

CASE NO. 2D24-0808
L.T. No: 2018-CA-007579

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

WELLS FARGO BANK, N.A.,
Appellant

v.

OCIE C. ALLEN, JR., ET AL.,
Appellees

APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL
CIRCUIT, IN AND FOR PINELLAS COUNTY, FLORIDA
JUDGE AMY W. WILLIAMS

APPELLANT WELLS FARGO BANK, N.A.'S INITIAL BRIEF

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PRELIMINARY STATEMENT

In this Initial Brief, Appellant Wells Fargo Bank, N.A. is called “Wells Fargo,” Appellees Ocie C. Allen, Jr. and Sandra E. Allen are the “Allens,” and the court below, Judge Amy W. Williams of the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida, is called the “Trial Court.” The record on appeal is called the “Record” with citations to the pdf page numbers as (R. __). When the citation to the Record includes a transcript, the Record citation is followed by the relevant transcript line number(s), e.g., (R. 1845:1-7).

STATEMENT OF THE CASE AND FACTS

I. NATURE OF THE CASE

This is an appeal from a Final Judgment erroneously (i) dismissing with prejudice Wells Fargo’s action seeking to foreclose a valid, first-priority mortgage lien based on the Trial Court’s flawed application of section 702.036, Florida Statutes, and (ii) quieting title to the subject real property in favor of the Allens despite Wells Fargo’s valid first-priority mortgage lien. This Court has jurisdiction under Fla. R. App. P. 9.030(b)(1)(A) and 9.110(a)(1).

In short, Wells Fargo held two mortgages on certain real property in Pinellas County: one larger mortgage associated with the

purchase of the property and a second, smaller mortgage associated with an accompanying line of credit. For whatever reason, the second, smaller mortgage was mistakenly recorded in the official records one minute before the larger mortgage, giving the second, smaller mortgage priority based on Florida's recording statutes.

Wells Fargo discovered this mistake during its attempt to foreclose the smaller, second mortgage and corrected the recording error by executing and recording a subordination agreement, which effectively swapped the priorities of the liens as originally intended and put the world on notice that the first, larger mortgage was now superior. After recording the subordination agreement, Wells Fargo dropped itself as a defendant as holder of the first mortgage, and a final judgment of foreclosure was entered for Wells Fargo foreclosing the second mortgage.

Despite having both constructive and actual knowledge of the recorded subordination agreement, the Allens purchased the property at the judicial sale. When Wells Fargo then sought to foreclose the first, larger mortgage, the Allens claimed they were entitled to the protection under section 702.036 and a judgment quieting title to the property. Misapplying the statute and placing

undue emphasis on Wells Fargo's failure to file the subordination agreement in the prior foreclosure action despite there being no obligation for Wells Fargo to do so, the Trial Court erroneously agreed with the Allens, quieted title to the property, and dismissed Wells Fargo's foreclosure action with prejudice. This unprecedented ruling destroyed Wells Fargo's properly recorded first-priority mortgage lien and constitutes reversible error.

II. STATEMENT OF THE FACTS

A. Borrowers Execute a First and Second Mortgage; Wells Fargo Mistakenly Records the Second Mortgage First

On February 23, 2006, Nadine S. Spoto and Rudolph Spoto ("Borrowers") executed a promissory note for \$276,457.11 in favor of Wells Fargo's predecessor Wachovia Bank, N.A. (R. 750-55). The same day, Borrowers and Lisa G. Spoto executed a mortgage ("First Mortgage") securing real property located at 17920 Gulf Blvd., Apt. 504, Reddington Shores, Florida 33708 ("Property"). (R. 757-63). This was to be a first-priority mortgage lien on the Property.

Two days later, on February 25, 2006, Borrowers executed a Prime Equity Line of Credit Agreement for \$50,000.00 in favor of Wells Fargo's predecessor Wachovia Bank, N.A. (R. 765-75).

Borrowers and Lisa G. Spoto then executed an Open-End Mortgage (“Second Mortgage”), which acted as a second mortgage lien on the Property. (R. 777-83).

While the First Mortgage was executed before the Second Mortgage and intended to take priority, the Second Mortgage was mistakenly recorded in the Official Records of Pinellas County one minute before the First Mortgage. (*Compare* R. 777 with R. 757) (reflecting Second Mortgage recorded at 1:16 p.m. and First Mortgage recorded at 1:17 p.m.). This unfortunate though common recording error turned what should have been a standard foreclosure process into a years’ long battle over lien priorities and title to the Property.

