DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

CASE NO.: 1D15-3784
TRIAL COURT CASE NO.: 2012-CA-013026

TODD JENKINS,

petitioner/appellant,

vs.

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB, AS TRUSTEE FOR STANWICH MORTGAGE LOAN TRAUST, SERIES 2013-7, and FV-I, INC., IN TRUST FOR MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC

respondents/appellees.

PETITION FOR WRIT OF MANDAMUS AND APPEAL OF ORDER GRANTING MOTION TO VACATE DEFAULT FINAL JUDGMENT

FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

BERNHARD LAW FIRM PLLC
Counsel for Todd Jenkins
333 SE 2nd Avenue, Suite 2000
Miami, Florida 33131
Telephone: 786-871-3349
Fax: 786-871-3301
Email: abernhard@bernhardlawfirm.com
/s/ Andrew J. Bernhard
Andrew J. Bernhard, Esq.
Fla. Bar No. 84031

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Rules and Statutes

INTRODUCTION

Christiana seeks to avoid the effect of an original plaintiff's default and admitted lack of standing to foreclose

This is a home mortgage foreclosure action filed by FV-I, Inc. ("FVI"), continued by substitute plaintiff Christiana Trust ("Christiana"), and intervened upon by new homeowner Todd Jenkins. Mr. Jenkins seeks to dismiss the foreclosure for lack of standing. He rejoined original plaintiff FVI to this action through a third party complaint alleging that FVI misrepresented its standing to initially file the complaint. Original plaintiff FVI has admitted by default to lack of standing and acts of misrepresentation and deception, but successor plaintiff Christiana seeks to escape dismissal on grounds that the original plaintiff's lack of standing should not apply to the successor.

Many years ago, the Florida Supreme Court enacted the Florida Rules of Civil Procedure "to secure just, speedy, and inexpensive determination of every action."[1] To further this purpose, Rule 1.500 provides that a party who fails to answer an action admits to all well-pled allegations by default. Ever since, Florida courts have treated a default as the dispositive end to any lawsuit, as there is no way to conduct the discovery and examination necessary to test facts, hold trial, and uphold constitutional guarantees in adversarial legal confrontation.

[1] Fla. R. Civ. P. 1.010.

Neither the trial court nor the parties deny that the original plaintiff in this foreclosure has admitted by default to lacking standing to foreclose. And it is undisputed that standing is required to start and maintain a foreclosure action. Because the successor plaintiff cannot overcome these dispositive facts, it attempts to circumvent them by characterizing dismissal as absurd and unjust. Yet, continuing this foreclosure despite default and lack of standing would contravene axiomatic constitutional and decisional law. This is so regardless of the procedural route travelled to reach the default or the admission to lack of standing.

Because Mr. Jenkins cannot take further discovery from the defaulting original plaintiff, this case turns on the default. Because the default has the procedural effect of admitting to Mr. Jenkins's allegations, including that FVI lacked standing to start this foreclosure action, Mr. Jenkins is entitled to entry of judgment dismissing this foreclosure.

STATEMENT OF CASE AND FACTS

A. Mr. Jenkins unveils improper claims to an old mortgage on his new home, including FVI and Christiana's baseless foreclosure

Todd Jenkins is a Jacksonville resident who bought a home at 12271 Bucks Harbor Drive North, Jacksonville, FL 32225 (the "Home") in December 2013. (App. 21). When he purchased the Home, it was encumbered by a mortgage issued by now-defunct Option One Mortgage Corp. ("Option One") to the Home's prior owners, the Boltons. *Id.* After purchasing the Home, Mr. Jenkins discovered that

several obscure companies had created documents purporting to transfer this mortgage in impossible ways, allegedly sending the same mortgage note to at least *three* different companies from the same original source—from Option One to American Home Mortgage Servicing, Inc. ("American Home"), in Texas *and* to Wilmington Trust Company in Delaware *and* to FV-I, Inc. ("FVI"), in Delaware. (App. 21–25). Mr. Jenkins has since strived to:

(i) Unveil illegitimate claims on the mortgage note through discovery on those with personal and contemporaneous knowledge of the facts, and

(ii) Protect his property from improper claims and foreclosures.

To this end, Mr. Jenkins hired professional support to investigate the mortgage note's travel history after Option One. (App. 22). Mr. Jenkins found that the State of California had shut down Option One in 2008, prohibiting it from engaging in any mortgage-related activity thereafter. (App. 39–44). To sell off all of its mortgages, Option One created Sand Canyon Mortgage Corporation ("Sand Canyon"). (App. 23). According to the 2009 sworn declaration of its president, Sand Canyon sold all of Option One's mortgages to Texas company American Home Mortgage Servicing, Inc. ("American Home"), in 2008. (App. 22–23, 52–53). Through this mass mortgage transaction, Sand Canyon ceased to own any residential real estate mortgages or engage in the servicing of residential mortgage loans altogether in 2008. (App. 52–53).

Thus, by 2008 the mortgage note belonged to and resided with American Home in Texas. (App. 23–24). However, Mr. Jenkins found post-2008 documents purporting to assign the same mortgage from Sand Canyon to other companies as well, including in 2011 to Wilmington Trust Company (App. 54–55), and in 2012 (unrecorded) to FVI (App. 25–26). Given that Sand Canyon had sold all of its mortgages to American Home in 2008, and ceased all mortgage-related activity, both of these later assignments were unfeasible. *Id*.

Nevertheless, Mr. Jenkins found that FVI, the last in line of claimants, had filed a foreclosure action on the Option One mortgage, alleging that FVI was the "legal and/or equitable owner and/or holder of the Note and Mortgage" with "the right to enforce the loan documents." (App. 6 at ¶ 6). FVI's foreclosure is the underlying action on appeal here. After filing the foreclosure complaint, FVI moved to withdraw from the case and substitute another company, Christiana Trust ("Christiana"), as plaintiff. (App. 9). FVI's basis for substitution was its own assignment of interest from FVI to Christiana. *Id*. The trial court granted FVI's motion, and Christiana replaced FVI as plaintiff. *Id*.

