reversed on appeal, determining—without mention of standing—that a material issue of fact remained on the forgery defense. See Wells Fargo Bank, N.A. v. Rutledge, 148 So.3d 533, 535 (Fla. 2d DCA 2014).

On remand, a bench trial was held. Rutledge submitted additional evidence in support of the claim that Ms. Dias's signature had been forged. Specifically, he submitted Ms. Dias's deposition, in which she testified that she had not signed the note or mortgage and that she was not present when they were signed. She also testified that she and Mr. Dias were no longer married. Asked when they were "separated or divorced," she responded simply "2007." Wells Fargo did not present any evidence to rebut Ms. Dias's deposition testimony, and the trial court found that Ms. Dias's signature had been forged. However, the court requested the parties submit memoranda addressing the effect of the forgery, considering that the Diases were no longer married.

Wells Fargo again challenged Rutledge's standing to raise the forgery defense, but the trial court was under the misimpression that this issue had been resolved in Rutledge's favor in the previous appeal and that, therefore, it could not be addressed on remand. Ultimately, the trial court entered a final judgment of foreclosure on Mr. Dias's one-half interest in the property in favor of Wells Fargo, reasoning that the Diases owned the property as tenants in common following their divorce. Wells Fargo timely appeals, and Rutledge timely cross-appeals. We reverse and remand

[230 So.3d 552]

because Rutledge does not have standing to raise Ms. Dias's forgery defense and there was no evidence presented to support the court's conclusion that Wells Fargo was entitled to foreclose on a one-half interest in the property.

The question of whether Rutledge could raise the forgery defense was not squarely addressed by this court's previous opinion, and therefore the trial court erred in declining to resolve the issue on remand. Rutledge is not a party to or a third-party beneficiary of the note and mortgage, the agreements that Wells Fargo seeks to enforce in its foreclosure suit. See Pealer v. Wilmington Trust Nat'l Ass'n ex rel. MFRA Trust, 212 So.3d 1137, 1139 (Fla. 2d DCA 2017) (Sleet, J., concurring) ("[T]he bank's standing to foreclose derives from its right to enforce the note and mortgage." (citing St. Clair v. U.S. Bank Nat'l Ass'n, 173 So.3d 1045, 1047 (Fla. 2d DCA 2015))). Rather, Rutledge is a subsequent purchaser who was at least constructively aware of Wells Fargo's recorded lis pendens when he purchased the property. Rutledge, 148 So.3d at 535 ; see also Whitburn, LLC v. Wells Fargo Bank, N.A., 190 So.3d 1087, 1091 (Fla. 2d DCA 2015) (holding that constructive notice of any superior interest documented in the official records is imputed to subsequent purchasers), review denied, No. SC16-945, 2016 WL 6998444 (Fla. Nov. 30, 2016) ; CCM Pathfinder Palm Harbor Mgmt., LLC v. Unknown Heirs of Gendron, 198 So.3d 3, 7 (Fla. 2d DCA 2015) ("[T]he law is clear that if a recorded mortgage is valid on its face, a subsequent purchaser 'is assumed to have recognized it as a valid lien against the property which he is buying.' " (quoting Spinney v. Winter Park Bldg. & Loan Ass'n, 120 Fla. 453, 162 So. 899, 904 (1935))). Accordingly, Rutledge purchased the property subject to Wells Fargo's superior interest, and his subordinate interest stemming from his possession of the property is limited. See Pealer, 212 So.3d at 1138–39 ; Whitburn, 190 So.3d at 1091–92. He cannot participate in Wells Fargo's foreclosure action as if he were a party to the note and mortgage; thus, he cannot challenge the mortgage's validity, as he attempted to do in this case. See Eurovest, Ltd. v. Segall, 528 So.2d 482, 483 (Fla. 3d DCA 1988) ("[A] purchaser who takes title to property subject to a mortgage without assuming any personal liability for repayment of the underlying debt is ... estopped from contesting the validity of the mortgage."); Gendron, 198 So.3d at 7 (quoting Eurovest with approval). Until the sale is formally set aside, he may still assert those limited rights available to him as a subsequent purchaser. See Eurovest, 528 So.2d at 483 (stating that a subsequent purchaser does retain some legal and equitable remedies, including "his equitable right of redemption [and] his right to participate in excess proceeds of the sale following any foreclosure proceeding").

Moreover, there was no evidence presented to support the court's determination that Wells Fargo was entitled to foreclose on a one-half interest in the property. It was not until the end of the trial, after finding that Ms. Dias's signature had been forged, that the court sua sponte asked the parties what effect the forgery and the Diases' divorce had on the validity of the note and mortgage. The parties submitted memoranda but never took discovery or presented evidence specifically on this issue. Reasoning that the Diases originally owned the property as tenants by the entirety and then by tenants in common upon their divorce, the court concluded that Mr. Dias retained a one-half interest in the property and that Wells Fargo could foreclose on his interest—even though Wells Fargo's lien against Ms. Dias's one-half interest in the property was unenforceable. But there was no evidence (such as a final judgment of dissolution)

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or testimony presented to establish when the couple was divorced or whether the property had been awarded in a judgment of dissolution. Ms. Dias only testified that she had been married to Mr. Dias in 2006, that they were "separated or divorced" in 2007, and that they were no longer married at the time of her deposition in 2015. While Ms. Dias did state that she and Mr. Dias owned the property, she also maintained that she never signed the relevant note or mortgage—raising the question of whether Mr. Dias had the authority to enter into the note or mortgage without her in the first place. See Sharp v. Hamilton, 520 So.2d 9, 10 (Fla. 1988) ("Entireties property is not subject to a lien against only one tenant"). Without any evidence to support the court's findings that the note and mortgage continued to be valid and enforceable as to a one-half interest retained by Mr. Dias, it was error to enter final judgment of foreclosure on that interest.

For the reasons set forth above, we reverse and remand for proceedings consistent with this opinion.

Reversed and remanded.

BLACK and SLEET, JJ., Concur.

DAVID NOURACHI, AS TRUSTEE, etc., Appellant,
v.
FIRST AMERICAN TITLE INSURANCE COMPANY, Appellee.

Case No. 5D09-2554

District Court Of Appeal Of The State Of Florida
Fifth District

JULY TERM 2010
August 6, 2010

Patrick A. Mcgee, of McGee & Perez, P.A. Orlando, for Appellant.

Bryce W. Ackerman of Ackerman & Haines, P.A., Ocala, for Appellee.

Appeal from the Circuit Court for Marion County, Brian Lambert, Judge.

EVANDER, J.

David Nourachi, as trustee of The HWY 44 Lakefront Trust ("Nourachi"), timely appeals from a final judgment in favor of First American Title Insurance Company ("First American") rescinding a title insurance policy. We affirm. The evidence supported the trial court's conclusion that Nourachi had knowledge of an express defect in title to the property in question at the time he sought title insurance from First American and

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deliberately failed to disclose this information. Where a party does not rely on a title insurance company to advise it of encumbrances *prior* to acquiring title to property, it may not recover on a material title defect of which it had actual knowledge and which it failed to disclose to the insurer at the time it applied for the title policy.

The underlying cause proceeded to a non-jury trial on First American's second amended complaint in which First American sought to rescind a title insurance policy it had issued to Nourachi. The facts, as found by the trial court, are set forth below:

In December 2002, for the sum of $22,600, Nourachi obtained a tax deed to certain unimproved real property located in Marion County. Nourachi then filed a quiet title action and obtained a default judgment on February 10, 2004. After the quiet title judgment was entered, Nourachi had "no trespassing" signs posted on the property. A forester with the United States Forest Service observed the signs on land that had long been part of the Ocala National Forest. On March 9, 2004, the United States Forest Service sent Nourachi a letter demanding that the signs be removed and notifying Nourachi that the land had been part of the Ocala National Forest since January 1937 when the United States purchased the tract from C.A. Savage, Jr. The following day, two of Nourachi's agents, Leo Nourachi and Sam Zalloum, met with officials of the Marion County Property Appraiser's Office. At the meeting, Nourachi's agents were advised that the county had made a mistake in adding the property to the county tax rolls and subjecting it to a tax sale because the property was actually owned by the United States. The subject property (along with other land) had been conveyed to the United States by C.A. Savage, Jr., and his wife, Dorothy Savage, on January 19, 1937,

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pursuant to a deed that had been recorded in Marion County's public records. The County officials offered to refund Nourachi his money.[1]

Immediately after the meeting, the "no trespassing" signs were removed from the property. Approximately one week later, a copy of the 1937 deed from the Savages to the United States was faxed to Zalloum. Zalloum then contacted a land surveyor, Larry Efird, Jr., to obtain a boundary survey for the property. Efird was provided with both a copy of the 1937 deed and the tax sale deed. At Zalloum's request, Efird sketched out the property described in the 1937 deed and his drawing reflected that at least a part of the property described in the 1937 deed fell within the property described in the tax deed. Efird quoted Zalloum a $3,000 fee to complete an actual survey. However, Nourachi did not retain Efird to perform an actual survey until December 2008 well after the commencement of the instant lawsuit.

In August 2004, Nourachi contacted First American, represented himself as the owner of the subject property, and requested First American issue a title insurance policy in the amount of $550,000. Nourachi deliberately failed to disclose the existence of the United States' claim to the property and First American negligently failed to discover same. As a result, First American issued a title policy to Nourachi in the requested amount. Approximately one year later, at Nourachi's request, the amount was increased to 1.3 million dollars. First American would not have issued the title policy if it had known of the United States' claim.

In June 2006, after Marion County refused to accept Nourachi's tax payment, Nourachi notified First American that the United States claimed ownership of the

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property. On October 5, 2006, First American filed a one count complaint against Nourachi seeking a declaration of its rights under the policy. In January 2007, First American filed an amended complaint, again asserting a single count for declaratory judgment. On July 9, 2008, First American filed a motion to amend its complaint to add a count for rescission. The motion was granted[2] and trial was held on June 10, 2009.

In entering judgment in favor of First American, the trial court found that Nourachi should not benefit by deliberately concealing a known, express defect in the title and then argue that the insurer should have been more circumspect or astute in performing its title search duties. The trial court granted First American's claim for rescission and directed First American to refund any title insurance premiums paid within thirty days.

On appeal, Nourachi argues that he had no duty to disclose facts that First American could, by its own diligence, have discovered in this arms-length transaction. Nourachi contends that a title company should not avoid liability when a defective condition of title, not excepted from coverage, subsequently causes a loss to the insured even though the insured knew of the particular defect. We reject Nourachi's argument and conclude that where an insured purchases property, subsequently learns of facts establishing that he does not have good title to the property, and then seeks title insurance without disclosing this known, express defect in title to the insurer, he is not entitled to recover under the policy.

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In reaching our conclusion, it is important to recognize the general nature and purpose of title insurance. Usually, a prospective purchaser of title insurance avails himself of a title insurance company's services *prior* to acquiring title to property for which he is seeking to have title insured. The prospective purchaser will typically lack knowledge of encumbrances which may cloud the title and, accordingly, will employ the services of the title insurance company so that he can learn whether encumbrances exist and to obtain insurance against those claims against title that may arise after issuance of the policy. The title company is to perform a title search and advise the prospective purchaser of any encumbrances upon the land that are revealed by the search. Thus, the prospective purchaser will typically rely on the title insurance company's expertise in searching the records and its willingness to issue a title policy in making a final decision as to whether to purchase a particular piece of real estate. *Commonwealth Land Title Ins. Co. v. Ozark Global, L.C.,* 956 F. Supp. 989 (S.D. Ala.), *aff'd,* 127 F.3d 41 (11th Cir. 1997).