B. Wells Fargo Files a First Foreclosure Action Intending to Foreclose the Junior, Second Mortgage

On April 10, 2017, Wells Fargo filed a foreclosure complaint and *lis pendens* against Borrowers for their failure to make the October 17, 2016, payment on the **Second Mortgage** (“2017 Foreclosure Action”). (R. 785-810). The complaint both referenced and attached a copy of the Second Mortgage. (*Id.*). At the time Wells Fargo filed the 2017 Foreclosure Action, the loan associated with the First Mortgage was not in default. (R. 1679:13-23).

Because the Second Mortgage was mistakenly recorded one minute before the First Mortgage, Wells Fargo alleged in the 2017 Foreclosure Action that the Second Mortgage was “superior” and named itself as a defendant based on Wells Fargo’s technical status as a junior lienholder. (R. 789).

i. Wells Fargo executes and records a Subordination Agreement to correct the priority of the mortgages as originally intended

Sometime during the 2017 Foreclosure Action, Wells Fargo or its counsel realized the inadvertent recording error. (R. 1674:11-1676:9). Accordingly, on April 16, 2018, Wells Fargo executed a Subordination Agreement for Open-End Mortgage (“Subordination Agreement”). (R. 812-15). A subordination agreement is “[a]n agreement by which one who holds an otherwise senior interest agrees to subordinate that interest to a normally lesser interest.” See *Subordination Agreement*, Black’s Law Dictionary (11th ed. 2019). The agreement has the effect of establishing different priorities for mortgagees’ liens than would have occurred under the normal course of recording those instruments. See Restatement (Third) Property (Mortgages) § 7.7 (1997). As Wells Fargo’s expert testified, subordination agreements are commonplace in the mortgage

industry and frequently used to correct recording errors. (R. 1773:10-1774:16; R. 2142:10-18).

The Subordination Agreement states that through an inadvertent error, the Second Mortgage was mistakenly recorded before the senior First Mortgage:

The Senior Lender has an existing loan in the original principal amount of \$276,457.11 (the "Senior Loan") to the Borrower, which was intended to be secured by a first lien mortgage on the Property. The Senior Loan is secured by a Deed of Trust, executed by Borrower, as trustor, in favor of N/A, as trustee for the benefit of Wachovia Bank, National Association, as beneficiary and recorded on 03/10/2006 in Book 14981 at page 2405 (or as No. 2006090114) of the Records of the Circuit Court of the County of Pinellas, State of Florida (the "Senior Security Instrument"). Through an inadvertent error, the Junior Security Instrument was recorded prior to the Senior Security Instrument.

The Subordinating Lender is willing to subordinate the lien of the Existing Security Instrument to the lien of the New Security Instrument under the terms set forth in this Agreement.

(R. 813).

The Subordination Agreement was recorded in the Pinellas County Official Records on April 23, 2018, putting the world on notice that the First Mortgage now took priority over the Second Mortgage as the signing parties originally intended. (R. 812).

ii. Consistent with the Subordination Agreement, Wells Fargo drops Wells Fargo as a party defendant given its corrected status as holder of the superior First Mortgage

On April 20, 2018, based on the Subordination Agreement executed just four days earlier, Wells Fargo filed in the 2017 Foreclosure Action a Notice of Dropping Wells Fargo as a party defendant. (R. 928-29). This put the parties and the Trial Court on notice that Wells Fargo, as plaintiff, no longer sought any relief from Wells Fargo, as a defendant. (*Id.*).

iii. Final judgment is entered for Wells Fargo; the Allens purchase the Property at judicial sale with actual and constructive knowledge of the Subordination Agreement

On July 26, 2018—months after the Subordination Agreement was recorded—the Trial Court (Judge Amy W. Williams) entered a final judgment of foreclosure for Wells Fargo, effectively foreclosing the Second Mortgage (“2017 Final Judgment”).¹ (R. 817-823). A judicial sale of the Property was set for September 26, 2018. (R. 819).

¹ Although the final judgment in the 2017 Foreclosure Action was entered in 2018, this brief calls it the “2017 Final Judgment” for continuity.

This is when Appellees, Ocie C. Allen and his wife Sandra E. Allen (“Allens”), come into play. Twelve days **before** the scheduled sale, the Allens requested a Title Search Report on the Property from Baxter Title Corporation (“Title Report”). (R. 642-44). The First Mortgage and the Subordination Agreement were listed:

Mortgage(s)

Mortgagor: Nadine S. Spoto and Lisa G. Spoto and Rudolph Spoto
Mortgagee: Wachovia Bank, National Association
Amount: \$50,000.00 Close Ended: No
Dated: 2/25/2006 Recorded: 3/10/2006 Maturity Date: 2/24/2046
Book: 14981 Page: 2391 Instrument #:
Comments:
Additional Info:

1. Subordination Agreement to Wells Fargo Bank, N.A. A Successor In Interest to Wachovia Bank, National Association recorded on 4/23/2018 in Book 20022 Page 2483.