Mr. Jenkins then intervened in the foreclosure action below, to protect his Home and discover the factual basis of FVI's claims. (App. 11). Mr. Jenkins set forth his investigative findings in affirmative defenses, a counterclaim against Christiana, and a third-party complaint against FVI. (App. 12–71). The crux of Mr.

Jenkins's claims was that FVI never had standing to file this foreclosure, and that every document to and from FVI was fraudulent, including those with Christiana. *Id*. Mr. Jenkins requested dismissal of the foreclosure, cancellation of the FVI-related assignments, discharge of FVI's lis pendens, and damages. (App. 14–37).

After a year and a half of litigation, Mr. Jenkins obtained FVI's admission-by-default that it did not have standing to file this foreclosure. (App. 71). This was undisputed by all parties. (App. 1–303). Mr. Jenkins found no other party below with *personal* knowledge of FVI's standing to file this foreclosure, and thus had no further discovery to take that would lead to admissible evidence on this dispositive point. (App. 283–84).

B. Mr. Jenkins seeks judgments dismissing the foreclosure given the original plaintiff's admitted lack of standing, but the trial court refuses

Mr. Jenkins requested entry of judgments dismissing this foreclosure, discharging the lis pendens, and cancelling FVI-related assignments; but the trial court refused. (App. 288–91, 296–303).

Mr. Jenkins filed a motion for default final judgment against FVI and mutually scheduled with Christiana for an October 1, 2014 hearing. (App. 122). On October 1st, just 15 minutes before the hearing, the trial court cancelled due to illness. Given that neither Christiana nor FVI filed any opposition to judgment, the trial court later entered a default final judgment against FVI, granting liquidated

damages, attorney's fees and costs, cancelling FVI's misrepresentative documents, and discharging FVI's lis pendens. (App. 124).

Christiana filed a motion to vacate the default final judgment, alleging that the judgment was void in its entirely because two paragraphs therein adversely affected Christiana. (App. 166). Mr. Jenkins responded, noting the due process provided to Christiana, failure to file opposition to judgment, and lack of standing to challenge the judgment against FVI in its entirety. (App. 172, 176, 216). Mr. Jenkins requested confirmation of the judgment where it did not affect Christiana, or an amendment to excise any objectionable material. (App. 216–21).

Mr. Jenkins also filed a motion for summary judgment against Christiana, requesting dismissal of the foreclosure given FVI's admission that it lacked standing to foreclose, and confirmation of the lis pendens discharge and document cancellation. (App. 126). The parties scheduled a hearing on summary judgment for December 4, 2014. (App. 174).

At 6:23 p.m. on the eve of the hearing, Christiana filed an unverified response to summary judgment, erroneously alleging that Christiana had established entitlement to foreclose through FVI's complaint. (App. 182). Mr. Jenkins filed an objection to this response as time-barred and hearsay. (App. 187). Mr. Jenkins also objected on untimeliness and the *Ellison* rule against changing position to avoid summary judgment. (App. 196).

On December 4, 2014, the parties presented oral argument on all matters. (App. 201). The trial court advised it would send out an order, but it did not. Christiana scheduled a follow-up February 2, 2015 hearing, where it presented further arguments against dismissal. (App. 222–38). The trial court found them unpersuasive, but granted Christiana another 10 days leave to amend its motion to vacate default final judgment and raise new arguments. *Id*.

On February 10, 2015, Christiana filed an amended motion to vacate default final judgment, alleging that Christiana was not included in the action, default judgment was absurd, and the third-party complaint did not state a claim. (App. 240–48). Mr. Jenkins filed a response stating that Christiana lacked standing to challenge judgment against FVI, the default judgment was amendable rather than void, the trial court had fulfilled Christiana's due process rights, and FVI's default and admission on standing required judgment denying foreclosure. (App. 250).

At a June 25, 2015 hearing, Christiana presented further argument on summary judgment against Christiana and dismissal of the counterclaim, but failed to file any verified opposition or admissible evidence. (App. 260–87). Mr. Jenkins again rebutted that Florida law and FVI's admissions required the trial court to enter a judgment denying foreclosure, cancel FVI's documents, and discharge the lis pendens. *Id.*

On July 14, 2015, the trial court entered an order vacating the October 8, 2014 default final judgment against FVI, stating:

> Under the circumstances of this case, the Court finds it appropriate to delay entry of final judgment as to FV-I until the claims against Christiana Trust have been fully litigated. The Court recognizes that FV-I admitted the well-pleaded facts set forth against it in the Third-Party Complaint by failing to file an answer, and, as such, the Court will not disturb the Clerk's entry of default against FV-I.

(App. 290). Given the order, the motion for default judgment remains pending.

On August 6, 2015, the trial court entered an order denying Christiana's motion to dismiss Mr. Jenkins's counterclaim, finding that Mr. Jenkins properly stated a cause of action on every count. (App. 292–94).

In a separate August 6, 2015 order, the trial court denied Mr. Jenkins's motion for summary judgment against Christiana, even though the trial court specifically found that Christiana's filings and oral arguments were insufficient to defeat a motion for summary judgment: "Christiana Trust's opposition filings and argument at the hearing [are] insufficient to defeat a motion for summary judgment . . ." (App. 296–303).

Notwithstanding, the trial court ruled that Christiana might still plead something that could overcome FVI's admission that it lacked standing to file this foreclosure, along with Mr. Jenkins's supporting evidence. (App. 302). On this finding alone, the trial court denied entry of an order dismissing the foreclosure. (App. 302–03).

JURISDICTION

Mr. Jenkins seeks a writ of mandamus compelling the trial court to enter default final judgment against original plaintiff and current third-party complaint defendant FVI, and therewith to enter judgment against FVI's successor Christiana, dismissing the foreclosure for FVI's lack of standing, cancelling FVI's documents, and discharging the lis pendens. Likewise, Mr. Jenkins seeks a reversal of the order vacating final default judgment against FVI and retroactively deferring ruling on Mr. Jenkins's motion for final default judgment.