In recognition of a prospective purchaser's presumed reliance on a title company's search, the general rule is that where a title company issues a policy in conjunction with the insured's purchase of property, the title company is obligated to answer for any defect that is a matter of public record which is not excepted by the policy. *See Parker v. Ward,* 614 So. 2d 975, 977 (Ala. 1992); *Lawyers Title Ins. Corp. v. D.S.C. of Newark Enters, Inc.,* 544 So. 2d 1070, 1072 (Fla. 4th DCA 1989). This rule has been found to apply even where the insured is alleged to have had actual knowledge of a material defect in title at the time of closing. *L. Smirlock Realty Corp. v. Title Guarantee Co.,* 418 N.E.2d 650, 654 (N.Y. 1981).

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However, where an insured does not apply for or receive a title insurance policy (or otherwise request a title search) from an insurer until *after* he has acquired title to the property, the insured's failure to disclose a material defect in title of which the insured had actual knowledge will preclude coverage. *Ozark Global; Pioneer Nat'l Title Ins. Co. v. Lucas,* 382 A.2d 933 (N.J. Super. Ct. App. Div.), *aff'd,* 394 A.2d 360 (N.J. 1978).

In *Ozark Global,* Fletcher Oil Company executed and delivered a warranty deed to Ozark Global L.C. ("Global") conveying certain real property in Mobile County, Alabama. The deed was expressly made subject to six state of Alabama revenue tax liens against Fletcher Oil Company, which secured an indebtedness in excess of $50,000. Global *subsequently* applied for a title insurance policy from Commonwealth. Commonwealth issued a title policy, which, through inadvertence or oversight, failed to list as exceptions those State of Alabama Department of Revenue tax liens that had been set forth in the deed but had not been released. The parties stipulated that Global knew or should have known at all applicable times that such liens had not been released. Global further acknowledged that it had not relied to its detriment on Commonwealth's failure to except those tax liens from the policy. Nevertheless, Global contended that Commonwealth was responsible for the liens based on the language of the policy.

In resolving the case in favor of Commonwealth, the court emphasized that Global did not rely on Commonwealth to advise it of encumbrances on the property, stating:

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Global's non-reliance upon Commonwealth for advisement as to whether the purchased land was encumbered is of utmost importance, for this fact displaces the general rule that a title insurer is liable for all title defects not specifically listed as exceptions to coverage.

Id. at 992.

The court observed that the purpose of title insurance is to protect a purchaser of real estate against title "surprises." When an insured has already purchased the property and is aware of title defects prior to applying for a title policy "it cannot be said that the insured will experience 'surprise' when the title insurance policy does not list the known encumbrance as an exception to coverage." *Id; see also D.S.C. of Newark Enters, Inc.,* 544 So. 2d at 1072-73 ("Also, since there is an element of reliance involved in the analysis of whether the title insurer should be held liable it is more difficult for an insured to recover where title is first taken and then title insurance is procured.")

The dissent attempts to distinguish *Commonwealth* by arguing that the title defects in question were the subject of an exclusion provision in the policy. In fact, the primary basis of the court's decision was as described above. The court only addressed the exclusion provision of the policy toward the end of its opinion as an alternative ground for its decision. *"Alternatively,* the court holds that the six tax liens fell within the 'created, suffered, assumed or agreed to by the insured claimant exclusions in the title policy...." 956 F. Supp. at 993 (emphasis added). The dissent's attempt to distinguish *Ozark Global* is actually a request to ignore what the *Ozark Global* court itself deemed to be the primary holding of the case.

In *Lucas,* the public records reflected that Lucas owned certain property on which she had been paying taxes for several years. She then learned that approximately

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thirteen acres of her property was apparently owned by a neighbor. The title defect occurred because sometime in the 19th Century, the insured's predecessors in title twice conveyed the subject property. In the second conveyance (to Lucas' predecessor), they were attempting to pass title to land they did not own. Armed with this information, the insured contacted Pioneer Title and requested a sixty-year title search. Not surprisingly, the sixty-year title search performed by Pioneer did not uncover the defect in Lucas' title. After receiving the sixty-year title search, Lucas then obtained a title insurance policy from Pioneer. When the neighbor subsequently brought a quiet title action against Lucas, Pioneer sought to rescind the title policy. The trial court denied Pioneer's claim, finding that no fraud had been committed by the insured. The appellate court reversed, finding that the record established "beyond question" that the policy was procured by half-truths and concealment. The court found that the insured had deliberately failed to disclose to Pioneer known matters relating to the title, material to the risk insured against, and as part of the design to mislead the insurer into issuing a substantial policy. The appellate court further observed that the insured had lulled Pioneer into a false sense of security by suggesting that a sixty-year search would be sufficient. Like Nourachi, Lucas argued that she was under no duty to disclose to the insurer those defects that appear in the public records. The court concluded that one who engaged in the above-described conduct may not urge that her victim should have been more circumspect or astute. 382 A.2d at 342.

The dissent attempts to distinguish *Lucas* by categorizing it as a "garden variety fraud case" because Lucas' agent went beyond simple non-disclosure by initially only requesting a sixty-year title search and suggesting that a sixty-year title search should

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be sufficient. The dissent ignores the distinction between a request for a title search and a title policy. Lucas requested and Pioneer provided a sixty-year title search. Based on Lucas' request, Pioneer was not required to do more at that time. However, when Lucas subsequently applied for a title policy, Pioneer was obligated to search further and was negligent if it failed to do so. Notwithstanding that negligence, the court determined that Lucas' claim must fail because of her intentional failure to disclose the known material defect in title. The dissent's argument is also internally inconsistent. On the one hand, the dissent calls *Lucas* a "garden variety fraud case." On the other hand, it contends that fraud cannot be found where the insured makes representations that are refuted by recorded documents in the chain of title--the type of representations made by Lucas' agent.

The *Lucas* decision was based primarily on the insured's intentional failure to disclose a material defect in title at the time she sought to obtain a policy on property she had already acquired. Lucas' agent's aforedescribed actions were evidence that Lucas had actual knowledge of the defect and refused to disclose same in the hope that the title search performed by Pioneer in conjunction with the *request for the title policy* would be deficient.

Our decision is also consistent with the general principle that a party may not insure against a loss that he knows has already occurred and that he fails to disclose to the insurer. *Mass. Bonding & Ins. Co., v. Hoxie,* 176 So. 480, 482 (Fla. 1937); *see also Natl Life Ins. Co. v. Harriott,* 268 So. 2d 397, 400 (Fla. 2d DCA 1972). In *Hoxie,* the insured had permitted two premises liability insurance policies to expire. Approximately two months later, an individual was injured on the premises by a falling light fixture.

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Immediately after learning of the occurrence of this incident, the insured paid a new premium and had the policies reinstated effective back to the initial expiration date. The insured failed to advise the insurance company of the above-described incident. Our supreme court determined that the insurer was entitled to a cancellation of the policy because the insured's non-disclosure constituted a fraudulent concealment of a material fact which was equivalent to a false representation that the fact did not exist. The court cited with approval to the following language from *Joyce on Insurance* (1st Ed.) Vol. 1 page 159, section 99:

If the delivery [of an insurance policy] be obtained by misrepresentation or fraud, it can have no effect as a binding contract, as in case the assured has knowledge of the loss at the time the application is made and conceals the fact.

Hoxie, 176 So. at 482.

The dissent attempts to limit *Hoxie's* holding to situations where the insured had "superior knowledge not available to the other party." However, there is no such limitation expressed in *Hoxie*. Indeed, the insurer in *Hoxie* could have placed itself in an equal position of knowledge with regard to the claim in question by simply "asking the right questions" in its application form. Alternatively, the insurer could have neutralized the superior knowledge position of the insured by inserting an appropriate exclusion provision in the policy. Our supreme court did not require the insured to do either--thereby reflecting that its decision was not based on the comparable positions of knowledge of the insurer and the insured.

Our sister court in *Harriott* properly concluded that the *Hoxie* decision was based on the general principle that an insured cannot seek to insure against a loss known by the insured but not disclosed to the insurer. Citing to *Hoxie,* the court stated:

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Settled law forbids insuring against a loss which the insured knows has already occurred and which he fraudulently conceals from the insurer. Sound policy forbids procuring insurance against a reasonably certain loss in the immediate future without disclosing the risk.

Harriott, 268 So. 2d at 400 (footnote omitted).

Here, the facts amply support the trial court's determination that Nourachi had knowledge of an express defect in title at the time he sought a policy from First American. Indeed, the very entity that sold the property to Nourachi specifically advised him that it (Marion County) did not have good title at the time of the conveyance. Immediately thereafter, Nourachi was provided a copy of the 1937 Savage deed to the United States confirming Nourachi's lack of good title. Nourachi then delayed the actual employment of a surveyor after being advised by the surveyor that at least part of the property he had obtained by tax deed was encompassed within the legal description set forth in the 1937 deed.

Furthermore, the United States' claim against Nourachi's property interest had fully matured by the time Nourachi had applied for a title policy. The United States had notified Nourachi in writing that it had a superior claim to the subject property pursuant to the 1937 deed that had been recorded in Marion County's Public Records. The United States had further made written demand upon Nourachi to remove personal property (the "No Trespassing" signs) that he had placed on the disputed parcel. Thus, we face the issue of whether a party having actual knowledge of a specific claim against his existing property interest has a duty to disclose that information where the claim has matured to the extent that the insurer's duty to defend against that specific claim would come into existence the instant the policy was issued. We believe, and *Hoxie* strongly

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suggests, that the answer is "yes." *Ozark Global* and *Lucas* reached the same conclusion. Notably, the dissent has failed to cite to a single case that answered this question in the negative.[3]

The dissent also suggests that the title policy in question expressly provides coverage for defects of which the insured had actual knowledge and which could be discovered in the public records. It does not. The policy simply excludes from coverage title defects of which the insured had actual knowledge and which are not recorded in the public records. As explained *supra,* the insured's obligation to disclose title defects of which the insured had actual knowledge and which are recorded in the public records is dependent on when the title policy was procured and whether the insured presumptively relied on the insurer's title search. *See Ozark Global,* 956 F. Supp 989; *D.S.C. of Newark Enters., Inc,* 544 So. 2d 1020.

Regardless, the dissent's suggestion that this case be determined solely on contract language was effectively rejected by our supreme court in *Hoxie.* In *Hoxie,* the literal language of the policy would apparently have provided coverage. Alternatively, the supreme court could have determined that to preclude liability, the insurer in *Hoxie* should have inserted an appropriate exclusion provision in the policy. Instead, the supreme court imposed a duty to disclose on the insured. The imposition of this duty was recognition that an insurance policy is designed to protect an insured against a

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potential risk--not to provide compensation for a claim that has already been made against the insured at the time the policy is sought.

The dissent also argues that *Hoxie* is distinguishable because it involves an indemnity policy rather than a title policy. There are valid policy reasons to treat the two policies differently when an insured procures a title policy in conjunction with the acquisition of an interest in property. In that situation, it is appropriate to presume that the insured has relied upon the title company's expertise in searching the public records. Additionally, prior to closing, the insured will ordinarily not have a property interest against which a third party may make a claim. Where there is no reliance by the insured on the insurer's search and a claim has already been made against the insured's property interest, there is no valid reason to depart from the general principle articulated in *Hoxie* and *Harriott.*

This is not a case of a party seeking to insure against the risk of a potential adverse claim. In fact, under Nourachi's legal theory, he had a valid claim against First American the instant it issued its policy. Nor is this a situation in which a party relied on a title company to properly perform a title search. Rather, the evidence suggests that Nourachi hoped that First American's title search would be deficient so as to afford him the opportunity to seek a recovery on a title policy.

