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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 3D23-770
Lower Tribunal Case No. 2018-018167-CA-01

JAMES TURNER

Appellant,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION

Appellee.

On Appeal from Final Judgment of the Circuit Court for the
Eleventh Judicial Circuit of Florida In and For Miami-Dade County

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APPELLANT'S INITIAL BRIEF

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TABLE OF CONTENTS

INTRODUCTION, Page 3.

TABLE OF AUTHORITIES, Pages 3-5.

STATEMENT OF THE CASE AND THE FACTS, Pages 5-10.

SUMMARY OF ARGUMENT, Pages 10-13.

ARGUMENTS, Pages 14-32.

CONCLUSION, Page 32.

CERTIFICATE OF SERVICE, Page 33.

CERTIFICATE OF COMPLIANCE, Page 33.

ARGUMENT ONE.
THE TRIAL COURT ERRED IN PREMATURELY GRANTING SUMMARY JUDGEMENT WHILE THE APPELLANTS VERIFIED MOTION TO COMPEL DISCOVERY WAS PENDING. THE DOCUMENTS REQUESTED WERE VITAL TO ENABLE A COMPLETE RESPONSE.

ARGUMENT TWO.
BY THE VERBATIM ADOPTION OF APPELLEES PROPOSED FINAL JUDGMENT ORDER.

ARGUMENT THREE.
THE TRIAL COURT ERRED IN FAILING TO COMPLY WITH THE NEW SUMMARY JUDGMENT RULES.

ARGUMENT FOUR.
THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BASED ENTIRELY ON THE MERRILL DOCTRINE. THE FACTS OF THIS CASE RENDER MERRILL INAPPLICABLE.

INTRODUCTION

James Turner will be referred to as Appellant. Federal National Mortgage Association (AKA Fannie Mae) will be referred to as Appellee. References of record shall be designated as ("R") followed by the appropriate page designation as set forth in record on appeal transmitted by the Clerk of the lower Court.

References to Transcript of Hearing before the Honorable Valerie Manno Schurr of December 2nd, 2022 shall be designated ("Tr") which transcript is found in the record at pages 1077-1100.

TABLE OF AUTHORITIES

American Bankers Mortg. v. Fed. Home Loan M, 75 F.3d 1401 (9th Cir. 1996). Pages 11&16.

Arguelles v. City of Orlando, 855 So. 2d 1202 (Fla. Dist. Ct. App. 2003). Page 21.

Chudasama v. Mazda Motor Corporation, 123 F.3d 1353, 1373 n. 46 (11th Cir. 1997). Page 24.

Corporate Management Adv. v. Boghos, 756 So. 2d 246 (Fla. Dist. Ct. App. 2000). Pages 23, 25.

First Nat. Bank and Trust v. Pack, 789 So. 2d 411 (Fla. Dist. Ct. App. 2001). Page 7.

Faiella v. Fed. Nat'l Mortg. Ass'n, 928 F.3d 141 (1st Cir. 2019). Page 31.

Herron v. Fannie Mae, 857 F. Supp. 2d 87 (D.D.C. 2012). Pages 30, 32.

Herron v. Fannie Mae, 861 F.3d 160 (D.C. Cir. 2017). Pages 7, 29.

Lebron v. National R.R. Passenger, 69 F.3d 650 (2d Cir. 1993). Pages 16,28, 31.

Meridian Invs., Inc. v. Fed. Home Loan Mortg. Corp., 855 F.3d 573 (4th Cir. 2017. Pages 30,32.

Montilla v. Federal National Mortgage Association, No. 20-1673 (1st Cir. Jun. 8, 2021). Page 30.

Perlow v. Berg-Perlow, 875 So. 2d 383 (Fla. 2004). Page 25.

Polizzi v. Polizzi, 600 So. 2d 490 (Fla. Dist. Ct. App. 1992). Page 24.

Rykiel v. Rykiel, 795 So. 2d 90 (Fla. Dist. Ct. App. 2001). Page 23.

Sacramento v. Citizens Prop. Ins. Corp., 342 So. 3d 737 (Fla. Dist. Ct. App. 2022). Page 20.

Smith v. Smith, 734 So. 2d 1142 (Fla. Dist. Ct. App. 1999). Page 22.

United States ex rel. Adams v. Aurora Loan Servs., Inc., 813 F.3d 1259, 16 Cal. Daily Op. Serv. 1879, 2016 Daily Journal D.A.R. 1707 (9th Cir. 2016). Page 32.

West v. West, 228 So. 3d 727 (Fla. Dist. Ct. App. 2017. Page 25.

In re Amendments to Fla. Rule of Civil Procedure 1.510, 317 So. 3d 72 (Fla. 2021). Page 26.

STATEMENT OF THE CASE AND FACTS.

The claims against Appellee arose from exorbitant and unexplained charges of more than $106,000.00 being added to Appellants modified mortgage balance. Appellant had been disputing these charges (“R”-982-993) with Appellee for a considerable period of time.

On February 5th, 2016 Appellant received a communication ("R"-472) informing him he had been approved for a Fannie Mae making homes affordable loan modification program. When he received this offer, he believed the disputes over charges had been resolved. The offer was conditioned on the receipt of three trial payments in the amount of $1349.66 each.

The communication informed Appellant he was approved for the modification in the total amount of $525,684.53. ("R"-473).

Appellant in good faith paid the required trial payments on the understanding the modification amounts were accurate after the disputed charges had been deducted. The Fannie Mae program also provided an incentive benefit totaling $5000.00 ("R"-759-final paragraph).