The Court has jurisdiction to issue writs of mandamus under Fla. R. App. P. 9.030(b)(3) and to review non-final orders made on a motion for relief from judgment under Fla. R. App. P. 9.130(a)(5). To be entitled to mandamus, a petitioner must allege a violation of a clear legal right and the breach of an indisputable legal duty. *Polley v. Gardner*, 98 So. 3d 648, 649 (Fla. 1st DCA 2012). The standard of review on an order ruling on a motion for relief from judgment is abuse of discretion. *Bank of America, N.A. v. Lane*, 76 So. 3d 1007, 1008 (Fla. 1st DCA 2011).

SUMMARY OF ARGUMENTS

Mr. Jenkins is entitled to a writ of mandamus requiring the trial court to enter default final judgment against original foreclosure plaintiff FVI and summary judgment against FVI's successor plaintiff, Christiana, as Mr. Jenkins has

established: (i) breach of an indisputable legal duty; (ii) a violation of a clear legal right; and (iii) lack of an adequate legal remedy apart from mandamus. FVI's default admission that it lacked standing to foreclose as original plaintiff requires entry of judgment against it and successor Christiana.

Mr. Jenkins has a clear legal right to entry of a default judgment denying foreclosure against original plaintiff FVI, as the trial court confirmed that he has properly stated his causes of action and FVI has admitted that it lacked standing to initially file this foreclosure. FVI's admissions make entry of a default final judgment after default a non-discretionary ministerial act that the trial court must perform. Given that Christiana's perpetuation of FVI's foreclosure relies entirely on FVI's standing, and FVI has admitted it lacked standing, the trial court has also breached its indisputable duty to deny foreclosure as to Christiana, to which Mr. Jenkins has a clear legal right.

Mr. Jenkins has no other remedy after FVI's admission-by-default to lack of standing, as Florida law requires even a successor plaintiff to provide a current or former employee of the original mortgage holder to substantiate its record-keeping procedures, when records were made, whether the information they contain derived from a person with knowledge, whether the original owner regularly made such records, and whether the records belonged to the original owner. Given that the only party with such personal knowledge of FVI's standing to foreclose is FVI,

and FVI has admitted that it did not have standing to foreclose the mortgage, there is no discovery to take, witness to cross-examine, or other remedy to further determine the issue of standing. Accordingly, there is no other remedy available other than mandamus and the Court should grant Mr. Jenkins's petition.

Further, the trial court abused its discretion by vacating default judgment against FVI through Christiana's motion and the trial court's *sua sponte* retroactive deferment. Florida law restricted the trial court to providing relief from judgment under the limited grounds in Rule 1.540 (mistake, inadvertence, excusable neglect, fraud, etc.), and prohibited the trial court from *sua sponte* raising its own basis to vacate on behalf of FVI. Nevertheless, the trial court improperly vacated judgment against FVI through Christiana's untenable motion to vacate and the trial court's own *sua sponte* retroactive deferment on the Jenkins motion for default judgment that the trial court ruled upon eight months prior. Given that this ruling exceeded Rule 1.540, the trial court abused its discretion.

Moreover, there was no proper motion or basis before the trial court to vacate the default judgment against FVI. FVI filed nothing below, Christiana lacked standing to challenge the judgment as to FVI, the trial court provided surplus due process to all parties, and Christiana failed to show why the judgment was not simply amendable rather than void. In the end, Christiana has relied on

conjecture rather than admissible evidence or timely oppositions, which does not provide a proper basis to deny or vacate judgment.

No matter the number of hearings the trial court provides, pleadings and motions Christiana files, or discovery requests Mr. Jenkins and Christiana exchange, it will remain inescapable that original plaintiff FVI has admitted that it did not have standing to initiate this foreclose action. Every single claim between all parties depends on that indisputable fact. Accordingly, it is logical and just that judgment be entered, the foreclosure dismissed, FVI's fraudulent documents be cancelled, and the slanderous lis pendens be discharged.

MANDAMUS ARGUMENT

A. Original plaintiff FVI's default admission that it lacked standing to foreclose requires entry of judgment against it and successor Christiana

Mr. Jenkins seeks a writ of mandamus requiring the trial court to enter default final judgment against FVI on the July 28, 2015 motion for default final judgment and summary judgment against Christiana on the October 22, 2014 motion for summary judgment, heard on December 4, 2014, February 2, 2015, and June 25, 2015. As required, Mr. Jenkins has established: (i) breach of an indisputable legal duty; (ii) a violation of a clear legal right; and (iii) lack of another adequate legal remedy. *Putnam Cnty. Envtl. Council v. Johns River Water Mgmt. Dist.*, 2015 WL 3930045, *1 (Fla. 1st DCA 2015) (granting mandamus to require Commission to review water district order); *Polley*, 98 So. 3d at 649

(granting mandamus to compel order granting motion to confirm judgment, as a ministerial task with no sufficient legal basis to defer ruling).

1. The trial court breached its indisputable duty and Mr. Jenkins's clear legal right to entry of judgment denying foreclosure

For the purposes of mandamus, the legal duty required of a lower tribunal should be ministerial and not discretionary. *Polley*, 98 So. 3d at 649 (granting mandamus to compel trial court to confirm judgment). For example, a trial court has an indisputable legal duty to timely rule on pending matters and motions, as all parties have a clear legal right to adjudication of their pending motions. *Id*; *Moody v. Moody*, 705 So. 2d 708, 708 (Fla. 1st DCA 1998) (granting mandamus requiring trial court to rule on motion to disqualify); *SR Acquisitions-Fla. City, LLC v. San Remo Homes at Fla. City, LLC*, 78 So. 3d 636, 638–39 (Fla. 3d DCA 2011) (granting mandamus requiring trial court to rule on motion for relief from foreclosure judgment). The trial court is required to rule on these pending motions within a reasonable time. *Foster v. State*, 4 So. 3d 701, 701 (Fla. 1st DCA 2009) (granting mandamus to rule on motion for post-judgment relief, even if delay primarily attributable to requests for time to respond to pending motion); *Wright v. State*, 876 So. 2d 701, 701 (Fla. 1st DCA 2004) (granting mandamus where trial court did not rule on motion to correct sentence for a year).