To accept Nourachi's argument would promote unsavory gamesmanship. For example, a party having actual knowledge of its defective title (but refusing to disclose same) could seek title insurance from one insurer after another until eventually finding an insurer that negligently failed to discover the title defect, and then make a claim on

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that insurer's subsequently-issued policy. The law should not encourage this type of conduct.

AFFIRMED.

LAWSON, J., concurs specially with opinion.

TORPY, J., dissents with opinion.

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LAWSON, J., concurring.

I concur in the majority opinion, but write to address what I view as the fundamental analytical flaw in an otherwise well-reasoned dissenting opinion. The dissent very logically and persuasively sets forth basic contract law and tort principles that, if applied to this case, would lead to a different result. This analysis, however, fails to recognize that there are some common law principles related to insurance (sometimes called "insurance law") that uniquely apply in the insurance context. This case is nothing more than a straight-forward application of one of the most basic insurance law principles--most often referred to as the "fortuity" principle or "known loss doctrine."

As explained in Appleman's latest insurance treatise:

One of the fundamental assumptions deeply embedded in insurance law is the principle that an insurer will not pay for a loss unless the loss is "fortuitous, " meaning that the loss must be accidental in some sense. The public policy underlying the fortuity requirement is so strong that if the insurance policy itself does not expressly require that the loss be accidental courts will imply such a requirement. The fortuity principle is often expressed with reference to certainty: losses that are certain to occur, or which have already occurred, are not fortuitous.

Robert H. Jerry, II, *Insurance Law's Fundamental Concepts and Assumptions, in New Appleman on Insurance Law Library Edition* § 1.05 (2010). "[T]he fortuity and known loss doctrines are 'integral to the nature of insurance and thus apply as a matter of public policy, irrespective of specific policy terms.'" *HSB Group, Inc. v. SVB Underwriting, Ltd.,* 664 F. Supp.2d 158, 183 (D. Conn. 2009) (quoting *Nat'l Union Fire Ins. Co. v. Stroh Companies, Inc.,* 265 F.3d 97, 107 (2d Cir. 2001); *see also General Housewares Corp. v. Nat'l Surety Corp.,* 741 N.E.2d 408, (Ind. App. 2000) ("the known

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loss doctrine is not so much an exception, limitation, or exclusion as it is a principle intrinsic to the very concept of insurance").

"Essentially, the doctrine provides that one may not obtain insurance for a loss that either has already taken place or is in progress." *Pittston Co. Ultramar America Ltd. v. Allianz Ins. Co.,* 124 F.3d 508, 516 (3d Cir. 1997); *see also Rohm & Hass Co. v. Cont'l Cas. Co.,* 781 A.2d 1172, 1177 (Pa. 2001) ("[W]hen an insured knows of an insurable harm incurred prior to the purchase of an insurance policy, the insured has suffered a 'known loss' and the damage is no longer a mere risk and is deemed uninsurable."); 7 Lee R. Russ and Thomas F. Segalla, *Couch on Insurance,* § 102:8 at 20 (3d ed. 1997) ("losses which exist at the time of the insuring agreement, or which are so probable or imminent that there is insufficient 'risk' being transferred between the insured and insurer, are not proper subjects of insurance").

This basic doctrine does not arise from a desire to protect an individual insurance company from something akin to fraud, as the dissent seems to suggest, but from a recognition that "the insured's risk is, in a real sense, borne by the insurer's policyholders as a group, from whose pool of premiums all claims must be paid if the insurer is to remain in business." *Fairfield Ins. Co. v. Stephens Martin Paving, LP.,* 246 S.W. 3d 653, 673-74 (Tx. 2008). In other words, because society as a whole relies on insurance, public policy will not permit a transaction that is anathema to the very concept of insurance which, if allowed in the aggregate, could put insurance at risk for all.

In this case, the finder of fact expressly found that David Nourachi committed "fraud" by not disclosing the "known, express defect in title" created by the United

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States' superior ownership interest in the land. Although I agree with the dissent that the facts should not have been viewed through the lens of Florida tort law (fraud being an intentional tort), still, the trial court's finding can only be understood as a finding that Nourachi knew that he had suffered a loss compensable under the title policy before he purchased the First American policy. Because "one may not obtain insurance for a loss... that the insured either knows of, planned, intended, or is aware is substantially certain to occur" prior to contracting for insurance, 43 Am Jur 2d *Insurance,* § 479, the policy was properly rescinded.

The dissent is correct in its observation that, analytically, the fortuity doctrine would support a broader rule in the title insurance context than the rule applied in the majority opinion (and the cases relied upon therein). However, unlike the dissent, I see no reason to reject the more narrow rule simply because a broader rule might also be justified.

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TORPY, J., dissenting.

The analysis of this case should begin and end with the insurance contract, which not only insures that title is vested in Appellant, but also provides coverage for undisclosed claims of the type at issue here. Although the policy contains an exclusion for known and undisclosed claims, it expressly excepts from that exclusion claims that may be discerned from the public record. *See J.S.U.B., Inc. v. U.S. Fire Ins. Co.,* 906 So. 2d 303, 309 (Fla. 2d DCA 2005) (exception to exclusion considered in determining scope of coverage). Specifically, the policy excludes coverage for:

Defects, liens, encumbrances, adverse claims, or other matters... not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to [the effective date of the policy].

The majority opinion dismisses this contract language by concluding that it only applies in the event that title insurance is procured before the property is purchased, a limitation not mentioned at all in the policy. With a stroke of the court's pen, the majority rewrites the contract to incorporate this limitation. The majority relies in part on fraud cases to support its holding, yet it conspicuously avoids any analysis of the elements of the law of fraud, the proof of which is woefully lacking here. Apparently conceding the absence of fraud, which was the basis upon which the lower court granted relief, the majority announces a customized, unlabeled legal theory that it purports to exact from two readily distinguishable decisions of foreign jurisdictions. Because established legal doctrine does not support Appellee's right to rescind the insurance contract, I dissent.

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What the trial judge stated as his "critical factual finding" was that Appellant "was specifically placed on notice that the United States of America was claiming a superior interest in the real property," but failed to disclose it to Appellee. The actual ownership of the parcel was far from settled at the time Appellant purchased the insurance and even by the time of trial. The legal descriptions in the competing deeds were difficult to compare, so much so that both the property appraiser and title insurer had (apparently) incorrectly determined the ownership of the parcel. The surveyor could not figure it out without a full-blown survey costing several thousand dollars. His off-the-cuff opinion, which the trial judge did not include in his detailed findings of fact, even if properly considered by our Court, only implicated "part" of the property. Appellant had a deed to the property and had completed a quiet title action. The trial judge made no finding that Appellant's claim of title was not colorable, nor was there evidence from which such a finding could be made. Appellant's deed had not been cancelled.

Unlike the majority, I do not think what Appellant did was unusual or unsavory. Appellant had purchased the property without the benefit of a warranty deed, which is typically the case in a tax deed sale. He filed and concluded a quiet title action--again, typical. Once he became aware of the claim of the United States, he consulted with a surveyor who could not give him a definitive answer without a full-blown survey. Instead of paying a surveyor $3,000, to investigate the claim on a piece of land that cost Appellant only $22,000, he took the prudent step of seeking a title policy at no initial cost. Cost aside, the procurement of title insurance afforded a more definitive and secure resolution of any doubt about ownership. The fact that Appellant sought a policy in excess of the purchase price was not unusual at all. The policy amount sets the

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ceiling on damages; it is not the measure of damages. This was vacant land. No doubt, Appellant desired to develop the property and sought to protect his future investment. Property owners not only rely upon title insurance in the acquisition of property, but also in connection with the exploitation of property already acquired, especially when the acquisition is without a warranty deed.

The trial judge permitted the rescission of the insurance contract based upon a finding that Appellant had procured the insurance through fraud.[4] Because Appellant made no affirmative misrepresentation of fact, the lower court based its finding of fraud on the failure to disclose that which Appellant had a duty to disclose. The majority affirms the rescission without any analysis of the elements of the law of fraud. This is a critical omission because a party may not avoid the effect of a contract by claiming fraud in the inducement when the subject of the representation is expressly addressed in the contract. *Mac-Gray Servs., Inc. v. DeGeorge,* 913 So. 2d 630, 634 (Fla. 4th DCA 2005). This is a point missed by the majority, which cites *Massachusetts Bonding & Insurance Co. v. Hoxie,* 176 So. 480 (Fla. 1937), for the general proposition that "literal language" may be avoided when a contract is procured by fraud. When a contract specifically addresses the very issue that is the subject of the alleged misrepresentation, this general proposition does not apply. *Id.* Here, this contract actually addresses the issue of nondisclosure by the insured of known claims and expressly excepts any duty of disclosure when the claims are matters in the public record. The duty of disclosure is thus negated by the contract itself, and the insurer

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assumes the risk of all claims of this sort, whether known or not known, or disclosed or not disclosed.

Even if the contract itself did not negate any duty of disclosure on Appellant's part, the general rule is that there is no duty to disclose facts during the formation of a contract. *Maxwell v. First United Bank,* 782 So. 2d 931, 934 (Fla. 4th DCA 2001). Under Florida law, there are four categories of exceptions to the general rule. First, when the parties are in a fiduciary relationship. *Dale v. Jennings,* 107 So. 175 (Fla. 1925). Second, where a party not under a duty to disclose undertakes to do so, but does so with half-truths. *Vokes v. Arthur Murray, Inc.,* 212 So. 2d 906 (Fla. 2d DCA 1968). Third, when a statute imposes the duty. *See, e.g.,* § 517.061(11)(a)3., Fla. Stat. (2008) (dealing with sale of securities). Fourth, where one party has superior knowledge unavailable to the other, but then only under limited circumstances. *See, e.g., Johnson v. Davis,* 480 So. 2d 625 (Fla. 1985) (sale of residence containing known, latent, material defects). These exceptions do not apply here.

In the specific context of title insurance, the rule is that "an insured under a policy of title insurance... is under no duty to disclose to the insurer a fact which is readily ascertainable by reference to the public records. Thus, even an intentional failure to disclose a matter of public record will not result in a loss of title insurance protection." *L. Smirlock Realty Corp. v. Title Guarantee Co.,* 418 N.E.2d 650, 654 (N.Y. 1981); *see also Lawyers Title Ins. Corp. v. D.S.C. of Newark Enters., Inc.,* 544 So. 2d 1070, 1072 (Fla. 4th DCA 1989) (general rule is that title insurer cannot avoid liability for condition discernable from public record, even if insured knew of defect and failed to disclose it to

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insurer). Indeed, this policy expressly incorporates this rule. The majority opinion acknowledges this "general rule."

Although the cases upon which the majority relies all fit within one of the four exceptions to the general rule, this case does not fit within any of these exceptions. Instead of denying relief, the majority creates today a fifth exception to the general rule of nondisclosure-where an applicant for insurance becomes aware of a claim after he buys the property, but before he procures the insurance. Setting aside the fact that this policy expressly negates that duty for recorded claims, this holding is without doctrinal support in the law of contracts.