Appellant having wrote and discussed on the phone with Fannie Mae his concerns over the disputed charges placed great trust in their assurances his concerns had been addressed. Knowing Fannie Mae had control over Ditech and owned his mortgage provided a further sense of relief. Appellant believed these services, the Financial incentives and the making home affordable program with its benefits created a special fiduciary relationship with Fannie Mae.

First Nat. Bank and Trust v. Pack, 789 So. 2d 411 (Fla. Dist. Ct. App. 2001).

Upon receipt of the modification documents the modification amount had increased by $106,081.59 to $631,766.12. ("R"-474).

Appellant sought an explanation from Appellee and a limited number of ledgers ("R"-476-483,738-749) were received which contained the same duplicated sums and charges he had previously disputed with Appellee.

Appellant without success had sought from Appellee and its business partner Ditech Financial explanations for the disputed charges recorded in the ledgers. ("R"- 761-762, 766-772, 780-781, 784-786, 790-806).

Appellant while attempting to continue obtaining documentation for the disputed charges became aware of multiple law suits being filed against Appellee and its business partner Ditech for fraud, conspiracy and violations of Federal and State Laws.

Appellant noted in one case ***Herron v. Fannie Mae*, 861 F.3d 160 (D.C. Cir. 2017).** "*The record establishes that the problems with stated trial modifications were highly debated and controversial topics at both Fannie Mae and Treasury. See id. at *25–27. Herron contends, however, that she was the only one who disclosed the extent of the problems. According to Herron, Fannie Mae pushed stated trial modifications, not to assist homeowners, but to obtain incentive*

*payments from Treasury and justify higher executive bonuses. Herron alleges that Fannie Mae knew that many homeowners enrolled in trial modifications would never be eligible to convert to permanent modifications, and therefore Fannie Mae wasted public funds and mismanaged HAMP by pushing these modifications. The record establishes that the problems with stated trial modifications were highly debated and controversial topics at both Fannie Mae and Treasury. See id. at *25–27. Herron contends, however, that she was the only one who disclosed the extent of the problems. According to Herron, Fannie Mae pushed stated trial modifications, not to assist homeowners, but to obtain incentive payments from Treasury and justify higher executive bonuses. Herron alleges that Fannie Mae knew that many homeowners enrolled in trial modifications would never be eligible to convert to permanent modifications, and therefore Fannie Mae wasted public funds and mismanaged HAMP by pushing these modifications".*

Appellant becoming concerned he was a victim of a financial conspiracy perpetrated by Appellee and Ditech, made the decision to withhold mortgage payments.

This culminated in Appellees business partner Ditech commencing the underlying foreclosure action on May 30th, 2018.

In response Appellant filed on May 22nd, 2019 his counterclaims with exhibits against Appellee and Ditech Financial. ("R"-187-251).

On June 11th, 2019 Ditech filed a Suggestion of Bankruptcy in the lower tribunal case. This filing noticed Appellant all his claims were stayed ("R"-265-266). The Bankruptcy case is still ongoing with

pleadings filed that detail the relationship between Fannie Mae and Ditech. (“R”-971-973).

On January 28th, 2021 Appellant filed his First Amended Six Count Counterclaim with exhibits against Appellee. (“R”-446-486) alleging the following.

Count One: Violations of Florida Deceptive and Unfair Trade Practice Act.

Count Two: Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing.

Count Three: Violation of the Florida Consumer Collection Practices Act.

Count Four: Unjust Enrichment.

Count Five: Civil Conspiracy & Fraud.

Count Six: Breach of Fiduciary Duty**.**

In response the Appellee filed their answers to the Appellants First Amended Counterclaim on March 10th, 2021 (“R”-492-512).

A review of the Answer establishes the responses adopt a repetitive boiler plate rhythm. The other constant is Appellees denial Ditech is their agent.

Of Note is the fact the Law Firm filing the Suggestion of Bankruptcy for Ditech "McGlinchey Stafford" also represents Appellee Fannie Mae.

On August 31st, 2022 Appellee filed their Motion for Summary Judgment. ("R"-513-533).

On November 8th, 2022 Appellant filed his response opposing summary judgment. ("R"-926-993).

On December 2nd, 2022 A hearing on the Motion for summary Judgment was conducted. ("R"-1077-1100).

On February 25th, 2023 the Lower tribunal entered a final order which is the subject of this Appeal. ("R"-1111-1114).

SUMMARY OF ARGUMENTS.

Argument One the lower tribunal erred in granting summary judgment while discovery was pending. (Page 14).

Argument two the lower tribunal erred in adopting verbatim the Appellees proposed order. (Page 22).

Argument three the lower tribunal erred in not authoring the final order or providing any independent factual findings or legal conclusions. (Page 25).

Argument four the lower tribunal erred in finding the Merrill Doctrine was applicable. (Page 27).

Appellant was provided with limited financial records which had duplicated charges and dates, a cursory inspection from the most uneducated person would create concern and suspicion as to the validity of these records.

It is simply not credible that Fannie Mae having been aware over a period of years fraudulent charges were being added to a customer account took no action to stop these violations unless they themselves were profiting by receiving kickbacks and secret commissions.

Fannie Mae had the ability to terminate Ditech's approval at its discretion for any breach of their agreements but chose not to. *American Bankers Mortg. v. Fed. Home Loan M, 75 F.3d 1401 (9th Cir. 1996).*

When Appellant sought the production of documents and financial records which Appellee alleged they had reviewed they objected. They knew the documents would lead to admissible evidence which would be self-incriminating. This concealment of

evidence deprived appellant the ability to fully respond to summary judgment and the ability to amend his complaint.