On a pending motion for default judgment, the prior default has the effect of admitting the allegations of a pleading, and "no further proof in support [of the

allegations is] necessary after default is entered." *Wiseman v. Stocks*, 527 So. 2d 904, 906 (Fla. 1st DCA 1988) (reversing order granting judgment to defaulting party, where default had effect of admitting truth of pleadings). The entry of default terminates a party's right to defend except to contest the amount of unliquidated damages. *McMullen v. HSBC Bank USA, Nat'l Ass'n*, 149 So. 3d 156, 157 (Fla. 1st DCA 2014) (holding entry of default terminated mortgagor's right to defend foreclosure except to contest amount of unliquidated damages). A trial court's taking, requesting, or relying upon evidence at a motion for default judgment is reversible error, given that the default has the effect of admitting the allegations of the pleading. *Wiseman*, 527 So. 2d at 905–06.

A plaintiff has a clear legal right to entry of a default where a party fails to answer, and refusing to enter a default "because of some personal disinclination or otherwise" is a breach that entitles the plaintiff to a writ of mandamus. *TBOM Mortg. Holding, LLC v. Brown,* 59 So. 3d 322, 323 (Fla. 3d DCA 2011) (granting mandamus where trial court refused to enter default in foreclosure action). Likewise, a trial court must enter a default final judgment denying foreclosure where the original plaintiff has admitted-by-default facts showing it lacked standing to file the foreclosure. *See id.*; *see also Poal Wk Taft, LLC v. Johnson Med. Ctr. Corp.*, 45 So. 3d 37, 39 (Fla. 4th DCA 2010) (holding no exception to statute entitling landlord to default final judgment on failure to deposit rent).

This is so even though Florida Rules of Civil Procedure 1.500(b) and (e) provide that defaults and final judgments after default "may" be entered against the party failing to respond; despite use of the word "may," the trial court "is mandatorily required" to enter default and default final judgment in these circumstances. *Brown,* 59 So. 3d at 323 (quoting *Comcoa, Inc. v. Coe*, 587 So. 2d 474, 477 (Fla. 3d DCA 1991) ("granting mandamus when the trial court impermissibly refused to issue writ required by law; 'in a statute such as this one, the term 'may,' which indeed ordinarily implies the exercise of choice or discretion, simply does not do so, and must, in contrast, be given a definition equivalent to the mandatory 'shall.'")). In sum, entry of a default final judgment after default is a non-discretionary ministerial act that the trial court must perform.

Here, the trial court has refused to perform this non-discretionary ministerial act of entering default judgment and denying foreclosure. The trial court has refused to rule on the July 28, 2015 motion for entry of final default judgment, filed over a year ago, and refused to enter judgment denying foreclosure despite the original plaintiff's admission that it lacked standing. This is so even though the Clerk entered a default against FVI on July 1, 2014 and the trial court has twice confirmed and adopted that default. (App. 124, 290–91) ("The Court recognizes that FV-I admitted the well-pleaded facts set forth against it in the Third-Party Complaint by failing to file an answer, and, as such, the Court will not disturb the

Clerk's entry of default against FV-I."). Given FVI's admissions-by-default, Mr. Jenkins has a clear legal right to dismissal of the foreclosure and entry of judgment in his favor, and it is the trial court's legal duty to do so on Mr. Jenkins's motions.

Nevertheless, the trial court has vacated default judgment and retroactively refused to rule on Mr. Jenkins's motion and enter judgment dismissing foreclosure, requesting that the claims be more "fully litigated." (App. 290). Yet, the foreclosure and Mr. Jenkins's claims are fully litigated—FVI has admitted it did not have standing to file the foreclosure, its assignments were fraudulent, and its lis pendens slandered Mr. Jenkins's title. The trial court ruled that Mr. Jenkins stated causes of action against both FVI and Christiana, and confirmed that Christiana's opposition filings are "insufficient to defeat a motion for summary judgment." (App. 302). As discussed below, because only FVI has personal knowledge on its own standing when it filed this foreclosure, there is no other discovery to take and no witness other than FVI to call. Every claim herein relies on FVI, its standing, and its documents on this mortgage. In other words, there is nothing else to litigate.

Thus, the trial court has breached its indisputable duty to rule and maintain a ruling on the motion for default final judgment that FVI lacked standing to foreclose, and to thereby cancel FVI's assignments and discharge FVI's lis pendens. *Polley*, 98 So. 3d at 649; *Foster*, 4 So. 3d at 701; *Wright*, 876 So. 2d at 701; *Moody*, 705 So. 2d at 708; *SR Acquisitions-Fla. City, LLC*, 78 So. 3d at 638–

39. Given that Christiana's perpetuation of FVI's foreclosure relies entirely on FVI's standing, and FVI has admitted it lacked standing, the trial court has also breached its indisputable duty to deny foreclosure, to which Mr. Jenkins has a clear legal right. *Id.* Mr. Jenkins has repeatedly requested that the trial court enter these judgments, both in hearings and in follow-up emails to the trial court's judicial assistant, to no avail. (App. 201–215, 260–87). Accordingly, the Court should grant mandamus requiring entry of judgment and dismissal of the foreclosure.

2. Opposite facts make the trial court's reliance on *Hutchinson* erroneous

As the sole legal basis to defer entry of default final judgment against FVI, the trial court relied entirely on *Days Inns Acquisition Corp. v. Hutchinson*, 707 So. 2d 747, 751 (Fla. 4th DCA 1997), an action for wrongful transfer of a telephone number. (App. 290). In *Hutchinson*, the plaintiff filed a declaratory action against a telephone number distributor and successor business for improperly transferring the plaintiff's number to the successor business. As the *Hutchinson* court stated, the "plaintiff's request for declaratory relief against Days Inn [the defaulting successor] was predicated solely upon [plaintiff's] claim of wrongdoing on the part of the non-defaulting co-defendant [the phone number distributor], whose liability has not yet been determined." *Id.* at 748. Given that judgment against the successor "rest[ed] **entirely** upon" judgment against the

predecessor, the *Hutchinson* court held that the trial court should have determined liability of the predecessor first. *Id.* (emphasis in opinion).