The majority fails to label the legal theory upon which it relies and offers flawed logic for the rule, which appears to apply only in the context of title insurance. It reasons that the owner relies upon the insurer's expertise only before it purchases the property, but not after, and that the general rule of nondisclosure should not apply when reliance is lacking. The fallacy in this distinction is that the insured has knowledge of the defect in both scenarios, so reliance from the standpoint of the insured is the same in both situations. Under the majority's approach, an insured who knows of a defect in title, but purchases property in the face of this knowledge, thereby intentionally damaging himself, is protected, whereas an insured who purchases property without knowledge of a defect, but who learns of the defect before procuring the insurance, is not. I fail to see how this factual distinction should make a difference in the rule of law. In both circumstances, the conduct of the insured is similarly "unsavory," using the majority's characterization of the conduct. The misdirection of the majority's rationale lies, in part, with its purported reliance on two decisions from foreign jurisdictions. When

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the holdings of these decisions are confined to the facts in each case, they do not support the holding here. Only by seizing on the superfluous language in these decisions does the majority find any precedential support for its rule of law. To this extent, however, these decisions do not embody the law of Florida. In any event, they are both readily distinguishable on the facts.

In *Commonwealth Land Title Insurance Co. v. Ozark Global, L.C.,* 956 F. Supp. 989 (S.D. Ala. 1997), the contract contained an express exclusion that precluded coverage. There, the insured purchased property that was encumbered by six state tax liens. The warranty deed under which the insured took title was expressly made subject to the liens. The insured procured a title policy without disclosing the liens and the title company did not expressly delineate the liens in the exclusions. The policy did, however, exclude defects that had been "created, suffered, **assumed or agreed to** by the insured claimant." *Id.* at 993 (emphasis supplied). The court concluded that the tax liens fell within this exclusion because the insured had taken title with an express assumption of the liability. *Id.* Here, Appellant never expressly assumed or even acknowledged the validity of the defect. The policy here contains the same exclusion, but Appellee has made no contention that Appellant ever "assumed" the defect. Thus, *Ozark Global* presents a dramatically distinct scenario where the insured sought to insure against an obligation that it had expressly assumed and the contract expressly excluded from coverage.

Pioneer National Title Insurance Co. v. Lucas, 382 A.2d 933 (N.J. Super. Ct. App. Div.), *aff'd,* 394 A.2d 360 (N.J. 1978), the second case on which the majority relies, is nothing more than a garden variety fraud case. In that case, the insured had been

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informed by his attorney that his title was defective. The attorney told the insured that an exhaustive investigation had been conducted and the outcome certain. The insured engaged a second attorney who acted as his agent in procuring title insurance. Even though the second attorney was fully aware of the defect and that it could only be detected if the title company searched beyond the customary sixty-year period, he, in a letter, requested a sixty-year search and only agreed to pay for the sixty-year search. The attorney also directed the insurer's attention to a particular concern for the purpose of diverting its attention from the real concern. The court concluded that "[t]he record establishe[d] beyond question that [the] policy was procured by half-truths and concealment by [the insured's attorney] that justify its rescission." *Id.* at 937. It found that the attorney had taken "advantage of [the insurer's] credulity by leading it to believe that the usual 60-year search would suffice, when he knew that an adverse claim was being made by reason of conveyances well beyond that period in the 19th Century." *Id.* In drawing a distinction from the general rule, the *Lucas* court stated:

However, here **more than awareness of a title defect is involved.** The insured's attorney actually knew of an adverse claim discoverable only by a search beyond the usual 60 years; yet by deliberate silence, he induced the title company to rely on a 60 year search. Moreover, in the letter to [the insurer] confirming the request for a title search, [the insured's attorney] stated that the problem he wanted examined consisted of a disparity between the description of the property in the deed and the tax map. **This reflects an attempt to lull [the insurer] into believing that the difficulty, if any, was something quite different from the real problem.**

Id. at 938 (emphasis supplied).

Lucas illustrates an exception to the general rule--that a party who undertakes to disclose information, even when not under a duty to do so, must disclose all material

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information. The very use of this exception presupposes that there exists no duty to disclose unless and until there is a partial disclosure. Here, by contrast, Appellant made no attempt to lull Appellee into a negligent search.

Neither do the Florida cases cited by the majority support its conclusion. *Hoxie,* 176 So. 480, is clearly distinguishable. It involved the exception to the general rule that applies when a party has superior knowledge not available to the other party. There, the insured was seeking retroactive renewal of an indemnity policy, but did not disclose that someone had fallen on the property during the lapse in coverage. Here, by contrast, it was Appellee, the insurer, that had superior access to the information. It was specially trained to find the information, and legally obligated to find it. *Hoxie* also involved indemnity insurance, an entirely different creature than title insurance. This is a distinction overlooked by my concurring colleague whose reliance on the "fortuity" doctrine is misplaced.[5] Indemnity insurance protects against the risk of a subsequent

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occurrence. The premium is based on an actuarial prediction. Title insurance, by contrast, is issued based upon past events and represents the "informed opinion of title examining experts employed by the company that title is in the condition expressed in the policy." *D.S.C. of Newark Enters.,* 544 So. 2d at 1072. Title insurers routinely issue policies in the face of ambiguous documents and known claims. They are in the peculiar position to assess their risk with reasonable certainty and disclaim that which they are unwilling to assume. Here, Appellee expressly assumed the risk of claims that were discernable from the public record, even those known by Appellant. Again, New York's highest court makes this very point:

[T]itle insurance is procured in order to protect against the risk that the property purchased may have some defect in title. The emphasis in securing these policies is on the expertise of the title company to search the public records and discover possible defects in title. Thus, unlike other types of insurance, the insured under a title policy provides little, if any, information to the title company other than the lot and block of the premises and the name of the prospective grantor. Armed with this information, the title company then can search the various indices and maps to ascertain the state of title to the property. Indeed, it is because title insurance companies combine their search and disclosure expertise with insurance protection that an implied duty arises out of the title insurance agreement that the insurer has conducted a reasonably diligent search.

L. Smirlock Realty Corp., 418 N.E.2d at 654-55.

National Life Insurance Co. v. Harriott, 268 So. 2d 397, 400 (Fla. 2d DCA 1972), also involved the nondisclosure of a fact known only by the insured (in the procurement of a credit life insurance policy) and unavailable to the company. Central to the court's

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decision was the nature of the credit life insurance itself, which is issued without an application, health examination or investigation. Thus, as with the other cases the majority relies on, *Harriott* is similarly distinguishable.

Even if a duty to disclose exists, the second part of the trial court's conclusion-that Appellant fraudulently concealed his knowledge-is an erroneous application of the law of fraud. Again, the majority opinion is devoid of any analysis of the elements of fraud. A central premise in the analysis of a fraud claim based upon nondisclosure is that the party advancing the claim must prove the claim as if the culpable party had "represented the nonexistence of the matter he failed to disclose." Restatement (Second) of Torts § 551; *see Humana, Inc. v. Castillo,* 728 So. 2d 261, 265 (Fla. 2d DCA 1999) (reliance is element of fraud based on nondisclosure). In other words, the proof of fraud based upon nondisclosure requires proof of all the elements of common law fraud, except that the nondisclosure may serve as a substitute for the "affirmative misrepresentation" element. Otherwise, proof of fraud of the nondisclosure variety would be easier than if the culpable party had affirmatively misled the aggrieved party by denying the existence of the nondisclosed fact, a considerably more reprehensible variety of fraud. Thus, whether based upon an affirmative misrepresentation or a nondisclosure, the proponent of a fraud claim must establish materiality, the intent to induce reliance and justifiable reliance. Proof of any of these elements is woefully lacking here, something the majority totally overlooks.[6]

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First, the nondisclosure was not material. The immateriality of the nondisclosed facts is conclusively proven here by the policy itself. The policy expressly addresses claims that are unknown by Appellee and known by Appellant, but only excludes from coverage those claims that are not discernible from the public record. By excepting from the exclusion those claims that are recorded in the public records, Appellee affirmatively eliminated any duty to disclose these facts because it expressly undertook the responsibility to find them and expressly accepted liability in the event that it did not find them. Even without this policy language, a reasonable title insurance company would attach no significance to an insured's representation of ownership or that his title to the property is free from claims of record. Title insurance companies are in the business of discerning ownership by resort to their own research and peculiar expertise. "Examination of record title or an abstract of the record title of real property is both an esoteric and a painstaking process[,]" which requires "considerable expertise." *D.S.C. of Newark Enters.,* 544 So. 2d at 1072.

Second, there was no intent to induce reliance by the nondisclosure. Again, the policy itself expressly addresses itself to claims that are unknown by Appellee and known by Appellant, but only excludes from coverage those claims that are not discernible from the public record. There can be no intent to induce reliance by failure to disclose that which is expressly addressed by the contract. Even absent this policy language, Appellant had every reason to expect that Appellee, the title insurer, would get to the bottom of who had title to this property using its own expertise. As New York's highest court explained:

[B]ecause record information of a title defect is available to the title insurer and because the title insurer is presumed to

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have made itself aware of such information, we hold that an insured under a policy of title insurance such as is involved herein is under no duty to disclose to the insurer a fact which is readily ascertainable by reference to the public records.

L. Smirlock Realty Corp., 418 N.E.2d at 654.

Finally, Appellee cannot establish justifiable reliance under an objective standard. In *M/I Schottenstein Homes, Inc. v. Azam,* 813 So. 2d 91 (Fla. 2002), our high court considered whether the purchaser of property can justifiably rely on misrepresentations that are refuted by recorded documents in the chain of title. It concluded that it could not:

[W]here recorded information which is clearly contained in the chain of title of the parcel purchased is asserted as the basis for an action for misrepresentation by the purchaser, a distinct and very different matter than the situation discussed herein exists. Knowledge of clearly revealed information from recorded documents contained in the records constituting a parcel's chain of title is properly imputed to a purchasing party, based upon the fact that an examination of these documents prior to a transfer of the real property is entirely expected. For this reason, it may often be the case that where fraud regarding information contained in and clearly revealed through a parcel's chain of title is alleged, reliance is not justified and a cause of action will not exist. It is also plain that there may be situations in which a party's allegations of fraudulent misrepresentation fail to state a cause of action. Where the pleadings of the parties make it evident that reliance on the part of a purchaser was not justified as a matter of law, a trial court may certainly be correct in ruling as a matter of law that no cause of action exists.

Id. at 95. (citations omitted). Where the allegedly defrauded party is sophisticated, the lack of justifiable reliance is especially compelling. *See Wasser v. Sasoni,* 652 So. 2d 411, 413 (Fla. 3d DCA 1995) (sophisticated party not justified in relying on fact available to party through reasonable diligence); *see also Nicholson v. Ariko,* 539 So. 2d 1141,

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1142 (Fla. 5th DCA 1989) (party may not reasonably rely upon interpretation of legal document to support claim for fraud). If this type of information is imputed to a lay purchaser, it must certainly be imputed to a title insurer trained and duty-bound to find it. *See D.S.C. of Newark Enters.,* 544 So. 2d at 1072 (title insurer has legal duty to make "thorough and competent search"). A title insurer is more sophisticated at discerning claims of this nature than anyone, including most lawyers. To suggest that it can reasonably rely upon anything that a layperson discloses about ownership turns the law of fraud on its head. *See Giallo v. New Piper Aircraft, Inc.,* 855 So. 2d 1273, 1275 (Fla. 4th DCA 2003) (party cannot recover in fraud for alleged oral misrepresentations that are adequately covered or expressly contradicted in contract).

The majority justifies its holding using the policy argument that the creation of this duty is necessary to avoid "unsavory" conduct in the future. Whether Appellant's conduct was unsavory begs the question. To create a duty to avoid unsavory conduct that is not unsavory but for the duty is the product of dyslexic logic. If there was no duty to speak, then there was nothing wrong with what Appellant did here. Certainly, his conduct defies no natural law. Indeed, before today, in an arm's-length transaction, there was no duty to disclose matters about which the other party has equal, if not superior, access. This is like the client who shops from lawyer to lawyer until he finds one who gives him the opinion that his proposed course of conduct comports with the law. As long as he does not misrepresent the facts, the client has no duty to tell the negligent lawyer that prior opinions have differed from his. The fact that the client had been given correct opinions by prior lawyers does not excuse the last lawyer from his duty to use due care.