Appellant disputed the allegations directed to Discovery made in Appellees Motion for Summary Judgment, they alleged;

‘*Discovery response and produced documents therefore fail to establish that Fannie Mae took any affirmative action*”

Appellant responded to Appellees First and Second requests for production providing the documents in his possession and directed Appellee to the exhibits and statements made in his first amended complaint.

The response to the requests for admissions was a denial for each request with details of the affirmative action taken by Fannie Mae when they instructed its business partner Ditech Financial and its predecessor Greentree to make improper and false charges for insurance, inspections, repairs and legal fees.

Fannie Mae attempt to shield themselves from any wrongdoing by alleging Ditech was required to use a guide book which prevents the actions Appellant complains of.

There is no documentary evidence of any kind that either party ever fully complied with the guide.

Appellant sought production of this evidence in the form of contracts and agreements Appellee objected to it.

Fannie Mae go a step further to shed liability seeking protection under the Merrill Doctrine. They site a case which facts are entirely different from this action, and which Court failed to comply with the three-part test to determine entitlement to be considered a government instrumentality.

Appellee had a fiduciary obligation to act in good faith in its dealings with the Appellant. Fannie Mae over a period of years acted in bad faith with reckless, indifferent, arbitrary, and intentional disregard for the wellbeing of the Appellant.

Appellant has no control over the entity Fannie Mae contracts with but is subject to that entity's demands. Fannie Mae owes a duty to see dealings are fair and reasonable.

Appellee made the decision to authorize and permit fraudulent charges to be added to Appellants account, when asked for help they ignored these requests as they themselves were profiting.

Appellee throughout its pleadings has attempted to create an illusion that it did not authorize the actions of its independent contractor Ditech.

This assertion is patiently false as both Fannie Mae and Ditech continue to share their collusion by having the same law firm represent them both.

Appellant asserts that Appellee devised a scheme to fraudulently inflate the final modification amount by the inclusion of improper charges, so they could receive hidden kickbacks and bonuses for the benefit of their management.

Appellee at all times directing and authorized the actions of its partner Ditech. The Ditech Bankruptcy case gives insight into the agreements between them. (“R”- 809-820).

ARGUMENT ONE.

THE TRIAL COURT ERRED IN PREMATURELY GRANTING SUMMARY JUDGEMENT WHILE THE APPELLANTS VERIFIED MOTION TO COMPEL DISCOVERY WAS PENDING.

The Ditech Bankruptcy (“R”-265-266) stayed Appellants ability to continue his attempts to obtain verification documentation for the disputed charges.

Appellant when contacting Appellee had never been informed of the specific name of a person dealing with his complaints.

The first time Appellant discovered the name of an individual with alleged personal knowledge of his account was upon receipt of Appellees August 31st, 2022 Summary Judgment Motion, attached was the Affidavit of Alan Bryant as an officer of Appellee. ("R"-536-539).

Mr. Bryant alleged he was personally familiar with and had personally reviewed the Turner loan.

He was personally familiar with the policies and procedures applicable to loan servicers as set forth in the Fannie Mae "Servicer Guide".

Appellant having been provided with the identity of an individual who alleged personal knowledge of his account sought on September 26th, 2022 production of documents referenced in the Affidavit ("R"-953-956).

On October 24th, 2022 Appellee filed its response objecting to the request ("R"-957-966).

On November 11th, 2022 Appellant filed his Motion to Compel ("R"-943-993).

Appellee refers to the *"Servicer Guide"* throughout his pleadings but fails to produce any evidence or documentation of the actual agreements between Appellee and Ditech.

Appellant requested the agreements and contracts between Appellee and Ditech to discover each party's obligations. The *Guide* provides that Fannie Mae may terminate a seller/servicer's approval at its discretion for breach of any representation or warranty required of it by the *Guide. American Bankers Mortg. v. Fed. Home Loan M, 75 F.3d 1401 (9th Cir. 1996).*

Appellant believed the documents requested could establish the Affirmative misconduct Appellee was guilty of in authorizing and permitting Ditech to make fraudulent charges to his account which providing Fannie Mae with secret bonuses and kickbacks.

Appellee had alleged it was a Federal instrumentality which designation requires permanent Government Control. *"Lebron v. National R.R. Passenger*, 69 F.3d 650 (2d Cir. 1993)". Appellant believing the control was temporary sought documents concerning ending conservatorship.

Appellant further sought billing records and invoices for the disputed disbursements made on his account to establish what

entities were allegedly paid. Appellees failure to provide these records is an indication they do not exist and evidence of their intentional concealment of facts.

The documents requested were vital to the Appellants ability to formulate a complete response to the summary judgment motion and could provide evidence to support his claims.

The Court at the commencement of the December 2nd, 2022 summary judgement hearing discussed the pending Motion to Compel Production of documents. ("T"-Page 4 commencing line 14 ending Page 8 lines 1-7).

THE COURT: Okay. Let me ask you a question because I did read your response and the very first thing it says is that you

filed a request for production and they didn't respond to it.

MR. JAMES TURNER: Well, they responded, your Honor –

THE COURT: And you didn't get any discovery. What?

MR. JAMES TURNER: They responded but it was a boiler plate response that didn't provide any documents whatsoever.

THE COURT: You didn't get any documents from that?

MR. JAMES TURNER: No, your Honor.

THE COURT: And there's a pending –

MR. JAMES TURNER: We –

THE COURT: There's a pending motion to compel.

MR. JAMES TURNER: Yes, your Honor. I did try to get that scheduled before today but your calendar was full well into next

year so I couldn't do it.

THE COURT: Oh and I am so busy. Tell me –

MR. KATZ: Judge, may I address that?

