

**IN THE CIRCUIT COURT FOR THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

TOORAK CAPITAL FUNDING LLC,

Plaintiff,

CASE NO.: 2020-022065-CA-01

v.

BEACH CLUB KENDAL LLC, ET AL.,

Defendants.

NOTICE OF APPEAL

NOTICE IS GIVEN that Defendant, BISCAYNE BEACH CLUB CONDOMINIUM ASSOCIATION, INC., hereby appeals to the Third District Court of Appeal, the "Order Denying Defendant's Motions to Vacate Consent Final Judgments of Foreclosure and Reserving Ruling as to Plaintiff's Motion to Tax Attorney's Fees and Costs." A copy of the Order is attached hereto. The nature of the order is a final appealable post-judgment order denying a motion to vacate a judgment under Fla. R. Civ. P. 1.540. The Order is appealable pursuant to Fla. R. App. P. 9.130(a)(5).

Respectfully Submitted,

HAZEL LAW P.A.

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STATE OF FLORIDA, COUNTY OF MIAMI-DADE
I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE
ORIGINAL ON FILE IN THIS OFFICE
JUAN FERNANDEZ-BARQUIN, Clerk of the Court and Comptroller, Miami-Dade County
Deputy Clerk

4-17 AD 20 24
[Signature]
12662



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served via Florida's E-filing Portal on Aamir Saeed, Esq., Counsel for Plaintiff, Miller George & Suggs, PLLC, 2200 W. Commercial Blvd, Suite 103, Fort Lauderdale, Florida 33309, at eservice@mgs-legal.com and asaed@mgs-legal.com and Jesmany Jomarron, Esq., Appellate Co-counsel, The Morgan Law Group, 55 Merrick Way, Suite 404, Coral Gables, Florida 33134, at jjomarron@morganlawgroup.net and mlg.eservice@morganlawgroup.net, on this 16th day of April, 2024.

/s/ Robin F. Hazel

Robin F. Hazel, Esq.

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

CASE NO: 2020-022065-CA-01
SECTION: CA25
JUDGE: Valerie R. Manno Schurr

TOORAK CAPITAL FUNDING LLC

Plaintiff(s)

vs.

BEACH CLUB KENDAL LLC et al

Defendant(s)

**ORDER DENYING DEFENDANT'S MOTIONS TO VACATE CONSENT FINAL
JUDGMENTS OF FORECLOSURE AND RESERVING RULING AS TO PLAINTIFF'S
MOTION TO TAX ATTORNEY'S FEES AND COSTS**

THIS CAUSE came before the Court for remote evidentiary hearing on March 4, 2024, on motions by Defendant Biscayne Beach Club Condominium Association, Inc. (the "COA") to vacate Consent Final Judgments of Foreclosure in Case Nos.: 2020-022065-CA-01, 2020-025327-CA-01, and 2020-25383-CA-01 (the "Foreclosure Cases"). The second two cases were transferred to this

Court and consolidated for all purposes with the first case and with Case No. 2022-8908-CA-01 (the "Safe Harbor Case"), also transferred to this Court. Also before the Court was Plaintiff's Third Motion for Sanctions, filed both as an alternative basis on which to deny the Motions to Vacate and as an alternative basis on which to award attorney's fees and costs.

Attorney Jesmany Jomarron appeared for Defendant Biscayne Beach Club Condominium Association, Inc. (the "COA"). Attorney Robert Edwards appeared for Plaintiff Toorak Capital Partners, LLC ("Toorak"). Also present via Zoom were Plaintiff representatives Stephen Tyde and Justin Huff, COA co-counsel Hubert Menendez, Esq., and Toorak co-counsel and witness, Aamir Saeed, Esq.

Findings of Fact

1. These cases involve three commercial foreclosure actions against three condominium units located in Miami-Dade County, Florida. The COA was not the borrower in any of the Foreclosure Cases.
2. On December 27, 2022, the COA filed materially identical motions in the three Foreclosure Cases seeking, under rule 1.540(b)(3), Fla. R. Civ. P., to vacate consent final judgments of foreclosure in each case. The COA filed its three motions exactly 365 days after the final judgments were entered in Case Nos. 2020-25327-CA-01 and 2020-022065-CA-01, and 327 days after the final judgment was entered in Case No. 2020-25383-CA-01.