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In my view, established public policy, embodied in Florida jurisprudence, actually supports a contrary conclusion. Public policy favors freedom of contract, especially when the party seeking to avoid the contract is sophisticated and fully capable of protecting itself. *See Nicholson,* 539 So. 2d at 1142 (rejecting, as matter of law, sophisticated businessman's attempt to avoid contract based on fraud). Here, it was Appellee that drafted the contract. All it had to do to avoid this dilemma was to exclude coverage for all defects known by the insured but not disclosed, whether or not the subject of public record. Instead it only excluded that which it could not be expected to find. I see no justification for excusing the performance of the bargained-for contract. There is also the policy that imposes upon title insurers the obligation to make a diligent search of the public record. Had Appellee fulfilled its obligation, it would have discovered the claim. Again, I see no reason why we should shift this duty to Appellant just because he had been given a different opinion that he did not disclose.

I am also concerned that the rule of law announced today is vague and capable of unforeseen havoc. If the holding is as expressed, under what circumstances does knowledge of a claim trigger the duty to disclose that which is discernable from a diligent search of the public record? Does it depend on the quality of the claim? Does it depend upon the identity of the claimant? Does the duty come into play only when a governmental entity, such as the property appraiser, confirms the validity of the claim? Does this case really stand for the proposition that an insured has a duty to disclose any known claims? Does the duty apply only to claims about which the insured has actual knowledge or does it also extend to those about which the insured should have knowledge? Does the insured have some duty to make inquiry? Is the lack of reliance

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the fact that the insured knew of the unresolved claim or the fact that he did not purchase the property in reliance on the policy? What if the insured relies upon the policy to develop the property, rather than acquire it?

Rather than formulate potentially bad law to address the peculiar facts of this one case, I would leave the law alone and let the chips fall where they may here. Appellant still must prove damages measured by the value of the property. I am certain that this title insurer and others can take measures to avoid similar dilemmas in the future.

I would reverse.

Notes:

1. Marion County issued a "Certificate of Correction" in October 2005.

2. We find no merit to Nourachi's argument that First American lost any right it had to rescind the title policy by failing to promptly seek rescission. Nourachi did not suffer any prejudice from First American's delay in seeking to amend its complaint to add a count for rescission.

3. The dissent's suggestion that our decision will somehow cause "unforeseen havoc" is belied by the scarcity of case law involving situations where a party who has procured title insurance subsequent to acquiring a property interest is alleged to have had actual knowledge of an express defect in title at the time the policy was issued. On the other hand, the adoption of the dissent's position would encourage individuals with actual knowledge of their defective title to seek to "remedy" their circumstances by engaging

in a search for a title company that would "hopefully" perform a deficient title search.

[4.] The trial judge also mentioned the duty of good faith, but this theory may not be invoked to vary an express term in a contract, or to supply a missing term. *Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc.,* 785 So. 2d 1232, 1235 (Fla. 4th DCA 2001).

[5.] Judge Lawson argues an alternative basis for affirming the trial judge-the "fortuity" doctrine, which is grounded in the notion that certain insurances are intended to protect against a **risk** of an **accidental loss.** It operates to preclude coverage for accidents that occur before the effective date of the insurance because those losses are not "risks," and therefore, **not insurable.** *Rohm & Hass Co. v. Cont'l Cas. Co.,* 781 A.2d 1172, 1177 (Pa. 2001). The linchpin of this principle is the lack of insurability of the loss, not the lack of disclosure. Judge Lawson does not and cannot cite a single example where this doctrine has been applied in a title insurance case because the doctrine simply has no application outside the context of indemnity, casualty, life or other similar insurances where the premiums are based on actuarial predictions about future occurrences. Title insurance, by contrast, is a "guaranty that the search was accurate and that it expresses the quality of the title shown by the record." *Krause v. Title & Trust Co. of Fla.,* 390 So. 2d 805, 806 (Fla. 5th DCA 1980). Title insurers assume the risk that they overlooked something that occurred prior to the issuance of the policy. They base the premium on the dollar amount of coverage. The "loss" is a "defect" in marketable title, not a potential, future happening. In the case of title insurance, the loss always predates the issuance of the policy. These are not "uninsurable" losses. They are the precise losses contemplated by title insurance. If the concurring opinion is right, then Judge Lawson should not have joined in the reasoning of the majority opinion because the pre-purchase, post-purchase distinction identified by the majority is repugnant to his theory, as are the cases embodying the general rule that the majority opinion accepts as correct. Judge Lawson's view also directly contradicts the policy language because under no circumstances would the exception to the exclusion ever apply.

[6.] The test for at least two of these elements is objective. The test for materiality is whether "a reasonable man would attach importance to [the fact's] existence or nonexistence in determining his choice of action in the transaction in question." Restatement (Second) of Torts § 538. Justifiable reliance, likewise, is an objective standard as the matter must be material for the reliance to be justified. *Id.*

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218 So.2d 451
D.A.D., INC., a Florida corporation, Appellant,
v.
Mattie M. MORING, a single woman, if living, or if dead, her unknown heirs, and Richard A. Roundtree and Ruth Roundtree, his wife, Appellees.
No. 1549.
District Court of Appeal of Florida, Fourth District.
Feb. 6, 1969.

Jeffrey Michael Cohen, of Law Offices of Norman F. Solomon, Miami, for appellant.

James E. Alderman, of Brown & Alderman, Fort Pierce, for appellees Roundtree.

REED, Judge.

The plaintiff in this case, D.A.D., Inc., is a Florida corporation which filed a suit to foreclose a mortgage executed by one of the defendants, Mattie M. Moring, on certain real property in St. Lucie County, Florida. The defendant Richard A. Roundtree and his wife were joined as parties defendant on the basis of an allegation in the complaint to the effect that they had an interest in the real property subject to the mortgage.

This appeal is from a final judgment of the Circuit Court for St. Lucie County, Florida, which held that the lien of the mortgage terminated upon the death of Mattie Moring and denied foreclosure.

The pertinent facts are undisputed. Mattie M. Moring and the defendant Richard A. Roundtree became joint tenants with right of survivorship by virtue of a deed from Mattie Moring to Mattie Moring and Richard A. Roundtree providing that on the death of either the estate would survive

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to the other. The deed was dated and recorded in the public records of St. Lucie County, Florida, on 25 September 1961. Subsequent to the recording of the deed, Mattie Moring executed a mortgage to the plaintiff which purported to impose a lien on the real property described in the deed. The execution of the mortgage and the promissory note thereby secured was without the knowledge or consent of the defendant Roundtree.

The plaintiff filed a suit to foreclose the mortgage on 12 October 1965. The defendant Mattie Moring died on 25 March 1966 prior to the cause coming at issue. The answer of the defendant Roundtree alleged the death of Mattie Moring and his interest in the property under the aforementioned deed.

The question on appeal is whether or not the lien of the mortgage executed by Mattie Moring under the circumstances above described is enforceable after her death against the undivided one-half interest in the property owned by her prior to her death. We answer this question in the negative and affirm the final decree.

A joint tenancy with a right of survivorship in real property is recognized by statute in the State of Florida. Section 689.15, F.S.1941, F.S.A.; Kozacik v. Kozacik, 1946, 157 Fla. 597, 26 So.2d 659. The principle incident of the tenancy is the right of survivorship by which the entire interest of one tenant, upon his death, remains to the other. Florida National Bank of Jacksonville v. Gann, Fla.App.1958, 101 So.2d 579. It necessarily follows from the right of survivorship that the interest of a joint tenant terminates upon his death prior to the other joint tenant. For this reason, a mortgage on the interest of a joint tenant imposes a lien upon a defeasible interest, and the lien, of necessity, terminates when, by reason of the mortgagor's death, his interest in the tenancy terminates.

Joint tenants in real property may, of course, sever the joint tenancy and extinguish the right of survivorship by any act which destroys any one of the four unities which are considered to be essentials of a joint tenancy, namely, the unity of interest, title, time and possession. As stated in Kozacik v. Kozacik, supra:

'* * * (A) joint tenancy may be terminated by any act which destroys one or more of its unities, provided the act of the joint tenant who severs his interest is such as to preclude him from claiming by survivorship any interest in the subject matter of the joint tenancy. * * * Accordingly, it is settled that a joint tenancy will be terminated by the alienation or conveyance by a joint tenant of his interest in the realty to a stranger, for by such act the unity of title is destroyed and the unity of possession is gone. * * *'

In Florida, because a mortgage is recognized as only a lien on real property and not as a conveyance thereof or a transfer of the right of possession, Section 697.02, F.S.1967, it would not appear that the execution of a mortgage destroys any of the unities, the joint tenancy, and, with it, the right of survivorship.

The appellant urges us to hold that although the mortgage did not terminate the right of survivorship in the joint tenancy, the undivided one-half interest of the mortgagor, Mattie Moring, survived to the other joint tenant subject to the lien of the mortgage. While there is an argument that can be made to support the logic and the fairness of the appellant's conclusion, it is our opinion that the same is at variance with the essence of a joint tenancy in real property, namely, the right of survivorship and its concomitant, a defeasible interest in the fee. Since this tenancy is recognized and authorized by the statutory law of this state, it is our view that the rule suggested by the appellant is more appropriate for adoption by the legislature than by the court.

The issue before this court has been considered by the District Court of Appeal for

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the Second District in the State of California in the case of People v. Nogarr, 1958, 164 Cal.App.2d 591, 330 P.2d 858. The California court on facts almost identical to those in the present case reached the conclusion we adopt. A contrary view on similar facts has been taken by the Supreme Court of Indiana in the case of Wilken v. Young, 1895, 149 Ind. 1, 41 N.E. 68.

For the foregoing reasons, the final judgment is affirmed.

Affirmed.

WALDEN, C.J., and MURPHREE, JOHN A.H., Associate Judge, concur.

898 So.2d 250

COUNTRYWIDE HOME LOANS, INC., Appellant,
v.
Sook Hyung KIM, unknown spouse of Sook Hyung Kim, Sook Hyung Kim, Unknown Tenant I, Unknown Tenant II, Pine Bay Homeowners' Association, Inc., Mortgage Electronic Registration Systems, Inc., acting solely as nominee for Aegis Mortgage Corporation d/b/a New America, Ltd., Capital One, F.S.B., and any unknown heirs, devisees, grantees, creditors, and other unknown persons or unknown spouses claiming by, through and under any of the above named Defendants, Appellees.

No. 4D04-929.

District Court of Appeal of Florida, Fourth District.

March 16, 2005.

Alaine S. Greenberg of Greenberg, Traurig, P.A., Ft. Lauderdale, for appellant.

Mitchell D. Adler and Danielle L. Rosen of Abrams Anton, P.A., Hollywood, for appellee Sook Hyung Kim.

KLEIN, J.

Countrywide initiated this mortgage foreclosure against Kim, asserting that the prior owners, a married couple, had executed a mortgage in favor of Countrywide which was in default. Because Countrywide had inadvertently failed to obtain the wife's signature on the mortgage, the trial court held that the mortgage was void as a matter of law. We reverse.

The owners of the property prior to Kim were Michael and Tricia Abdulahad, husband and wife. The facts as reflected by the record, when the trial court entered this summary judgment, showed that when the mortgage was executed, the property was owned by Michael and Tricia, as tenants by the entirety, but the mortgage was signed only by Michael. The fact that Tricia had not signed the mortgage was due solely to inadvertence, as she attended

[898 So.2d 251]

the closing, knew that the proceeds of the mortgage were being used to pay for the property, and would have signed the mortgage if requested to do so. She assumed the mortgage would be paid from the proceeds of the sale to Kim.