THE COURT: Well, let me ask him. I'm not done yet.

MR. KATZ: Okay.

THE COURT: What were you asking for? Because I did read some things here and looks like they increased the amount of the loan by over a hundred dollars.

MR. JAMES TURNER: Correct, your Honor.

THE COURT: So I think that's what he was it -- it looks like maybe he was trying to get to the bottom of that

MR. JAMES TURNER: I can itemize it if you'd like me to go through them, your Honor, in preparation of this hearing.

THE COURT: Okay, just for the record, we have a court reporter, so let's --

MR. JAMES TURNER: Yes.

THE COURT: -- just for the record, tell me what you were asking him for.

MR. JAMES TURNER: Our motion to compel seeks the lender agreement between Fannie Mae and Ditech.

THE COURT: Okay.

MR. JAMES TURNER: We are seeking a copy of the Federal Housing Finance Agency conservatorship agreement which relates to Fannie Mae.

THE COURT: Okay.

MR. JAMES TURNER: We are seeking their policies and procedures applicable to their services.

THE COURT: Okay.

MR. JAMES TURNER: We are looking for the government agreement --

THE COURT: So Ditech was the servicer?

MR. JAMES TURNER: Yeah, the problem

THE COURT: Okay.

MR. JAMES TURNER: -- Ditech is in bankruptcy, your Honor, and they have been in bankruptcy for two years --

THE COURT: Oh, wow.

MR. JAMES TURNER: -- so we've been stayed from getting any documents because of the stay of the bankruptcy proceedings.

THE COURT: Okay.

MR. JAMES TURNER: And then we were looking for the Fannie Mae and Ditech selling and servicing agreement --

THE COURT: And you didn't get – and what was the response?

MR. JAMES TURNER: It was one of those what I call it boilerplate response, it just said unnecessary, not relevant and...

THE COURT: Okay.

MR. JAMES TURNER: I attached it to the motion, you can see their response, your Honor. It is attached to our response.

THE COURT: Okay, let me see.

THE COURT: Yeah, because the problem is a brand new case just came out of the Third District Court of Appeal reversing a summary

judgment because there was discovery that was pending and they said you cannot have a summary judgment when there's discovery pending and so.

The Court acknowledged the fact discovery was pending and it was aware of an opinion from Florida's Third District Court of Appeal. (see; *Sacramento v. Citizens Prop. Ins. Corp.*, 342 So. *3d 737 (Fla. Dist.*

Ct. App. 2022) which stated summary judgment is premature while discovery is ongoing.

Appellant informed the Court of Appellees business partner Ditech's Bankruptcy ("R"-page 7 lines 3-7) which had terminated his ability to proceed with discovery.

Appellant informed the Court he had attempted to schedule a hearing on his Motion to Compel Discovery, but the Courts calendar was full.

Appellant had sought discovery on September 26th, 2022 in good faith and not for the purposes of delay.

If the requested documents had been produced by October 26th, 2022 Appellant would have had time to file a motion for leave to amend his complaint based on the facts the documents would provide. There would have been sufficient time to prepare a full defense to the Motion for Summary Judgment scheduled for December 2nd, 2022. The Appellee thwarted this effort necessitating the Motion to Compel.

In Arguelles v. City of Orlando, 855 So. 2d 1202 (Fla. Dist. Ct. App. 2003) Entry of summary judgment in this case was premature because discovery had not been completed. In UFF DAA, Inc. v. Towne Realty, Inc., 666 So.2d 199 (Fla. 5th DC A 1995), this court held that it was reversible error to enter summary judgment when relevant

discovery was in progress and a deposition of a party was pending. See also Villages at Mango Key Home Owners Assoc., Inc. v. Hunter Development, Inc., 699 So.2d 337 (Fla. 5th DCA 1997) (holding that summary judgment should not be granted when depositions are pending unless protective order is sought or entered). Arguelles v. City of Orlando, 855 So. 2d 1202, 1203 (Fla. Dist. Ct. App. 2003).

As explained the Documents requested would provide evidence to establish the true relationship between Appellee and Ditech and permit a review of the financial records their Officer alleged he had personal knowledge of.

Without site of these documents the Appellant was denied the right to formulate a complete response to the Summary Judgment Motion and the ability to Amend his Complaint.

Smith v. Smith, 734 So. 2d 1142 (Fla. Dist. Ct. App. 1999) A trial court's decision to grant a continuance in a summary judgment hearing is discretionary. Spolski General Contractor, Inc. v. Jett-Aire Corp., 637 So.2d 968 (Fla. 5th DCA 1994). However, that discretion is tempered if discovery is not completed and is necessary for disposition of the case. In UFF DAA, Inc. v. Towne Realty, Inc., 666 So.2d 199 (Fla. 5th DCA 1995), a case involving pending discovery set after a motion for summary judgment, this court held:

ARGUMENT TWO.

THE COURT ERRED IN ADOPTING VERBATIM APPELLEES PROPOSED ORDER

Appellant on September 22, 2023 in preparing this brief reviewed Court Map the mechanism for submitting documents to the Judge in the lower tribunal. There he discovered a proposed order dated December 2nd, 2022 (Exhibit A) filed with the Court on November 29th, 2022 3 days before the Court conducted the Summary Judgment hearing of December 2nd, 2022.

This proposed order granted Appellees Motion for summary judgment in total based on the Merrill Doctrine.

The final judgment ("R"-1111-1114) the subject of this Appeal is a verbatim adoption of the proposed order (Exhibit B).

