

ALERTS AND UPDATES

Florida Supreme Court Says Bank and Homeowner Can't Settle Mortgage Foreclosure Case

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In a significant decision that could widely impact mortgage foreclosure cases, the Florida Supreme Court has refused to allow a bank and a homeowner to settle a mortgage foreclosure case after the case had been appealed. Finding that the issue was "one of great public importance" that "has the potential to impact the mortgage foreclosure crisis throughout this state," the court rejected the parties' voluntary dismissal and ordered the homeowner and the bank to proceed with the appeal.

In *Pino v. The Bank of New York*, No. SC11-697 (Fla. December 8, 2011), the Bank of New York Mellon ("BNY Mellon") filed a mortgage foreclosure case against a homeowner, Roman Pino. BNY Mellon alleged in the complaint that it owned the note, and held the mortgage, based on an assignment from an earlier lender. Pino soon filed a motion for sanctions, alleging that the assignment document was fraudulent. In response, BNY Mellon voluntarily dismissed the mortgage foreclosure case. Five months later, BNY Mellon filed an identical mortgage foreclosure case against Pino but attached a new assignment, dated after the original notice of voluntary dismissal had been filed.

Pino then filed a motion for sanctions in the original, dismissed case, asking the court to vacate the voluntary dismissal, based on fraud, and dismiss the second foreclosure case. The trial judge denied the motion, believing that she lacked jurisdiction to impose sanctions in a case that had been voluntarily dismissed by the plaintiff. The Fourth District Court of Appeal agreed, in a split decision. However, while affirming the trial judge's ruling, the Fourth District Court of Appeal certified the issue to the Florida Supreme Court as one of great public importance, noting that "many mortgage foreclosure cases appear to be tainted with suspect documents."

After the Florida Supreme Court agreed to hear Pino's appeal, Pino filed his initial brief on the merits. Before BNY Mellon filed its answer brief, Pino and BNY Mellon jointly filed a stipulated dismissal with the Supreme Court, advising that they had settled the case and stipulating to its dismissal. Despite the stipulation, the Supreme Court refused to accept the dismissal.

Under Florida's appellate rules, parties who settle a case on appeal may seek dismissal of the appeal before the appellate court decides the case on the merits, by following Rule 9.350:

- (a) Dismissal of Causes When Settled. When any cause pending in the court is settled before a decision on the merits, the parties shall immediately notify the court by filing a signed stipulation for dismissal.
- (b) Voluntary Dismissal. A proceeding of an appellant or petitioner may be dismissed before a decision on the merits by filing a notice of dismissal with the clerk of the court without affecting the proceedings filed by joinder or cross-appeal

In deciding the *Pino* case, the Florida Supreme Court noted that the language of the rule did not impose a mandatory obligation on an appellate court to dismiss a case following the filing of a notice of dismissal. Rather, an appellate court has the discretion to retain jurisdiction and decide the case on the merits.

The Florida Supreme Court recognized the concern of the Fourth District Court of Appeal that a large number of mortgage foreclosure cases "appear tainted by suspect documents." The Florida Supreme Court also agreed that Pino's requested sanction of dismissal of the mortgage foreclosure case, if imposed, "may dramatically affect the mortgage foreclosure crisis in [Florida]." Moreover, the Supreme Court went on to say that "the issue has broader implications and presents questions outside of the mortgage-foreclosure context."

In a strong dissent, Justice Charles T. Canady wrote that the rule did not permit an appellate court to deny a stipulation for dismissal:

In rejecting the stipulated dismissal, the Court is requiring that the parties litigate a case that has been settled, is no longer in controversy, and has not been perfected for consideration by this Court. The respondent who has settled this case will now be required to expend resources to prepare an answer brief. And the petitioner, who may no longer be represented by counsel, is directed to file a reply brief.

Canady further wrote, "the parties to this proceeding have rights. They should not be dragooned into litigating a matter that is no longer in controversy between them simply because this Court determines that an issue needs to be decided. Under the Florida Constitution, this Court does not have the power to reach out and grab cases that we deem worthy of our attention."

The implications of the Florida Supreme Court's decision are significant. While the court has not yet decided the merits of the case, the court appeared concerned that trial courts should have the authority to sanction lenders who file foreclosure cases with suspect documents, even after a lender temporarily and voluntarily drops a case to investigate, or cure, questions about its underlying documents. If the Supreme Court ultimately allows Pino to proceed with his sanctions motion, once a questionable document has been filed by a lender in a foreclosure case, the lender may lose the ability to control its case if it later discovers an irregularity, or concern, over the document.

Because homeowners are routinely defending mortgage foreclosure cases by disputing lenders' underlying documents, such decisions could impact a large number of foreclosure cases. Countless notes and mortgages may then become unenforceable. In addition to the strong, negative impact this could have on lenders' balance sheets, the chains of title for property could also be affected. Homeowners who obtained such sanctions would then have mortgages encumbering their properties, even if the mortgages were unenforceable. These delinquent homeowners could also receive windfalls if they were permitted to own their homes without making payments on their loans.

While we do not yet know how the Florida Supreme Court will decide this issue, its decision already makes clear that lenders have lost some control over their foreclosure cases, once appealed. Even if a case is settled, Florida's appellate courts may now potentially "reach out and grab cases that [they] deem worthy of [their] attention."

For Further Information

If you have any questions about this *Alert* or would like more information, please contact [Scott H. Marder](#), any [member](#) of the [Trial Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

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