When Kim purchased from Michael and Tricia, through further inadvertence, the mortgage to Countrywide was not paid off or satisfied and, when it went into default, Countrywide filed this foreclosure suit.

Countrywide relies on *Schmidt v. Matilsky,* 490 So.2d 237 (Fla. 1st DCA 1986) to support its argument that the mortgage is valid even though Tricia neglected to sign it. In *Schmidt* the husband signed an option to sell land in the presence of his wife, and the court upheld the option against the wife, who had not signed, because her husband signed with her knowledge and assent. *Accord, Douglass v. Jones,* 422 So.2d 352 (Fla. 5th DCA 1982) (wife did not acquiesce). *See also Smith v. Royal Auto. Group,* 675 So.2d 144 (Fla. 5th DCA 1996) (missing signature to a contract can be supplied by the courts through reformation); *Spear v. MacDonald,* 67 So.2d 630 (Fla.1953) (reformation should be applied to correct deed and mortgage containing wrong legal description due to surveyor's errors).

This mortgage is accordingly not void, and the summary judgment is reversed.

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HON REALTY CORP., a Florida corporation, Plaintiff-Appellant
v.
FIRST AMERICAN TITLE INSURANCE CO., a California corporation, Defendant-Appellee.
No. 07-15844.
United States Court of Appeals, Eleventh Circuit.
September 4, 2008.

Appeal from the United States District Court for the Southern District of Florida; D. C. Docket No. 07-20494-CV-KMM.

Before TJOFLAT, ANDERSON and BLACK, Circuit Judges.

PER CURIAM.

Plaintiff-appellant Hon Realty Corp. ("Hon Realty") appeals from the grant

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of defendant's motion for summary judgment and the denial of its cross-motion for summary judgment in the instant declaratory judgment action arising out of a title insurance policy appellant purchased from defendant-appellee First American Title Insurance Co. ("First American"). At issue on appeal is whether the term "public records" used in an applicable exclusion term of the insurance contract includes public records that were not filed with the "Official Records" of Florida, pursuant to Fla. Stat. § 695.11,[1] the state's recording statute for encumbrances and liens against real property. For the following reasons, we conclude that the contractual term "public records" includes only those records filed under the state's recording statute to obtain constructive notice of a particular encumbrance or lien pursuant to Fla. Stat. § 695.11. Accordingly, we affirm the judgment of the district court.

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The facts are straightforward and undisputed. Hon Realty purchased a property, against which the City of Miami had an encumbrance because of the prior landowner's violations of several city ordinances. First American warranted title on the property as of the closing of the property, the effective date of the title insurance contract. The enforcement order for the encumbrance was issued prior to the purchase of the property—and, importantly, prior to the effective date of the title insurance—but the order was not recorded under Florida's recording statute, Fla. Stat. § 695.11, with the Miami-Dade County clerk of court until two weeks after Hon Realty closed on the property and after the effective date of the insurance policy. The district court determined—and the parties do not dispute on appeal—that the title insurance policy would warrant the title against (thus insuring against) said encumbrance, but only if the enforcement order with respect to the encumbrance "ha[d] been recorded in the public records at Date of Policy." Because the enforcement order was available in the City's public records but was not recorded in Miami-Dade's statutory "Official Records" until after Hon Realty recorded the warranty deed on the property, we must decide whether the insurance contract's provision that would cover encumbrances "recorded in the public records" by the date of the policy would include the City's public records or only the "Official Records" described in the state's recording statute.

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We review de novo the district court's grant of summary judgment. Burton v. Tampa Hous. Auth., 271 F.3d 1274, 1276-77 (11th Cir. 2001). Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Celotex v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553 (1986). The parties agree that this case presents only a question of law requiring the Court to interpret the parties' title insurance contract under Florida law. Flintkote Co. v. Dravo Corp., 678 F.2d 942, 945 (11th Cir. 1982) (recognizing that courts sitting in diversity apply the substantive law of the forum); see State Farm Fire & Cas. Co. v. Metro. Dade County, 639 So. 2d 63, 65 (Fla. Dist. Ct. App. 1994) (stating that contract construction is a question of law).

Florida law construes insurance policy exclusions narrowly, and any ambiguity in the contract should be resolved in favor of coverage and construed against the drafter. State Farm Fire & Cas. Co., 639 So. 2d at 65. However, "where the language of a policy is clear and unambiguous on its face, the policy must be given full effect." Am. Motorists Ins. Co. v. Farrey's Wholesale Hardware Co., Inc., 507 So. 2d 642, 645 (Fla. Dist. Ct. App. 1987).

We conclude that the policy is clear and unambiguous on its face and resolves the issue presented. The policy itself defines "public records" as follows:

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"records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters related to real property to purchasers for value and without knowledge." District Court Order at 4 (emphasis added). It is clear that the "public records" definition contemplated only the inclusion of those records filed under a state recording statute and not those general public records that may be available from, for example, a public records request with the state or a local municipality.

Notably, the enforcement order of the encumbrance at issue here specifically contemplated that the City's order be recorded with the county in order to be recorded as a lien against the property, which evinces the fact that the purported record of the enforcement order itself was not effective as an encumbrance to subsequent purchasers for value without knowledge prior to recording under Fla. Stat. § 695.11. See also Fla. Stat. Ann. § 162.09(3) (West 2000) (providing same). If the order itself was not effective against Hon Realty until its recording under Fla. Stat. § 695.11, the order cannot be reasonably considered a "public record" within the meaning of the contract.

Appellant argues that the record of the enforcement order was itself created under the City's authority granted by state statute permitting it to enforce local ordinances and is therefore a record "established under [a] state statute[ ]" that

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provides notice with respect to real property. Appellant's argument is without merit. The statute granting the City the authority to enforce its ordinances through encumbrances has nothing to do with a record filed under a statute "for the purpose of imparting constructive notice of matters related to real property . . . ." The purpose of Chapter 162 of the Florida Statutes, relied upon by Appellant, is to provide a mechanism for enforcing local ordinances and not a mechanism for imparting constructive notice of matters related to real property. Moreover, Fla. Stat. § 162.09(3) expressly contemplates that a "certified copy of an order imposing a fine, or a fine plus repair costs, may be recorded in the public records" in order to effect a lien under the state's recording statute.

For the foregoing reasons, we conclude that the judgment of the district court is due to be

AFFIRMED.[2]

Notes:

1. This statutory provision reads as follows:

All instruments which are authorized or required to be recorded in the office of the clerk of the circuit court of any county in the State of Florida, and which are to be recorded in the "Official Records" as provided for under s. 28.222, and which are filed for recording on or after the effective date of this act, shall be deemed to have been officially accepted by the said officer, and officially recorded, at the time she or he affixed thereon the consecutive official register numbers required under s. 28.222, and at such time shall be notice to all persons. The sequence of such official numbers shall determine the priority of recordation. An instrument bearing the lower number in the then-current series of numbers shall have priority over any instrument bearing a higher number in the same series.

Fla. Stat. Ann. § 695.11 (West 2000).

2. Appellee's request for oral argument is denied.

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201 So.3d 109

BCML HOLDING LLC, Appellant,
v.
WILMINGTON TRUST, N.A., etc., Appellee.

No. 3D14–1627.

District Court of Appeal of Florida, Third District.

Sept. 24, 2015.

[201 So.3d 110]

Todd L. Wallen, Miami, for appellant.

Lerman & Whitebook and Carlos D. Lerman, Hollywood, for appellee.

Before SUAREZ, C.J., LAGOA and EMAS, JJ.

EMAS, J.

BCML Holding, LLC ("BCML") appeals a final summary judgment in favor of Wilmington Trust, N.A. ("Wilmington") on BCML's counterclaim. For the reasons that follow, we affirm.

FACTS

On July 11, 2007, Gonzalo and Daniela Malesich ("Malesich") executed a note and purchase money mortgage which conveyed an interest in a condominium unit at the Murano Grande on Miami Beach to MERS, the nominee of the lender, American Brokers Conduit ("ABC"). The mortgage instrument contained a provision in which Malesich "covenants the Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property...." However, at the time the mortgage was executed, Malesich did not own the subject property; it was owned by RSV Corp. ("RSV").

Five days later, on July 16, 2007, RSV conveyed the property to Malesich via warranty deed. The mortgage and deed

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were recorded in the public records on August 1, 2007.

Thereafter, MERS assigned the mortgage to Citibank, N.A. In 2010, the Murano Grande Condominium Association ("Murano") initiated foreclosure proceedings on Malesich's unit due to unpaid condominium assessments. Murano obtained summary judgment in its favor and proceeded to the foreclosure sale, at which Murano was the highest bidder. After the certificates of sale and title were issued to Murano, it sold the property to BCML in 2012.

On April 3, 2013, Wilmington, successor trustee to Citibank, filed a foreclosure complaint against Malesich for default of the July 11, 2007 mortgage. BCML, Murano, and others were also named as defendants in the foreclosure complaint, which alleged a default date of October 1, 2008 (prior to Murano's foreclosure complaint).

BCML answered the complaint, asserting several affirmative defenses, including that Wilmington was estopped from bringing the action. BCML also asserted a two-count counterclaim for declaratory relief and to quiet title, alleging that because Malesich did not own the property on July 11, 2007, when it conveyed an interest in that property, the mortgage was void ab initio.

The parties filed cross-motions for summary judgment on BCML's counterclaim for declaratory relief and to quiet title. Following a hearing, the trial court held that the after-acquired title doctrine applied and granted summary judgment in favor of Wilmington. In its order granting summary judgment, the trial court stated:

> Pursuant to principles of after acquired title, the conveyance by RSV Corp. to Malesich cured any deficiency in the Mortgage arising from the lack of ownership by Gonzalo Malesich of the Property at

> the time of execution and delivery of the Mortgage. See, *Florida Land Co. v. Williams,* 84 Fla. 157, 92 So. 876 (1922) ; *Walters v. Merchants & Manufacturers Bank of Ellisville,* 218 Miss. 777, 67 So.2d 714 (1953) ; *Cook v. Katiba,* 152 So.2d 504 (Fla. 1st DCA 1963).

The trial court denied BCML's motion for reconsideration, dismissed BCML's counterclaims with prejudice, and entered final judgment in favor of Wilmington on BCML's counterclaims.[1] BCML appealed, and we review the issue de novo. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.,* 760 So.2d 126 (Fla.2000).

ANALYSIS

Under the doctrine of after-acquired title "if a grantor purports to transfer ownership of real property to which he lacks legal title at the time of the transfer, but subsequently acquires legal title to the property, the after-acquired title inures, by operation of law, to the benefit of the grantee." *Ackerman v. Abbott,* 978 A.2d 1250, 1254 (D.C.2009). This doctrine

> is a species of estoppel by deed, the principle that a grantor may not deny the truth of a deed against one in whose favor he executed it. Having conveyed title he did not have, when the grantor finally does acquire title, the doctrine operates to vest title automatically in the grantee.

Id. (internal citations omitted). As the Supreme Court of Florida observed in *Trustees of Internal Imp. Fund v. Lobean,* 127 So.2d 98, 102 (Fla.1961) :

> Legal estoppel or estoppel by deed is defined as a bar which precludes a party to a deed and his privies from asserting

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> as against others and their privies any right or title in derogation of the deed, or from denying the truth of any material fact asserted therein. In other words legal estoppel contemplates that if I execute a deed purporting to convey an estate or land which I do not own or one that is larger than I own and I later acquire such estate or land, then the subsequently acquired land or estate will by estoppel pass to my grantee.