Rykiel v. Rykiel, 795 So. 2d 90 (Fla. Dist. Ct. App. 2001) the court may not adopt the judgment verbatim, blindly, or without making in-court findings. *See E.I. DuPont DeNemours v. Simpson*, 763 So.2d 427 (Fla. 3d DCA 2000); *Corporate Management Advisors, Inc. v. Boghos*, 756 So.2d 246 (Fla. 5th DCA 2000); *Ford Motor Co. v. Starling*, 721 So.2d 335 (Fla. 5th DCA 1998); *White v. White*, 686 So.2d 762 (Fla. 5th DCA 1997); *Wattles v. Wattles*, 631 So.2d 349 (Fla. 5th DCA 1994). Review of the findings and conclusions of such a judgment is hampered or made impossible by the trial court's lack of participation. *Boghos*. In this case, the record contains no findings or conclusions by the trial court, and the final judgment has no corrections, additions or deletions on its face.
Rykiel v. Rykiel, 795 So. 2d 90, 92 (Fla. Dist. Ct. App. 2001)

Appellant was never provided a copy of this proposed order and had no knowledge of it until September 22nd, 2023.

It is apparent from reviewing the transcript of the December 2nd, 2022 Summary Judgment hearing Judge Manno Schurr had no knowledge of the Merrill Doctrine.

The Judge stated at the hearing ("TR"-Page 9 line 25).

THE COURT: Tell me what the Merrill Doctrine is. I don't know what that is. I've been on the bench 17 years, I've never heard anybody talk about that before.

The record establishes at the hearing Judge Manno Schurr made no findings of fact or legal conclusions. ("R"-20-lines 11-14), she states.

THE COURT: Let me take it under advisement, I'll let you know. I want to read the cases.

It is well established that trial courts are admonished for the verbatim adoption of proposed orders drafted by litigants.
E.g., Chudasama v. Mazda Motor Corporation, 123 F.3d 1353, 1373 n. 46 (11th Cir. 1997). *The Eleventh Circuit made it clear that "a judge's practice of delegating the task of drafting sensitive, dispositive orders to counsel, and then uncritically adopting the orders nearly verbatim would belie the appearance of justice and creates the potential for overreaching and exaggeration on the part of the attorney preparing findings of fact. Id. The court referred to a quote of Judge J. Skelly Wright, who characterized opinions drafted by lawyers as "not worth the paper they are written on" as far as assisting the appellate court in determining why the judge decided the case. Id. at 1373 n. 46. See also, Polizzi v. Polizzi, 600 So.2d 490, 491 (Fla. 5th DCA 1992). This Court's review of the conclusions reached by the trial court in the Amended Final Judgment should consider the trial court's lack of*

participation in drafting the Amended Final Judgment". Corporate Management Adv. v. Boghos, 756 So. 2d 246, 248 (Fla. Dist. Ct. App. 2000).

Judge Mannu Schurr adopted the Appellees proposed order word for word.

"Perlow v. Berg-Perlow, 875 So. 2d 383 (Fla. 2004). This leads to the conclusion that independent judgment does not appear to have been exercised as Perlow and our precedent require. See,e.g., West v. West, 228 So. 3d 727, 728–29 (Fla. 5th DCA 2017) ("The appearance of impropriety exists when the trial judge adopts verbatim one party's one-sided final judgment, especially where the judge did not orally announce findings or rulings during or at the end of trial.").

On February 23rd, 2023 almost 11 weeks after the hearing the Appellant received an email from the Court requesting case law. (Exhibit B).

This time line indicates the Court had not conducted any independent review of the cases as announced at the hearing.

On February 25th, 2023 just two days after the email the Court signed verbatim the Appellees proposed order submitted on November 29th, 2022.

The appellant believes the trial judge did not independently make any factual findings or legal conclusions, in reviewing the

proposed judgment over eleven weeks after the hearing she simply signed it to relieve her case load.

ARGUMENT THREE.

THE TRIAL COURT ERRED IN FAILING TO COMPLY WITH THE NEW SUMMARY JUDGMENT RULES.

The order under review is governed by recently amended Florida Rule of Civil Procedure 1.510. See In re Amends. to Fla. R. Civ. P. 1.510, 317 So. 3d 72, 77 (Fla. 2021) (providing that "rule 1.510 takes effect on May 1, 2021. This means that the new rule must govern the adjudication of any summary judgment motion decided on or after that date, including in pending cases").

Although amended rule 1.510 borrows heavily from its federal counterpart (Rule 56), it differs in at least one relevant respect: rule 1.510 mandates that the trial court *"shall state on the record the reasons for granting or denying the motion."* In its opinion amending rule 1.510, the Florida Supreme Court emphasized this requirement:

Where federal rule 56(a) says that the court should state on the record its reasons for granting or denying a summary judgment motion, new rule 1.510(a) "*says that the court shall do so*". The

wording of the new rule makes clear that the court's obligation in this regard is mandatory.

To comply with this requirement, it will not be enough for the court to make a conclusory statement that there is or is not a genuine dispute as to a material fact. The court must state the reasons for its decision with enough specificity to provide useful guidance to the parties and, if necessary, to allow for appellate review.

The Court in adopting verbatim the Appellees proposed order failed to comply with this rule.

ARGUMENT FOUR.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BASED ENTIRELY ON THE MERRILL DOCTRINE. THE FACTS OF THIS CASE RENDER MERRILL INAPPLICABLE.

Appellees sought Summary Judgement in total based on the application of the Merrill Doctrine. ("R"-517) (2-Summary of the Argument) alleging Fannie Mae is a government instrumentality and *Failella* supports this position.

There entire Motion rests on these allegations which Appellant Denys are applicable.