3. Plaintiff Toorak filed materially identical verified memoranda in opposition to each of the three motions.
4. The Defendant COA presented no witnesses at the evidentiary hearing and introduced no documents into evidence, relying exclusively for its claims of fraud, misrepresentation, and misconduct on court filings and one transmittal letter to this Court, which was admitted into evidence as Plaintiff's Exhibit B. Plaintiff's counsel sent the transmittal letter (and attachments) to the Court on December 23, 2021, with courtesy copies provided to all counsel of record, including counsel for the Defendant COA.
5. The transmittal letter read in relevant part: "Dear Judge Manno Schurr: Please be advised a consent final judgment of foreclosure has been reached with the counsel for the borrower." It is undisputed that Plaintiff Toorak had in fact entered into a stipulation for entry of consent final judgments in all three Foreclosure Cases with the borrower, Beach Club Kendall, LLC, just as represented. The stipulation was filed with the Court and served on defense counsel. The transmittal letter made no mention of the COA, except to note that its counsel was copied thereon. Finally, Plaintiff's counsel asked the Court in the transmittal letter to enter a proposed Consent Final Judgment of Foreclosure.
6. Seven days prior thereto, on December 16, 2023, Plaintiff's counsel had sent an email to counsel of record, including the COA's counsel, which read as follows:

Good afternoon,

Please find attached the proposed consent final judgment of foreclosure and consent stipulation for everyone's review prior to submission.

If I do not hear back within by [sic] Monday, December 20, 2021, by 5 pm, I will go ahead and submit to the court.

Thank you!

7. The COA voiced no objection. Attorney Jomarron's explanation for the COA's "failure"^[1] to respond was that the email had been sent to a former associate (William P. McCaughan, Jr.), not to him, and that his office was closed for much of the holiday season.
8. The Courts in Case Nos. 2020-25327-CA-01 and 2020-022065-CA-01 entered the Final Judgments on December 27, 2023—11 days after the proposed Final Judgments had been provided to defense counsel. The COA voiced no objection. The Court in Case No. 2020-25383-CA-01 entered Final Judgment on February 3, 2022. The COA voiced no objection.
9. Paragraph 7 of the final judgment in each of the three cases foreclosed all prospective claims against the condominium units with notable exceptions, including an "except[ion] as to claims or rights under Chapter 718 or Chapter 720, Fla. Stat., if any." Chapter 718 is the chapter of Florida Statutes entitling the COA to enforce its lien rights, subject to the safe harbor protections.^[2] Accordingly, the final judgments did not extinguish any rights the COA has or may have to assessments under the operative statutes.
10. The COA had several opportunities to voice objections to or otherwise challenge the

foreclosure judgments thereafter. These opportunities included, but were not limited to, when Attorney Saeed emailed the COA's counsel on April 11, 2022 (Plaintiff's Exhibit D) noting that the Plaintiff had foreclosed its mortgage on the three condominium units at issue and prevailed at the foreclosure sales and, therefore, was seeking statutory "safe harbor" assessment payoff amounts.^[3] See Plaintiff's Exhibit D.

11. Eight days later, and after a follow up inquiry from Mr. Saeed, Attorney Jomarron emailed Saeed back stating: "Good afternoon, we were not retained to respond to this matter. The [COA] indicated they [sic] will handle directly with you and instructed us not to communicate any further on this issue." See Plaintiff's Exhibit E. Saeed sought contact information for the COA from Mr. Jomarron, but Mr. Jomarron did not respond.
12. Accordingly, on April 20, 2022, Attorney Saeed sent the COA a letter by Federal Express regarding all three units in question, reiterating that the Plaintiff was a first mortgagee lender that foreclosed on each of the three units and requesting estoppel letters for each pursuant to Fla. Stat. §718.116. See Plaintiff's Exhibits F and G (enclosing Fed Ex shipping confirmation). The COA did not respond.
13. On May 6, 2022, Attorney Edwards sent a second letter to the COA demanding safe harbor estoppel certificates for the three condominium units in question and indicating that suit would be filed if they were not forthcoming. See Plaintiff's Exhibit G.
14. Meanwhile, Attorney Saeed was able to reach by telephone the COA's Property Manager, Domenic Macrina, to whom (according to the COA's corporate representative at deposition), the COA Board had given "a lot of discretion" in dealing with requests from the Plaintiff for estoppel certificates. See Plaintiff's Exhibit Q (deposition transcript of COA corporate representative Donn Dutton, Esq.), at pg. 86:21-87:14. Saeed and Macrina had several telephone conversations.
15. Mr. Saeed's un rebutted testimony was that, when he sought estoppel certificates from Mr. Macrina, Macrina verbally demanded \$70,000.00, threatened to use the board's approval process to undermine Plaintiff Toorak's ability to resell the properties if the \$70,000.00 was not paid, and told Saeed that, if Toorak filed suit against the COA, things would "get ugly." Macrina also refused to memorialize even the \$70,000.00 figure in writing.
16. At the March 4, 2024 hearing, Attorney Jomarron acknowledged that the safe harbor assessments due from the Plaintiff were actually only about \$1,330.00, give or take. See Transcript, at pgs. 31-32.
17. Plaintiff filed suit for the estoppel certificates in what is referred to above as the "Safe Harbor Case," which has been pending since May 24, 2022. As of the date of the March 4, 2024 hearing, the COA had still not provided estoppel certificates to the Plaintiff.