While this doctrine has been described as a species of estoppel by deed, it has also been characterized as a doctrine grounded in the covenant or warranty of title made by the grantor when conveying the property. *See, e.g., Pitts v. Pastore,* 561 So.2d 297 (Fla. 2d DCA 1990) (observing that "a mortgage with covenants of warranty, such as the mortgage involved in this case, permits any title acquired by the mortgagor, after the execution of the mortgage, to inure to the benefit of the mortgagee."). In the instant case, the grantor Malesich, when conveying the property, expressly warranted that he was fully seised of the property at the time of conveyance, and had the right to mortgage, grant and convey the property.

The doctrine of after-acquired title applies to mortgages. *See Rose v. Lurton Co.,* 111 Fla. 424, 149 So. 557, 558 (1933) (noting "[i]t is now undoubtedly well settled in this jurisdiction that when it is appropriately so worded, a mortgage on after-acquired property of the mortgagor will be held valid, and enforceable between the parties to it, by a suit for foreclosure"); *Florida Land Inv. Co. v. Williams,* 84 Fla. 157, 92 So. 876, 877 (1922) (noting the general doctrine that "where a mortgage upon real estate contains full covenants of warranty, title acquired to the mortgaged property the mortgagor after the execution of the mortgage inures to the benefit of the mortgagee"); *Pitts,* 561 So.2d at 301 (Fla. 2d DCA 1990) (noting "[i]t is well established that one can enter into a mortgage agreement to create a lien against property which the mortgagor will only acquire in the future. Such a mortgage lien simply fails to attach until the property is purchased" (internal citations omitted)).

BCML argues that the after-acquired title doctrine does not apply as against a non-party to the original mortgage and subsequent purchaser of the subject property. BCML contends it is not a privy or successor in interest and that it cannot be bound by Malesich's covenant or his act in acquiring title after execution of the mortgage. BCML asserts in essence that, as to it, the mortgage was and remains void. We disagree, and conclude that BCML is bound, as a successor in interest, and estopped to deny the existence of title acquired by Malesich after the mortgage was executed.

It has long been settled that:

> Where a grantor sets forth on the face of his conveyance by averment or recital that he is seised of a particular estate in the premises and which estate the deed purports to convey, the grantor and all persons in privity with him are estopped from ever afterwards denying that he was seised and possessed at the time he made the conveyance. *The estoppel works upon the estate and binds an after-acquired title as between parties and privies.*

Moralis v. Matheson, 75 Fla. 589, 79 So. 202, 203–04 (1918) (emphasis added). *See also Lobean,* 127 So.2d at 102 (holding that the doctrine precludes a party to a deed *and his privies* from asserting as against others *and their privies* any right or title in derogation of the deed) (emphasis added); *Murray v. Newsom,* 111 Fla. 193, 149 So. 387, 388–89 (1933) (holding that the

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"doctrine of the inurement to the grantee of an after-acquired title by his grantor rests on the principle of estoppel and the question is one of intention. Where it appears to have been the object of the covenant to assure to the grantee the full and absolute enjoyment of the property without any right of the grantor to divest or interfere with the possession at any time thereafter, the deed operates as an estoppel against the claim of the grantor to a subsequently acquired estate, whether a present right passes or not."); *Meyers v. American Oil Co.,* 192 Miss. 180, 5 So.2d 218, 220 (1941) ("To suggest that a grantor who conveys property without title thereto may afterwards maneuver himself, or those in privity with him, into a more advantageous position as respects that property than he could have occupied had he had complete right and title at the time of the conveyance, would be to propose that which upon its face carries its own refutation.")

It is clear from the case law that the after-acquired doctrine "inures to the benefit of the grantee,[2] "—here Wilmington[3] —and that the covenant also "runs with the land," *Moralis,* 75 Fla. at 593, 79 So. 202 binding those who are successors in interest to the grantor as well as the grantee. *See also Taylor v. Fed. Farm Mortg. Co.,* 141 Fla. 703, 193 So. 758, 758 (1940) (applying after-acquired title doctrine to the "successor to the original mortgagee"); *Smith v. Urquhart,* 129 Fla. 742, 176 So. 787, 789 (1937) (noting that "the term 'privity' denotes mutual or successive relationship to the same rights or property") (quoting *Coral Realty Co. v. Peacock Holding Co.,* 103 Fla. 916, 138 So. 622, 625 (1931)); *Key West Wharf & Coal Co. v. Porter,* 63 Fla. 448, 58 So. 599 (1912) (holding that a party claiming title under one who is estopped will also be bound by the estoppel); *Ackerman,* 978 A.2d at 1255 ; *Jacobsen v. Nieboer,* 299 Mich. 116, 299 N.W. 830 (1941) ; *Horowitz v. People's Sav. Bank,* 307 Mass. 222, 29 N.E.2d 770 (1940) ; 22 Fla. Jur. 2d *Estoppel and Waiver* § 10 (2015) (noting that the rule applying estoppel to privies includes privies in blood, privies in estate, and privies in law). Thus, once Malesich mortgaged the property, with an express recital that he was "lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey" the property, and thereafter acquired the property described in the mortgage, there existed a valid mortgage inuring to the benefit of the mortgagee (and its successors in interest) and as against the original mortgagee (and its successors in interest). This construction is logical, as it would surely make little sense to permit BCML to thwart the mortgage lien by claiming it was an “innocent” purchaser, especially when it was on notice of the mortgage and deed, which were recorded together two weeks after the property was conveyed, three weeks after the mortgage was executed, and five years before BCML purchased the property. *U.S. Bank Nat. Ass'n v. Bevans,* 138 So.3d 1185 (Fla. 3d DCA 2014).

BCML also asserts that the doctrine of after-acquired title does not apply because the original transaction was a purchase money mortgage. Under Florida law, a “purchase money mortgage given as part of the transaction in which the premises were purchased is an exception to the general rule that, where a mortgage contains

[201 So.3d 114]

full covenants of warranty, title acquired by the mortgagor after the execution of the mortgage inures to the benefit of the mortgagee.” *Nelson v. Dwiggins,* 111 Fla. 298, 149 So. 613, 614 (1933). However, this exception does not apply to the instant transaction. While this mortgage was entitled a “purchase money mortgage” it did not represent the type of transaction contemplated by the Florida Supreme Court when it established this exception to the doctrine of after-acquired title. In a typical purchase money mortgage, the mortgage is given by the buyer of the property to the seller of the property to secure the unpaid balance of the purchase price, and the conveyance and mortgage are executed simultaneously. BCML concedes this describes the type of transaction involved in *Dwiggins,* and further concedes this was not the type of transaction involved in the instant case. Nonetheless, BCML asserts that because courts recognize the type of mortgage at issue as a purchase money mortgage, the exception is applicable and the after-acquired title doctrine should not apply. However, application of the *Dwiggins* exception is not talismanic. We must first consider the underlying purpose of the exception, and then, in determining its applicability, consider not merely the title or label given to the document, but all of the relevant facts and circumstances surrounding the transaction.

As the Florida Supreme Court explained in *Dwiggins,* 149 So. at 614, this exception “is based on the idea that it would be unjust to allow a purchase-money mortgage to be foreclosed on any greater title than the seller had conveyed, merely because it contained a covenant of warranty.” In other words, because the mortgagee of the property is also the seller of the property, that individual knows whether he is in fact lawfully seised of the property and able to convey full title. Upon foreclosing, this mortgagee should not be permitted to obtain greater title than he could originally have conveyed. The *Dwiggins* Court further explained:

> [T]he purchase-money mortgage, being foreclosed, should be held limited to the exact interest in the land *that had been simultaneously conveyed to the mortgagor by the mortgagee bank's deed,* the original vendor's lien of the bank having, as we have held been waived by the new form the transaction took, when the vendor elected to take a mortgage security on the particular interest in the mortgaged property that had been conveyed to the mortgagor by the mortgagee's deed.
>
> *Id.* (Emphasis added.)

In so holding, *Dwiggins* cited to *Williams,* 92 So. at 877, wherein the Court, in discussing after-acquired title, acknowledged “there is a generally recognized exception of purchase-money mortgages *given as a part of the transaction in which the premises mortgaged are purchased.* ” (emphasis added). Thus, this exception is limited to those purchase money mortgages involving a simultaneous sale of the property by the mortgagee to the mortgagor. The Court in *Williams* expounded on the reason for such an exception:

> It would be manifestly unjust to hold that one selling and conveying property which he does not own may, by taking from his grantee contemporaneously with the conveyance to him a purchase-money mortgage, containing the usual covenants of warranty, for a part of the agreed consideration and afterwards, by foreclosing such purchase-money mortgage, acquire title to an ownership of the property, the purchaser in the meantime having in order to protect himself, acquired title to the property by purchase

[201 So.3d 115]

> from the owner, the original grantor having refused to purchase such outstanding paramount title.
>
> *Id.* at 877–78.

The doctrine of after-acquired title is predicated on the notion that an uninformed grantee should not be penalized if the grantor did not own the property at the time of the conveyance, yet subsequently acquired it. 23 Am. Jur. 2d *Deeds* § 278 (2015). Obviously, as in the case of the purchase money mortgage presented in *Dwiggins,* where the mortgagee is also the one conveying the property to the mortgagor, the mortgagee is fully aware of the nature and extent of the interest being conveyed, and is foreclosed from relying upon the after-acquired doctrine to thereafter acquire greater title than that which it originally conveyed. Such are not the circumstances of the underlying transaction in this case. The original lender, ABC, loaned money to Malesich in exchange for a mortgage on property which Malesich thereafter purchased from a third-party in a subsequent transaction. We conclude that the purchase money mortgage exception to the after-acquired title doctrine does not apply to the instant case.

CONCLUSION

We hold that the doctrine of after-acquired title applies to the instant case, inuring to the benefit of Wilmington (and against BCML) as successors in interest. We further hold that the exception for purchase-money mortgages is inapplicable given the nature of the original transaction. The trial court was correct in entering summary judgment in favor of Wilmington.

Affirmed.

Notes:

[1] The foreclosure case remains pending below.

[2] *Murray,* 149 So. at 388 ; *Williams,* 92 So. at 877.

[3] We find no merit in BCML's additional argument that Wilmington cannot claim the benefit of the doctrine because it is not the original mortgagee. The record establishes that Wilmington is ABC's successor in interest.

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368 So.3d 1081

Gregory MAKI and Elizabeth Maki, Appellants,
v.
NCP BAYOU 2, LLC, Appellee.

Case No. 6D23-643

District Court of Appeal of Florida, Sixth District.

June 16, 2023

Gregory-Eugene Maki and Elizabeth-Ann Maki, Punta Gorda, pro se.

Ben H. Harris, III, of Jones Walker LLP, Miami, for Appellee.

MIZE, J.

Appellants Gregory and Elizabeth Maki (collectively, the "Makis") appeal the final judgment of foreclosure entered by the trial court in favor of Appellee NCP Bayou 2, LLC ("NCP").[1] We reverse.

Background and Procedural History

The Makis obtained two loans that were secured by mortgages on their home (the "Property"). In 2002, the Makis took out a mortgage (the "First Mortgage Loan"). In 2005, the Makis obtained a home equity line of credit (the "HELOC Loan"). To obtain the HELOC Loan, the Makis signed a Home Equity Line of Credit Agreement and Disclosure (the "HELOC Note") and a mortgage (the "HELOC Mortgage") to secure repayment of the HELOC Note. Both the First Mortgage Loan and the HELOC Loan were assigned to different lenders over the years, with the First Mortgage Loan ultimately being assigned to Wilmington Savings Fund Society ("Wilmington"), and the HELOC Loan ultimately being assigned to Multibank 2009-1 RES-ADC Venture, LLC ("Multibank").