A three-part test as defined in *"THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT in "Lebron v. National R.R. Passenger, 69 F.3d 650 (2d Cir. 1993)".* is used to determine if an entity can be considered a Government Instrumentality. The test requires (1) The Government creates the corporation through special law, (2) To accomplish governmental objectives, (3) Permanent government control.

E.g. Lebron v. National Rail Road Passenger Corp. , 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995), the Supreme Court considered whether Amtrak, a federally chartered corporation, was nonetheless subject to the governmental constraints of the First Amendment. In holding that it was, the Court analyzed the extent to which (1) Amtrak served a government purpose and (2) the government-controlled Amtrak. Id. at 397, 115 S.Ct. 961. Because Amtrak was "created by a special statute, explicitly for the furtherance of federal governmental goals," it was clear that Amtrak served a government purpose. Id. As to control, the Court noted that government appointees-controlled Amtrak's board of directors and that Amtrak was "not merely in the temporary control of the Government (as a private corporation whose stock comes into federal ownership might be)." Id. at 398, 115 S.Ct. 961. As such, the Court distinguished Amtrak, which the government "specifically created ... for the furtherance of governmental objectives, and not merely holds some shares but controls the operation of the corporation through its appointees," from a situation where the government only acts as a shareholder. Id. at 399, 115 S.Ct. 961. In the former, the government exerts control "not as a creditor but as a policymaker." Id. ; see also Dep't of Transp. v. Ass'n of Am. R.R. , ––– U.S. ––––, 135 S.Ct. 1225, 1231–33, 191 L.Ed.2d 153 (2015) (holding that Amtrak is a governmental entity for separation of powers purposes because of pervasive government control). Albeit dicta, we find the Court's language instructive here.

Applying the reasoning of Lebron, Fannie Mae is not a federal instrumentality.

Appellees in their motion at ("R"-523-524) state they were placed into conservatorship on September 6th, 2008 by FHFA and that control continues. Thus, the issue of FHFA control needs explanation which can be found in "*Herron v. Fannie Mae*, 861 F.3d 160 (D.C. Cir. 2017)".

The FHFA became conservator "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of Fannie Mae. 12 U.S.C. § 4617(a)(2). Although there is no specific termination date, the purpose of the conservatorship is to restore Fannie Mae to a stable condition. *See, e.g.* , *id.* § 4617(b)(2)(D) (giving the FHFA authority as conservator to take actions "necessary to put [Fannie Mae] in a sound and solvent condition" and "appropriate to carry on [its] business ... and preserve and conserve [its] assets and property"). "This is an inherently temporary purpose." *Rubin* , 587 Fed.Appx. at 275. While the conservatorship authorized the government to exercise substantial control over Fannie Mae, "that control is temporary, 'as a private corporation whose stock comes into federal ownership might be.' " *See Meridian Invs.* , 855 F.3d at 579 (quoting *Lebron* , 513 U.S. at 398, 115 S.Ct. 961). Thus, the government's indefinite but temporary control does not transform Fannie Mae into a government actor. *See Lebron* , 513 U.S. at 399, 115 S.Ct. 961 (citing *Reg'l Rail Reorganization Act Cases* , 419 U.S. 102, 152, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974)). *Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017)nation.

As conservator, the FHFA succeeded to "all rights, titles, powers, and privileges" of Fannie Mae. 12 U.S.C. § 4617(b)(2)(A)(i). This language evinces Congress's intention to have the FHFA step into Fannie Mae's private shoes. *Perry Capital* , 848 F.3d at 1103 & n.22. When it stepped into these shoes, the FHFA "shed[ ] its

government character and ... [became] a private party." *See Meridian Invs.* , 855 F.3d at 579. *Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017).

Montilla v. Federal National Mortgage Association, No. 20-1673 (1st Cir. Jun. 8, 2021)The court, applying *Lebron v. Nat'l R.R. Passenger Corp.,*513 U.S. 374 (1995), also held that FHFA's conservatorship over Fannie Mae did not make Fannie Mae a government actor for the purposes of the plaintiffs' constitutional claims because the government does not exercise sufficient control over Fannie Mae. See *Montilla*, slip op. at 6-9; see also Lebron, 513 U.S. at 398-99 (holding that a corporation is subject to constitutional claims if, among other things, the government "retains for itself permanent authority to appoint a majority of the directors of [the] corporation").

Applying these principles, the conservatorship over Fannie Mae is temporary and did not create the type of permanent government control that is required under *Lebron. Fannie Mae is not a federal instrumentality.*

Herron v. Fannie Mae, 857 F. Supp. 2d 87 (D.D.C. 2012) The fact that Fannie Mae was created by statute and that Fannie Mae, like all financial institutions, has a mission to serve the public is not relevant to the analysis in this Opinion. The critical issue is whether the government through FHFA permanently controls Fannie Mae. The Court concludes it does not.

The Proposed Final Order submitted by Appellee and adopted by the Judge for the lower tribunal reads in part (“R”-1112),

"*Fannie Mae's evidence establishes it as federal instrumentality for purposes of application of the Merrill doctrine. See Faiella v. Fed. Nat'l Mortg. Assn., 928 F.3d 141, 148 (1st Cir. 2019) (FNMA "is a federal instrumentality for purposes of the Merrill doctrine and, thus, cannot be held liable for the unauthorized acts of its agents.").*

Appellant asserts the Faiella Opinion is not applicable to the facts of this case based on the following analysis.