Here, the facts are opposite. Christiana's foreclosure "rests entirely upon" FVI, not the other way around. FVI is the *defaulting predecessor* and Christiana is the non-defaulting *successor*, not the other way around. FVI, as predecessor, has admitted-by-default that it did not have standing to file the foreclosure. Christiana, as an arms-length and unaffiliated successor, cannot contest FVI's admission that it lacked standing and improperly prepared mortgage assignments. Given predecessor FVI's admissions and successor Christiana's reliance on FVI, it is entirely appropriate to enter final default judgment against predecessor FVI and summary judgment against successor Christiana. Because *Hutchinson*'s facts and reasoning are opposite to those here, it can provide no support to defer default judgment and the Court should grant mandamus.

3. Mr. Jenkins has no other remedy after FVI's admission-by-default to lack of standing

This mortgage foreclosure has reached the end of its course. The original plaintiff has admitted-by-default that it lacked standing and made misrepresentations in assignment documents; FVI's default prohibits taking further discovery on the only party with personal knowledge, and thus the only avenue remaining is denial of foreclosure through judgment against FVI and Christiana—there is no other remedy.

To succeed in a foreclosure action, a plaintiff must prove standing. *Hunter v. Aurora Loan Servs., LLC*, 137 So. 3d 570, 573 (Fla. 1st DCA 2014) ("A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate it has standing to foreclose."). Once a defendant contests a plaintiff's standing, the plaintiff's right to bring suit on the note at the requisite time becomes a disputed issue that the plaintiff must prove. *Ham v. Nationstar Mortg., LLC*, 164 So. 3d 714, 719 (Fla. 1st DA 2015) (holding successor failed to prove standing of original plaintiff to foreclose mortgage). Where a successor entity takes over a foreclosure from the original plaintiff, the successor must prove the original plaintiff's standing. *Id.*

Personal knowledge is necessary to prove this standing. *See, e.g.,* § 90.802, Fla. Stat. (2015) (prohibiting hearsay); *Fla. Dept. of Fin. Servs v. Assoc. Indus. Ins. Co., Inc.*, 868 So. 2d 600, 601 (Fla. 1st DCA 2004) (affidavits must be on personal knowledge to avoid hearsay and speculation). Thus, Florida law requires a successor foreclosure plaintiff to provide a current or former employee of the original mortgage holder to substantiate the record-keeping procedures, when records were made, whether the information they contain derived from a person with knowledge, whether the original owner regularly made such records, and whether the records belonged to the original owner. *Hunter*, 137 So. 3d at 573–74 (holding servicer's testimony failed exception to admit computer-generated

hearsay on standing to foreclose); *see also Lacombe v. Deutsche Bank Nat'l Trust Co.*, 149 So. 3d 152, 155–56 (Fla. 1st DCA 2014) (holding exhibits failed business records exception and could not show standing at foreclosure filing).

Even when an original plaintiff in a mortgage foreclosure produces a duly endorsed note after the inception of the case but before another party is substituted as plaintiff, the trial court must still dismiss the foreclosure for lack of standing if such standing at the time the complaint was filed is not shown. *Kiefert v. Nationstar Mortg., LLC*, 153 So. 3d 351, 353 (Fla. 1st DCA 2014) (holding successor plaintiff failed to establish original plaintiff held note when when it filed complaint, as required for successor standing). A successor's subsequent acquisition of the note endorsed in blank cannot cure the original plaintiff's lack of standing at the inception of the case. *Id.* at 354.

Here, the only party with personal knowledge of FVI's standing to foreclose is FVI, and FVI has admitted that it did not have standing to foreclose the mortgage. (App. 14–37, 71). Given that the only party with personal knowledge of standing at initial filing has admitted to lack of standing, there is no discovery to take that will lead to admissible evidence on the issue of standing; i.e. from the party with personal knowledge. Discovery on the remaining parties would only produce inadmissible conjecture and speculation. Although the trial court indicated that allegations in an answer by Christiana might hypothetically overcome FVI's

admission, the trial court's position overlooks FVI's role as the original plaintiff and sole party with personal knowledge on its own standing.

Given that further attempts to litigate this action would deprive Mr. Jenkins of his due process right to personally confront FVI on standing through cross-examination, this case is fully litigated. Given that FVI has refused to come forward, there is no party with personal knowledge to impeach or cross-examine. Under these circumstances, there is no other remedy available other than mandamus and the Court should grant Mr. Jenkins's petition.

In sum, FVI's default admission that it lacked standing to foreclose requires entry of judgment against it and successor Christiana. The trial court breached its duty and Mr. Jenkins's right to entry of judgment denying foreclosure. The trial court's reliance on *Hutchinson*, with opposite facts, is unfounded. Given that Mr. Jenkins has no other remedy after FVI's admission-by-default to lack of standing, the Court should grant this petition for writ of mandamus, require the trial court to enter default judgment, dismiss the foreclosure action, cancel FVI's misrepresentative assignments, and discharge FVI's lis pendens.

APPEAL ARGUMENT

A. The trial court abused its discretion by vacating default judgment against FVI through Christiana's motion and a *sua sponte* retroactive deferment

1. The trial court failed to state any proper basis for vacating the default final judgment against FVI

A trial court is restricted in providing relief from judgments to a limited number of grounds set forth in the civil rule governing such relief. Fla. R. Civ. P. 1.540; *see Lane*, 76 So. 3d at 1008–09 (reversing order granting motion to vacate on excusable neglect where not raised by defaulting party). Thus, a party seeking to set aside a default judgment must show, with supporting affidavits, excusable neglect, a meritorious defense, and due diligence; newly discovered evidence or fraud; or that the judgment is void or satisfied. *Id*.; *State v. Whitmire*, 791 So. 2d 1192, 1193 (Fla. 1st DCA 2001) (reversing order granting motion to vacate where evidence did not support motion); *Scott v. Premium Dev., Inc.*, 328 So. 2d 557, 559 (Fla. 1st DCA 1976) (affirming order declining to set aside default final judgment cancelling lien and declaring it fraudulent, where defendant failed to show factual basis for meritorious defense).