The Makis failed to make the payment due on the HELOC Note in June 2013 and failed to make all the subsequent payments that came due thereafter. In October 2014, Multibank sent default letters to each of the Makis. The default letters informed the Makis that Multibank was exercising its right under the HELOC Note to accelerate all amounts due under the note and that, therefore, the entire principal and all other amounts due under the note were immediately due and payable. In each of the default letters, Multibank demanded that the Makis pay all principal and all other amounts due under the HELOC Note within thirty days of receipt of the letters.

In December 2014, after the Makis failed to pay the amount owed on the HELOC Note, Multibank filed a complaint against the Makis to recover the amounts owed under the HELOC Note (the "Prior Lawsuit"). Multibank only sought a monetary judgment for the amounts due under the HELOC Note. Multibank did not assert a claim to foreclose the HELOC Mortgage. Multibank later amended its complaint to add a claim for unjust enrichment.

After conducting a trial, the trial court in the Prior Lawsuit entered a final judgment in favor of Multibank and against the Makis for all amounts due under the HELOC Note. The final judgment was entered on January 3, 2017. In March 2018, Multibank filed notice that it had assigned the final judgment to NCP. Multibank subsequently assigned the HELOC Mortgage to NCP as well.

[368 So.3d 1084]

In November 2019, Wilmington filed an action against the Makis to foreclose its mortgage securing the First Mortgage Loan. Wilmington included NCP as a defendant as the junior lien holder. In December 2019, NCP responded by filing a counterclaim against Wilmington and a crossclaim against the Makis seeking to foreclose the HELOC Mortgage due to the Makis' failure to pay the final judgment entered in the Prior Lawsuit in January 2017. The Makis responded with an answer asserting various affirmative defenses.

NCP filed a motion for summary judgment. The motion was initially heard before a trial judge that was not the judge assigned to the division in which the case was pending.[2] That judge denied the motion without prejudice so that the motion could be reset for hearing before the judge assigned to the case. Before the motion for summary judgment was scheduled for another hearing, the Makis filed a motion to amend their answer to assert a statute of limitations defense under section 95.11(2)(c), Florida Statutes, which the trial court granted.[3] The Makis followed up that motion with a motion for summary judgment based on, among other things, the statute of limitations defense.

After a hearing on both parties' motions for summary judgment before the judge assigned to the case, the trial court issued an order granting NCP's motion and denying the Makis' motion. The trial court subsequently entered a final judgment of foreclosure ordering the Property to be sold at a foreclosure sale. The Makis filed a motion for rehearing, which the trial court denied. This appeal followed.[4]

Analysis

The Makis raise five issues on appeal, including that NCP's foreclosure action was barred by the statute of limitations set forth in section 95.11(2)(c), Florida Statutes. We agree with the Makis on this point.[5]

Whether NCP's foreclosure action was barred by the applicable statute of limitations is a question of law that we review de novo. *Snow v. Wells Fargo Bank, N.A.* , 156 So. 3d 538, 541 (Fla. 3d DCA 2015).

Section 95.11(2)(c), Florida Statutes, mandates that an action to foreclose a mortgage shall be commenced within five years. "The statute of limitations on a mortgage foreclosure action does not commence until a default in payment of the final installment, unless the mortgage contains an acceleration clause." *Snow* , 156 So. 3d at 541. When a mortgage secures a promissory note that contains an optional acceleration clause, and the holder of the note exercises its right to accelerate all future payments due under the note, the statute of limitations for the action to foreclose the mortgage begins to run on the

[368 So.3d 1085]

date that the lender exercises its right to accelerate the payments due under the note. *See id.* ; *Greene v. Bursey* , 733 So. 2d 1111, 1114–15 (Fla. 4th DCA 1999) ; *Monte v. Tipton* , 612 So. 2d 714, 716 (Fla. 2d DCA 1993).[6]

In this case, NCP's predecessor in interest, Multibank, exercised its option to accelerate all payments due under the HELOC Note in October 2014. Therefore, the statute of limitations on the action to foreclose the HELOC Mortgage began to run in October 2014 and expired in October 2019, approximately two months before NCP filed its action to foreclose the HELOC Mortgage in December 2019.

In its Answer Brief, NCP argues that the HELOC Note required a final payment of all sums due and owing under the note on the maturity date of January 15, 2016 and that, therefore, the statute of limitations did not begin to run until that date. However, as noted above, when a lender exercises its option to accelerate all future payments due under a note, those payments then become due immediately upon the acceleration – not when the payments would have otherwise been due had the lender not accelerated the future payments. Accordingly, the statute of limitations on an action to foreclose a mortgage securing an accelerated debt begins to run when the lender exercises its right to accelerate the debt. *See Snow* , 156 So. 3d at 541 ; *Greene* , 733 So. 2d at 1114–15 ; *Monte* , 612 So. 2d at 716.

NCP also argues that a creditor holding a note secured by a mortgage is not required to pursue a monetary judgment on the note and a foreclosure of the mortgage simultaneously. A lender is entitled to elect its remedies and an unsatisfied monetary judgment on the note does not bar a subsequent action to foreclose the mortgage. This is correct, but it does not change the fact that the statute of limitations on a mortgage foreclosure action begins to run when the lender accelerates the debt secured by the mortgage. A lender may choose to initially bring only an action on the promissory note without sacrificing its right to later bring a mortgage foreclosure action, but there is simply no legal authority for the proposition that the lender bringing an action solely on a note and obtaining a final judgment for the amount owed under the note extends the statute of limitations period for a later filed action to foreclose the mortgage.

NCP cites *Klondike, Inc. v. Blair* , for the proposition that:

> [U]ntil the mortgage debt is actually satisfied, the recovery of a judgment on the obligation secured by a mortgage, without the foreclosure of the mortgage, although merging the debt in the judgment, has no effect upon the mortgage or its lien, does not merge it, and does not preclude its foreclosure in a subsequent suit instituted for that purpose.

211 So. 2d 41, 43 (Fla. 4th DCA 1968) (quoting 37 Am. Jur. *Mortgages* , § 523). This proposition of law is correct, but it does not help NCP's case. As the Fourth District Court of Appeal noted, the recovery of a judgment on a promissory note secured by a mortgage, without foreclosure of the mortgage, merges the promissory

[368 So.3d 1086]

note in the judgment, *but it has no effect on the mortgage* . When a judgment is obtained on a note secured by a mortgage without a foreclosure of the mortgage, the mortgage is *not* merged into the judgment. The judgment does not preclude a subsequent action to foreclose the mortgage, but neither does it extend the statute of limitations period on a mortgage foreclosure action that exists separate and apart from the judgment.

NCP also argues that a lender satisfies the statute of limitations for a mortgage foreclosure action by showing separate and continuing defaults, some of which fall within five years of the filing of the complaint. *See Bank of Am., N.A. v. Graybush* , 253 So. 3d 1188, 1192 (Fla. 4th DCA 2018) ("Alleging and proving separate and continuing defaults, some of which fall within five years of the filing of the complaint, satisfies the statute of limitations."). NCP asserts that the Makis' failure to pay the judgment was a continuing default under the HELOC Note that continued after the initial default on the note. But that is not correct. The note having been extinguished and merged into the judgment, the obligation to pay the judgment was a new and different obligation than the original note. The Makis' failure to pay the judgment was a failure to pay the judgment, not a default under the note. This conclusion is apparent from section 95.11, which creates a separate statute of limitations period of twenty years for "an action on a judgment or decree of a court of record in this state," while the statute of limitations period for an action to recover on a promissory note is five years. *Compare* § 95.11(1), Fla. Stat. (2018)*with* § 95.11(2)(b), Fla. Stat. (2018). There is a separate statute of limitations for an action to collect a judgment because such an action is not the same cause of action as the action that was brought to obtain the judgment.

NCP also points to cases in which it contends that courts allowed subsequent foreclosure actions on new defaults on a debt that occurred after a prior lawsuit to collect the debt was dismissed. *See e.g. Bartram v. U.S. Bank Nat'l Ass'n* , 211 So. 3d 1009 (Fla. 2016) ; *Deutsche Bank Tr. Co. Americas v. Beauvais* , 188 So. 3d 938, 944 (Fla. 3d DCA 2016). Based on these cases, NCP asserts that an initial acceleration does not bar a subsequent action based on subsequent payment defaults. However, as the Florida Supreme Court found, when a lender accelerates an installment debt and brings an action to collect it, and the action is dismissed, the dismissal revokes the acceleration and places the parties back in the same contractual relationship they had before the acceleration "where the mortgage remains an installment loan and the [debtor] has the right to continue to make installment payments without being obligated to pay the entire amount due under the note and mortgage." *Bartram* , 211 So. 3d at 1019 ; *see also Beauvais* , 188 So. 3d at 946. In such a case, where an acceleration was revoked and the debtor's right and obligation to make installment payments was put back in place, there can be a subsequent default on that reinstituted obligation that starts the running of a new statute of limitations period. However, none of that happened in this case. In this case, the action on the note brought by NCP's predecessor in interest was not dismissed, the acceleration was never revoked, the parties were never put back in their original contractual relationship with the Makis having the right and obligation to make installment payments on the HELOC Note, and there was no "subsequent default" on such reinstituted installment payments. The opposite happened here. NCP's predecessor in interest succeeded on its claim for a judgment on the HELOC Note and the note was then merged into the final judgment. The statute of limitations

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on the action to foreclose the mortgage – which is a separate action from an action to collect the amounts owed on a note or an action to enforce a judgment – began to run in October 2014 and no event occurred that tolled or reset the statute of limitations.

Conclusion

NCP's mortgage foreclosure action was barred by the statute of limitations contained in section 95.11(2)(c), Florida Statutes. The trial court erred as a matter of law by concluding otherwise and granting NCP's motion for summary judgment. The final judgment of foreclosure is reversed and this case is remanded to the trial court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

NARDELLA and SMITH, JJ., concur.

Notes:

[1] This case was transferred from the Second District Court of Appeal to this Court on January 1, 2023.

[2] It appears that a senior judge covered the initial hearing on NCP's motion for summary judgment.

[3] NCP asserts in its Answer Brief that the trial court should not have considered the statute of limitations defense in deciding its motion for summary judgment because that defense was not included in the Makis' answer that was pending at the time NCP filed its motion for summary judgment. However, the trial court granted the Makis' motion to amend their answer to assert the statute of limitations defense and did consider the defense in deciding the motion for summary judgment. NCP did not file a cross-appeal. Therefore, the trial court's decision to allow the Makis to argue the statute of limitations defense in opposition to NCP's motion for summary judgment is not at issue in this appeal.

[4] The Makis did not seek a stay of the foreclosure sale pending appeal. The foreclosure sale occurred on September 1, 2022. NCP submitted the winning bid and currently holds title to the Property.

[5] We find no merit to the other arguments raised by the Makis.

[6] The HELOC Note at issue in this case contained an optional acceleration clause. A debt instrument may also include an automatic acceleration clause by which the entire indebtedness automatically becomes due immediately upon default without any action by the lender. "Such an acceleration is self-executing, requiring neither notice of default nor some further action to accelerate the debt." *Snow* , 156 So. 3d at 541. In a case involving a debt instrument containing an automatic acceleration clause, the statute of limitations to foreclose a mortgage securing such debt instrument begins to run immediately upon the default. *See id.*