In *Faiella v. Fed. Nat'l Mortg. Ass'n*, 2017 DNH 250 (D.N.H. 2017) (p*age 3 paragraph 2) Fannie Mae stipulated that, for purposes of its summary judgment motion, it could be assumed that* *Ditech acted as its agent* *at all relevant times. And Faiella* *acknowledged that no discovery was needed* *in order to permit him to address the summary judgment issues.*

It is an undisputable fact the exact opposite applies to this appeal. Fannie Mae in the affidavit of their officer confirm Ditech was not their agent ("R"-538, paragraph 13).

Discovery was needed and a Verified Motion to Compel Discovery ("R"-943-948) was pending before the Court.

Importantly in Faiella the Court failed to consider Lebron and the requirement of Permanent government control.

Lebron v. National R.R. Passenger, 69 F.3d 650 (2d Cir. 1993)".

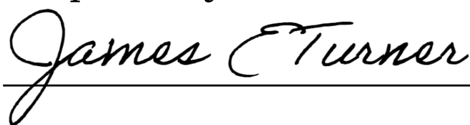
Meridian Invs., Inc. v. Fed. Home Loan Mortg. Corp., 855 F.3d 573, 578-79 (4th Cir. 2017).
United States ex rel. Adams v. Aurora Loan Servs., Inc., 813 F.3d 1259, 16 Cal. Daily Op. Serv. 1879, 2016 Daily Journal D.A.R. 1707 (9th Cir. 2016).
Herron v. Fannie Mae, 857 F. Supp. 2d 87 (D.D.C. 2012.

CONCLUSION

Based on the Foregoing Facts the Appellees actions are sufficient to prove affirmative misconduct.

Appellant respectively asks this Court to find the Final Judgment was premature and set it aside, permit pending Discovery to proceed, and find the Merrill Doctrine is not applicable to the facts of this case.

Respectfully Submitted



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Certificate of Compliance

Appellant Certifies that the font and size in this Motion is Bookman Old, 14 point, in compliance with Rule 9.045(b) Florida Rules of Appellant Procedure.

Certificate of Service.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic service this 29th Day of September 2023 to the following.

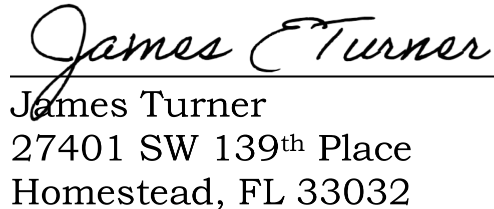

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EXHIBIT. A

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

CASE NO.: 2018-018167-CA-01

DITECH FINANCIAL, LLC,
Plaintiff,
v.
JAMES TURNER JR. A/K/A JAMES E. TURNER, JR. A/K/A JAMES EDWARD TURNER, et al.
Defendants.
_______________________________________/

JAMES E. TURNER and JEFFREY TURNER,
Counter-Plaintiffs,
v.
DITECH FINANCIAL, LLC,
Counter-Defendant,
_______________________________________/

JAMES E. TURNER and JEFFREY TURNER,
Third-Party Plaintiff,
v.
FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Third-Party Defendant.
_______________________________________/

FINAL JUDGMENT

THIS ACTION came before the Court on December 2, 2022 on Third-Party Defendant, FEDERAL NATIONAL MORTGAGE ASSOCIATION'S ("Fannie Mae") Motion for Final Summary Judgment (the "Motion"), and the Court, having reviewed the court file, having considered the evidence, heard argument of the parties and otherwise been duly advised on the premises, hereby **ORDERS AND ADJUDGES** that Third-Party Defendant's Motion is **GRANTED**.

Along with the Motion for Summary Judgment, Fanniae submitted summary judgment evidence in the form of an Affidavit of Alan Bryant, who is an officer of Fannie Mae. On

November 8, 2022, Counter-Plaintiffs filed their Limited Response Opposing Summary Judgment with Affidavits in Support (the "Response"). Counsel for Fannie Mae and the self-represented Counter-Plaintiffs appeared at the December 2, 2022 hearing electronically.

Based upon Fannie Mae's Motion for Final Summary Judgment, with supporting affidavits, and having considered the evidence, heard arguments of counsel for Fannie Mae and Counter-Plaintiffs, and being otherwise duly advised on the premises, the Court finds there are no genuine issues of material fact and that Fannie Mae is entitled to judgment as a matter of law.

Fannie Mae's evidence establishes it as federal instrumentality for purposes of application of the *Merrill* doctrine. *See Faiella v. Fed. Nat'l Mortg. Assn.*, 928 F.3d 141, 148 (1st Cir. 2019) (FNMA "is a federal instrumentality for purposes of the *Merrill* doctrine and, thus, cannot be held liable for the unauthorized acts of its agents."). Fannie Mae "serves an important governmental objective: to maintain the secondary mortgage market and assist in meeting low- and moderate-income housing goals;" and (ii) allowing Fannie Mae to be held liable for its agents' unauthorized acts "would frustrate Congress's intent as expressed in the prescribed nature of [Fannie Mae's] authority." *Id*. at 149. *See also, Nelson v. Nationstar Mortg., LLC*, 504 F.Supp.3d 1307, 1326 (S.D. Ala. 2020)(adopting *Faiella*'s reasoning in deeming Fannie Mae a federal instrumentality for *Merrill* doctrine purposes); *Coniglio v. Federal Nat'l Mortg. Asss'n*, 2019 WL 9633294 at *3 (M.D. Fla. Sept. 16, 2019)(quoting extensively from Faiella and finding Fannie Mae to be a federal instrumentality for *Merrill* doctrine purposes); *Denton v. Nationstar Mortg. LLC*, 2020 WL 1917486, *4 (N.D. Okla. Apr. 20, 2020)("The First Circuit's opinion directly addresses, and rejects, the Dentons' argument that [Fannie Mae] is not a 'federal instrumentality' for purposes of the *Merrill* doctrine.").