A trial court may not *sua sponte* raise a basis to vacate or make findings on behalf of a party, where that party fails to make such an evidentiary showing or argument. *Lane* at 1009 (citing *Neumann v. Neumann*, 857 So. 2d 372, 373 (Fla. 1st DCA 2003) (holding that trial court abused a party's due process right by

adjudicating issues not presented by the pleadings and noticed to the parties)). Although there is generally a policy favoring setting aside defaults, that policy is based on the desire to allow trial on the merits after an application by the defaulting party for that trial, and is otherwise inapplicable. *Id.*; *Grimsley v. Fla. Universal Fin. Corp.*, 339 So. 2d 721, 772 (Fla. 1st DCA 1976) (reversing order vacating default judgment without showing meritorious defense and legal excuse).

Here, the trial court failed to provide any basis whatsoever to vacate the default final judgment against FVI. Instead, the trial court simply stated:

> Under the circumstances of this case, the Court finds it appropriate to delay entry of final judgment as to FV-I until the claims against Christiana Trust have been fully litigated.

See July 14, 2015 order vacating judgment. Yet, the trial court had already entered final judgment as to FVI, and thus was not in a procedural posture to defer judgment.

Moreover, retroactive deferment is not a basis to vacate final default judgment. Fla. R. Civ. P. 1.540(b). The trial court failed to acknowledge any meritorious defense, excusable neglect, due diligence, evidence, or other sustainable basis to vacate the default final judgment as to FVI. The effect is an improperly retroactive deferment and a baseless order vacating judgment without explanation. Given the failure to provide any proper basis to vacate the judgment against FVI, the trial court abused its discretion.

2. Christiana lacked standing to challenge the entire default final judgment against FVI

To challenge any issue in litigation, a party must have proper standing to request adjudication of that particular issue. *Caserta v. Tobin*, 175 B.R. 773, 774 (11th Cir. 1994) (citing *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979, 984 (11th Cir. 1990)). Only parties in interest to any particular provision in a judgment have standing to seek relief from that provision, and a person otherwise cannot challenge that judgment provision. *See SR Acquisitions*, 78 So. 3d at 638 (citing *Salomon v. Taylor*, 50 Fla. 608 (Fla. 1905) and *Jaffer v. Miami Beach Redev. Agency*, 392 So. 2d 1305 (Fla. 1980)).

Thus, a non-defaulting party does not have standing to object to entry of a default judgment against a defaulting party altogether, so much as to object to inclusion of judgment provisions that would directly prejudice the non-defaulting party. *See, e.g., Bd. Of Com'rs of Jupiter Inlet Dist. v. Thibadeau,* 956 So. 2d 529, 534 (Fla. 4th DCA 2007) (holding standing to object is limited to those with substantial interests, and standing to seek judicial review is limited to those who are adversely affect); *Caserta*, 175 B.R. at 775; *State v. Washington*, 884 So. 2d 97, 100 (Fla. 2d DCA 2004) (holding party lacked standing to challenge search of home in which she was a guest); *U.S. v. Jones*, 260 B.R. 415, 418 (E.D. Mich. 2000) (discussing that debtors do not have standing to object to a proof of claim).

Here, Mr. Jenkins filed a third-party complaint against FVI, who chose not to file an answer and thereby admitted all the allegations *pro confesso*. Given FVI's admissions, the trial court entered a final judgment against FVI. Nevertheless, Christiana moved to vacate the entire judgment as against FVI on the basis of failure to state a cause of action and unjustness. (App. 245–48 at ¶¶ 28–46). Yet, Christiana lacked standing to assert these grounds to vacate the entire default judgment against FVI. Christiana also lacked standing to vacate the final default judgment where it related solely to FVI. Accordingly, the trial court's adjudication of Christiana's motion to vacate the entire default final judgment against FVI was an abuse of discretion.

3. Christiana's three special set hearings provided surplus due process

Due process is a flexible concept and requires only that a proceeding be "essentially fair." *See Pratt v. State*, 429 So. 2d 366, 366 (Fla. 1st DCA 1983) (holding omission of jury charge did not deny essentially fair proceeding); *Carmona v. Wal-Mart Stores, East, LP*, 81 So. 3d 461, 463–64 (Fla. 2d DCA 2011) (affirming denial of motion for post-judgment relief where defendant had some notice and opportunity to present objections); *Carillon Cmty. Res. v. Seminole County*, 45 So. 3d 7, 9 (Fla. 5th DCA 2010) (citing *Gilbert v. Homar*, 520 U.S. 924 (1997)). Any concept of a rigid procedure is incompatible with the elastic nature of due process, as "the requirements of due process are not technical,

nor is any particular form of procedure necessary." *Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 51 (Fla. 2000) (holding that allowing lender to obtain a pre-judgment order that borrower pay interest did not violate due process).

The extent of procedural due process protection varies with the character of the interest and the nature of the proceeding involved. *Citizens of State v. Fla. Public Service Com'n*, 146 So. 3d 1143, 1154 (Fla. 2014) (citing *Hadley v. Dep't of Admin.*, 411 So. 2d 184, 187 (Fla. 1982)); *Friends of Everglades, Inc. v. Bd. Of County Com'rs of Monroe County*, 456 So. 2d 904, 911 (Fla. 1st DCA 1984) (finding nothing showed failure provide due process prior to approval of orders, where there was notice and some opportunity to be heard). There is no single unchanging test which may be applied to determine whether the requirements of procedural due process have been met; courts instead consider the facts of the particular case to determine whether the parties have been accorded that which the state and federal constitutions demand. *Id.*

Where a case has been pending for years and there was no ambush to violate procedural safeguards, then there is an insufficient basis to reverse an order on due process. *HSBC Bank USA, N.A. v. Serban*, 148 So. 3d 1287, 1291–92 (Fla. 1st DCA 2014) (holding trial just days after last pleading was not due process violation warranting reversal). Due process may be satisfied where the parties were served with notice of the hearing months before, and during that interim period the

defendants raise no objections to the relief requested. *Carmona*, 81 So. 3d at 463–64. Similarly, absence of a preliminary hearing does not of itself show lack of due process. *Asian Imports, Inc. v. Pepe*, 633 So. 2d 551, 553 (Fla. 1st DCA 1994) (affirming denial of motion to vacate default judgment as defaulted defendants were not entitled to a notice of hearing on liability and liquidated damages); *Francis v. State*, 168 So. 2d 684, 684 (Fla. 3d DCA 1964) (holding failure to hold preliminary hearing did not itself show lack of due process).