Conclusions of Law

To prevail on a motion to vacate under rule 1.540(b)(3), Fla. R. Civ. P., the movant must establish three things: (1) that the non-moving party or its counsel engaged in fraud or other misconduct;^[4] (2) that the movant has a genuine need for "relief" from the final judgment obtained by the fraud or other

misconduct;^[5] and (3) that the movant sought to vacate the judgment “within a reasonable time,” but in no circumstance more than one year after the judgment was entered. “A litigant may not sit on his hands, fail to voice his objections, and then claim prejudice when a final judgment is entered which may adversely affect him.” *Allstate v. Gillespie*, 455 So.2d 617, 620 (Fla. 2d DCA 1984). A party seeking to vacate a judgment under rule 1.540(b)(3) must do so “as soon as is reasonably possible.” See *Dynasty Express v. Weiss*, 675 So.2d 235, 240 (Fla. 4th DCA 1996) (citation to authority omitted).

Ruling of the Court

Upon due consideration of the above and other filings and pleadings of record, the Court concludes:

- a. Neither Plaintiff nor its counsel engaged in any fraud, misrepresentation, or misconduct whatsoever, let alone anything sufficient to warrant an order vacating the judgments under rule 1.530(b)(3), Fla. R. Civ. P.
- b. The final judgments of foreclosure did not, particularly by virtue of paragraph 7, harm the COA such that it required “relief” from the judgments, as required by the rule. Even so, Plaintiff had and has been endeavoring since at least April 11, 2022 to obtain estoppel certificates so it could pay the COA whatever it is lawfully owed.
- c. The COA did not bring its motion within a reasonable time, as required by the rule and applicable case law referenced above.
- d. By failing to object earlier to the three final judgments of foreclosure, the Defendant COA waived its right to do so.

Movant, the Defendant Biscayne Beach Club Condominium Association, Inc., failed to establish any of the three requirements for vacating judgments under rule 1.540(b)(3). Accordingly, the motion in Case No. 2020-022065-CA-01 is hereby DENIED. This ruling also applies to the COA’s motions to vacate in Case Nos. 2020-025327-CA-01 and 2020-25383-CA-01, which are also hereby DENIED. As announced on the record in open court, the Plaintiff is entitled to the estoppel certificates.^[6]

The Court reserves ruling as to Plaintiff’s entitlement to reasonable attorney’s fees and costs associated with these matters.

[1] Attorney Jomarron himself twice referred to the COA’s lack of any response as a “failure” on its part. See Transcript of March 4, 2024 evidentiary hearing (hereinafter, “Transcript”), at pgs. 59-60.

[2] See fn. 3, *infra*.

[3] Section 718.116 of the Florida Statutes is known as the “safe harbor” statute. Subsection (1) (b) limits Plaintiff’s liability to the assessments due “during the 12 months immediately preceding the acquisition of title...” or “[o]ne percent of the original mortgage debt...,” whichever is less. Section 718.116 (8) provides that “[w]ithin 10 business days after receiving a written ... request [for an

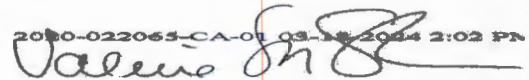
estoppel certificate], from a unit owner ... or a unit mortgagee ... the association shall issue the estoppel certificate.” An Association’s failure to comply constitutes “irreparable harm” and the unit owner or mortgagee is entitled to summary proceedings thereafter in any action to enforce the statute. See *Amelio v. Marilyn Pines Unit II Condo. Ass’n*, 173 So.3d 1037, 140 (Fla. 2d DCA 2015) (“... irreparable harm is [established] when a violation of Chapter 718 is shown”) citing *Hobbs v. Winkauf*, 940 So.2d 1151, 1153 (Fla. 2d DCA 2006); *Hollywood Towers Condo. Ass’n, Inc. v. Hampton*, 40 So.3d 784, 788 (Fla. 4th DCA 2010); *Briarwinds Condominium Ass’n, Inc. v. Rigsby*, 51 So.3d 532, 533 (Fla. 3d. DCA 2010); Fla. Stat. 718.116(8) (affording summary proceedings and attorney’s fees where a Condominium Association fails or refuses to comply).

[4] See *U.S. Bank Nat’l Ass’n v. Paiz*, 68 So.3d 940, 944 (Fla. 3d DCA 2011) quoting *Freemon v. Deutche Bank*, 46 So.3d 1202, 1205 (Fla. 4th DCA 2010).

[5] See *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, 20 So.3d 952, 958 (Fla. 4th DCA 2009).

[6] See Transcript, at pg. 68.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 18th day of March, 2024.

2020-022065-CA-01 03-18-2024 2:02 PM


2020-022065-CA-01 03-18-2024 2:02 PM

Hon. Valerie R. Manno Schurr

CIRCUIT COURT JUDGE

Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

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