As a federal instrumentality, Fannie Mae is not liable for the unauthorized acts of its loan servicer. *See e.g., Hinton v. Fed. Nat. Mortg. Ass'n*, 945 F. Supp. 1052, 1055 (S.D. Tex. 1996), aff'd, 137 F.3d 1350 (5th Cir. 1998) (applying *Merrill* to bar claims asserted against Fannie Mae); *Cannon v. Wells Fargo Bank N.A.*, 917 F. Supp. 2d 1025, 1034–35 (N.D. Cal. 2013)(applying the *Merrill* doctrine to bar claims against Fannie Mae for acts of its servicer); *Gray v. Seterus, Inc.*, No. 6:13-CV-1805-MC, 2017 WL 525110, at *2–3 (D. Or. Feb. 8, 2017) (finding that Fannie Mae was a federal instrumentality under *Merrill* and therefore immune from suit for alleged violation of the Equal Credit Opportunity Act, the Fair Housing Act, breach of contract, breach of the covenant of good faith and fair dealing, and promissory estoppel); *Toler v. PHH Mortg. Corp.*, No. 6:12-6032, 2014 WL 1266838, at *3 (W.D. Ark. Mar. 26, 2014) (finding *Merrill* doctrine precluded a breach of contract claim against Fannie Mae, even if agency relationship existed); *Johnson v. Fed. Home Loan Mortg. Corp.*, No. C12-1712 TSZ, 2013 WL 2445367, at *4 (W.D. Wash. June 5, 2013), aff'd, 793 F.3d 1005 (9th Cir. 2015) (Freddie Mac shielded from liability for loan servicer's alleged breach of contract and breach of fiduciary duty under the *Merrill* doctrine); *Dupuis*, 879 F. Supp. 139 (holding that Freddie Mac was protected by *Merrill* from the loan servicer's acts in excess of its actual authority); *Paslowski*, 129 F. Supp. 2d at 804–05 (finding Freddie Mac not liable under the *Merrill* doctrine for servicer's alleged breach of contract, breach of fiduciary duty, and violation of state consumer protection law); *Draper v. Fed. Home Loan Mortg. Corp.*, No. AP 13-3105-ELP, 2014 WL 2601740, at *3 (Bankr. D. Or. June 10, 2014) (*Merrill* barred claims against Freddie Mac absent facts that establish that it authorized loan servicer to breach a forbearance agreement).

A review of both Fannie Mae and the Turners Affidavits confirms that Ditech serviced the loan. All actions complained of by the Turners were performed by Ditech. While Fannie Mae

may have discussed the alleged improprieties with Turner, they are not alleged to have committed any wrongdoing directly, nor did they authorize the conduct complained of. Importantly, the Servicing Guide submitted by Fannie Mae in support of its Motion specifically precludes the very conduct complained of. The Court further finds that whether Ditech is classified as an agent or independent contractor is immaterial, as such a determination would not change the result herein.

Therefore, as Plaintiff's evidence fails to demonstrate any improper acts by Fannie Mae, nor show that Ditech was authorized by Fannie Mae to perform such unlawful acts, Fannie Mae is protected from liability under *Merrill*.

Finally, Plaintiffs lack standing to assert noncompliance with any of the contracts to which they are not a party, including the Guide, as a basis for liability. *See De Soleil S. Beach Residential Condo. Ass'n v. De Soleil S. Beach Ass'n, Inc.*, 315 So.3d 58, 61 (Fla. 3d DCA 2020("[A] non-party to a contract generally cannot raise, as a defense, the violation of the terms of that contract."); *Deutsche Bank Trust Co. Americas v. Harris*, 264 So.3d 186, 190 (Fla. 4th DCA 2019)("[W]here the borrower is neither a party to nor a third-party beneficiary of the trust, the borrower lacks standing to raise an issue as to the Bank's compliance with its pooling and servicing agreement…"); *Castillo v. Deutsche Bank Nat. Trust Co.*, 89 So.3d 1069 (Fla. 3d DCA 2012)("Because the appellant is neither a party to nor a third-party beneficiary of the trust, we find the appellant lacks standing to raise" noncompliance with the pooling and servicing agreement as a defense).

Based upon the foregoing, the Court **ORDERS** as follows:

1. Judgment is entered in favor of Third-Party Defendant FEDERAL NATIONAL MORTGAGE ASSOCIATION on the Third Party Complaint, filed January 28, 2021.

2. Counter-Plaintiffs shall take nothing by this action.

3. Third-Party Defendant shall go hence without day.

4. The Court reserves jurisdiction as to court costs and attorney's fees.

DONE AND ORDERED in Chambers in Miami Dade County, Florida, this 2nd day of December, 2022.

____
The Honorable Valerie R. Manno Schurr
CIRCUIT COURT JUDGE

Copies furnished to all parties named on the attached service list

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Unknown Tenant(s)
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EXHIBIT. A

Events by Case

DITECH FINANCIAL LLC vs JAMES TURNER, Jr. et al

Case Number: 2018-018167-CA-01

From: 09/22/2020 **To:** 09/22/2023

Fannie Maes Motion for Final Summary Judgment

Scheduled by: Katz, Allen, Stewart (Attorney)

Virtual Hearing *powered by*

Join Zoom Hearing

Start: 12/02/2022 11:15 AM | **Duration:** 15 min | **Meeting ID:** 91850414671 | **Join URL:** https://zoom.us/j/91850414671

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Response Opposing Summary Judgment with Affidavits In Support Nov 8th 2022.pdf
Response 11-10-2022

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Motion 09-08-2022

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