Here, the trial court has satisfied Christiana's due process rights to notice and an opportunity to be heard because: (i) Christiana received notice of impending default judgment against FVI in August 2014 (App. 122), months before the October 2014 default judgment against FVI (App. 124); (ii) Christiana filed no opposition[2] to the requested relief whatsoever before the October 2014 default judgment (App. 1–4); (iii) the trial court fully and fairly heard Christiana's objections to judgment on its assignment and lis pendens interests at a hearing on December 4, 2014, none of which provided any basis to counteract FVI's admissions as to standing or the improper assignments and lis pendens (App. 201–

[2] Because Christiana participated in the proceedings below without making any timely objection to judgment against FVI, Christiana waived its right to contest entry of judgment and there has been no due process violation by entry of the unopposed default final judgment. *Lane* at 1009 (holding that because appellees participated in the proceedings below without making any objection as to entry of default judgment, the appellees waived their right to contest that issue later).

15); (iv) the trial court again fully and fairly heard Christiana's objections to the default judgment through its hearing on February 2, 2015 (App. 222–39); and (v) the trial court again fully and fairly heard Christiana's objections to the default judgment at a third hearing on June 25, 2015 (App. 260–87).

Christiana repeatedly squandered its opportunities by relying on ambush rather than proper filings before and after judgment. After all of these hearings, the trial court's only conclusion was that Christiana's filings and opposition were "insufficient to defeat a motion for summary judgment" against Christiana, much less default judgment against FVI. (App. 302)

Further, no matter how much process the trial court provides Christiana, it has been inescapable and dispositive that the original plaintiff FVI admitted that it did not have standing to file the underlying action and that its assignments were fraudulent. *See Kiefert*, 153 So. 3d at 354 (holding foreclosure successor's later acquisition of note cannot cure original plaintiff's lack of standing at case inception); *Dep't of Rev. v. Bank of Am., N.A.*, 752 So. 2d 637, 642 (Fla. 1st DCA 2000) (successor stands in shoes of predecessor, though assignor cannot assign a right it does not possess). Thus, the trial court abused its discretion by vacating the default final judgment against FVI through a motion filed by Christiana.

4. Christiana failed to raise issues rendering the judgment entirely void under Rule 1.540, rather than just partially voidable

There is an important distinction between a judgment that is "void" and one that is "voidable"—a void judgment is required to vacate under Rule 1.540. *Sterling Factors v. U.S. Bank Nat. Ass'n*, 968 So. 2d 658, 666 (Fla. 2d DCA 2007) (holding that so long as court has jurisdiction over subject matter and party, a procedural defect occurring before the entry of a judgment does *not* render the judgment void); *Epstein v. Bank of Am.*, 2015 WL 340781 at *1–3 (Fla. 4th DCA Jan. 28, 2015) (holding error in text of foreclosure judgment rendered judgment voidable, not void); *Krueger v. Ponton*, 6 So. 3d 1258, 1261 (Fla. 5th DCA 2009) (judgment is voidable, not void, where movant alleges non-congizable cause of action, or general errors, irregularities, or wrongdoing in proceedings).

A "voidable" judgment is entered upon some error in procedure that may allow a party to have the erroneous part of the judgment vacated, whereas a "void" judgment never has legal force and effect. *Sterling Factors*, 968 So. 2d at 665. A "voidable" judgment has legal force and effect unless and until it is vacated in whole or in part. *Krueger*, 6 So. 2d at 1261. Thus, even if there is an objectionable part of a voidable final judgment that requires reconsideration, a trial court should deny a motion to vacate final judgment except as to the provisions that require reconsideration. *Pepe*, 633 So. 2d at 553 (affirming trial court's ruling denying

defendant's motion to vacate final judgment of foreclosure except as to the provision for attorney's fees because the fees were unliquidated).

Here, Christiana failed to raise issues that rendered the entire default judgment void under Rule 1.540, rather than just partially voidable. Christiana raised procedural discrepancies affecting only part of the judgment, and Christiana was able to address and cure those procedural discrepancies through its motions and numerous hearings thereon. To recap, Mr. Jenkins provided all parties with notice of hearing for default final judgment against FVI, to be held at 2:30 p.m. on October 1, 2014. Neither FVI nor Christiana filed any type of objection or opposition to final judgment against FVI. On October 1, 2014, at 2:15 p.m., the trial court cancelled the hearing due to illness. Given that no party had objected to the motion for default final judgment against FVI, the trial court thereafter entered default final judgment.

Whether Christiana had planned to appear at the October 1, 2014 hearing to oppose final default judgment against FVI is unknown. However, even if Christiana had appeared and opposed on October 1st, the trial court could simply have left Paragraphs 2 and 3 (cancelling assignments and discharging lis pendens) out of the final default judgment, mooting any objection by Christiana.

Although Christiana may have some interest in FVI's assignments and lis pendens, it had no vested property right or due process right in the trial court's

other determinations, including: (i) that Mr. Jenkins was entitled to liquidated damages from FVI (Judgment ¶ 1); (ii) the addresses of Mr. Jenkins and FVI (Judgment ¶¶ 4–5); (iii) that Mr. Jenkins was entitled to a hearing on attorney's fees from FVI (Judgment ¶ 6); and (iv) that the trial court retained jurisdiction to enforce the judgment (Judgment ¶ 7). Any textual or procedural discrepancies could be cured by simple amendment or correction by interlineation, and thus the default judgment was voidable not void.

Given that the trial court had jurisdiction over all parties and the subject matter, that Christiana waived its objections by failure to timely object, and that Paragraphs 2 and 3 were excisable or amendable, any procedural or textual defect could only render the judgment voidable, not void. *Sterling Factors*, 968 So. 2d at 666; *Epstein*, 2015 WL 340781 at *1–3; *Krueger*, 6 So. 3d at 1261. Thus, these allegations could not support a Rule 1.540 motion to vacate the judgment as void.

5. Default final judgment denying foreclosure is just after the original plaintiff admits lack of standing

Under well-established Florida law, a default is an admission by a defendant of the truth of the allegations of the claimant's pleadings and the fair inferences to be drawn therefrom, entitling the claimant to the relief requested in the complaint. *N. Am. Acc. Ins. Co. v. Moreland*, 60 Fla. 153, 157–59 (Fla. 1910) (affirming default judgment where complaint afforded a legal basis for a judgment); *McMullen*, 149 So. 3d at 157 (holding entry of default terminated right to defend

except to defend amount of unliquidated damages). A court should enter a default final judgment on liability and liquidated damages where the defendant has failed to respond. *See Pepe*, 633 So. 2d at 553 (affirming denial of motion to vacate default judgment as defaulted defendants were not entitled to a notice of hearing on liability and liquidated damages).

An original foreclosure plaintiff's admission that it did not have standing when it filed its foreclosure action is dispositive for the successor plaintiff. *McMullen*, 149 So. 3d at 157 (affirming denial of motion to vacate default foreclosure judgment where default entered); *Kiefert*, 153 So. 2d at 354 (holding foreclosure successor's later acquisition of note cannot cure original plaintiff's lack of standing at case inception); *Dep't of Rev.*, 752 So. 2d at 642 (successor stands in shoes of predecessor, though assignor cannot assign a right it does not possess). This is the just and logical result of every default final judgment.

Here, Mr. Jenkins alleged and FVI admitted that it did not have standing to file this action, as admitted through allegations that: (i) loan originator Option One/Sand Canyon transferred the note and mortgage to American Home upon ceasing operations in 2008 (Countercl. ¶¶ 19–20); (ii) FVI's law firm (Ablitt Scofield) then drafted a first fraudulent and duplicative assignment of the note and mortgage from Sand Canyon to Wilmington Trust Co. in 2011 (Countercl. ¶ 23), and a second fraudulent and duplicative assignment of the note and mortgage from

Sand Canyon to F-I in 2012 (Countercl. ¶ 26); and (iii) FVI and Ablitt Scoffield then improperly filed this foreclosure even though it was American Home that still had the original note and entitlement to foreclose when FVI filed this foreclosure action in December 2012 (Countercl. ¶¶ 30–32).[3]

Mr. Jenkins pleaded and moved for liquidated damages readily determinable as the Clerk of Court's property sale price and fees expressly stated on the Clerk of Court's Certificate of Sale and Certificate of Title issued to Mr. Jenkins ($8,056). Given that FVI admitted by default to these allegations and that the trial court was prohibited from *sua sponte* addressing extraneous matters, the trial court properly entered its initial default final judgment against FVI on October 8, 2014. Naturally, a successor's propagation of the predecessor's impropriety should always lead to the successor's loss, and thus judgment was proper against Christiana's interests as well. Accordingly, there was no basis to vacate the default final judgment and the trial court abused its discretion by doing so.

CONCLUSION

The trial court abused its discretion by vacating judgment against FVI through Christiana's motion and on a *sua sponte* basis of retroactive deferment. The trial court failed to state any proper basis to vacate the default final judgment relating solely to FVI, and Christiana lacked standing to challenge the entire

[3] *See also* Mr. Jenkins's May 1, 2014 Aff. Defs. 2, 3, 7, and 9; Countercl. n.3 and ¶¶ 38, 41, 70, 72, 78, and 80.

default final judgment against FVI. Christiana's three special set hearings provided surplus due process, and Christiana failed to raise issues rendering the judgment entirely void under Rule 1.540, rather than just partially voidable. Given that default final judgment denying foreclosure is logical and just after the original plaintiff admits lack of standing, the trial court abused its discretion in vacating the default final judgment against FVI.

Further, FVI's default admission that it lacked standing to foreclose requires entry of judgment against it and successor Christiana. The trial court breached its indisputable duty and Mr. Jenkins's clear legal right to entry of judgment denying foreclosure. The trial court's reliance on *Hutchinson*, with opposite facts, is unfounded and inappropriate. Given that Mr. Jenkins has no other remedy after FVI's admission-by-default to lack of standing, the Court should grant this petition for writ of mandamus, requiring the trial court to enter default judgment, dismiss the foreclosure action, cancel FVI's misrepresentative assignments, and discharge FVI's lis pendens.

BERNHARD LAW FIRM PLLC
Counsel for Todd Jenkins
333 SE 2nd Avenue, Suite 2000
Miami, Florida 33131
Telephone: 786-871-3349
Fax: 786-871-3301
Email: abernhard@bernhardlawfirm.com

/s/ Andrew J. Bernhard
Andrew J. Bernhard, Esq.
Fla. Bar No. 84031

CERTIFICATE OF SERVICE

I CERTIFY that, in accordance with Fla. R. Jud. Admin. 2.516, a copy of this brief was served by email and U.S. mail on August 27, 2014, to:

FV-I, Inc.
c/o The Corporation Trust Company
1209 N. Orange Street
Wilmington, DE 19801

Thomas Wade Young, Esq.
Lender Legal Services, LLC
201 E. Pine Street, Ste. 730
Orlando, FL 32801
tom@twylaw.com

/s/ Andrew J. Bernhard, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated petition is in compliance with the font requirements of Rule 9.210(a)(2), Fla. R. App. P. as submitted in Times New Roman 14-point.

/s/ Andrew J. Bernhard, Esq.