Mortgagor: Nadine S. Spoto and lisa G. Spoto and Rudolph Spoto
Mortgagee: Wachovia Bank, National Association
Amount: \$276,457.11 Close Ended: Yes
Dated: 2/23/2006 Recorded: 3/10/2006 Maturity Date: 3/11/2036
Book: 14981 Page: 2405 Instrument #:
Comments:

(R. 634; R. 642-44). A copy of the Subordination Agreement was also attached to the Title Report received by the Allens. (R. 665-68).

Mr. Allen knew of the Subordination Agreement and testified that he reviewed it before seeking to purchase the Property. (R. 727:22-24; R. 729:1-4). Three days before the scheduled sale, Mr.

Allen emailed an escrow officer at Baxter Title Corporation with concerns about the First Mortgage. (R. 637-39; R. 732:5-15). Mr. Allen was concerned that the First Mortgage was “still there” in the Pinellas County public records and that he “did not find where [the First Mortgage] was released.” (R. 638-39). Rather than retain an attorney to assist with his title concerns (R. 736:24-737:12), Mr. Allen relied on the title company’s incorrect interpretation of the Subordination Agreement and purchased the Property the next day at the scheduled judicial sale on September 26, 2018. (R. 637; R. 1633). Mr. Allen’s ownership interest was then memorialized in a Certificate of Title. (R. 1070).

C. Wells Fargo Files the Instant Foreclosure Action Seeking to Foreclose the First Mortgage

On November 20, 2018, Wells Fargo filed a foreclosure action against Borrowers for their failure to make the February 11, 2017, payment on the **First Mortgage** and all subsequent payments (“2018 Foreclosure Action”). (R. 34-58). Wells Fargo properly named the Allens as defendants based on their record ownership and inferior interest in the Property. (R. 35). Notably, Judge Amy W. Williams

who presided over the 2017 Foreclosure Action was also assigned to the 2018 Foreclosure Action. (R. 108).

The Allens answered the Complaint and defended that section 702.036(1), Florida Statutes, barred Wells Fargo from bringing another foreclosure action given the 2017 Final Judgment. (R. 197-204). The Allens also counterclaimed against Wells Fargo to quiet title. (R. 202-03). Notably, the Allens did not bring any claim against or attempt to add as a counter-defendant Baxter Title based on the title agent's incorrect interpretation of the Subordination Agreement.

Wells Fargo moved to dismiss the Allens' Counterclaim for failure to state a claim to quiet title, as no cloud on title existed. (R. 216-19). Wells Fargo highlighted the fact that Wells Fargo had timely recorded the Subordination Agreement and dropped Wells Fargo from the 2017 Foreclosure Action as the holder of the First Mortgage. (R. 217-18).

D. Trial Occurs, After Which the Trial Court Erroneously Enters Judgment for the Allens

After the denial of multiple competing summary judgment motions,² a two-day bench trial occurred on January 25 and 26, 2024. (R. 1818). Before trial, the parties submitted a Joint Stipulation of Facts. (R. 2366-70). At trial, the Trial Court took judicial notice of the 2017 Foreclosure Action and accepted the parties' Joint Stipulation of Facts. (R. 1832:10-15).

Despite the Notice of Dropping Wells Fargo as a party *filed* in the 2017 Foreclosure Action, the publicly available and recorded Subordination Agreement, and the Allens' actual knowledge of the Subordination Agreement, the Allens went to great lengths to argue they were entitled to judgment because of bald assertions that Wells Fargo tricked or misled the Trial Court in the 2017 Foreclosure Action. (*See, e.g.*, R. 1835:13-14; R. 1836:2-5; R. 1838:21-23). The Allens continually reminded the Trial Court that she was the same judge who entered the 2017 Foreclosure Judgment. Rather than arguing the legality of the Subordination Agreement or addressing

² (R. 268-77; R. 338-50; R. 414-21; R. 492; R. 578-83; R. 613-26; R. 744-83; R. 824-1042; R. 1055-76; R. 1142).

the Allens' notice of it, the Allens argued in opening that Wells Fargo was "untruthful" and "misled" the Trial Court in the 2017 Foreclosure Action by failing to notify "this Court" about the Subordination Agreement. (R. 1838:21-23). This theme of unsubstantiated "trickery" permeated throughout trial.

i. Wells Fargo's corporate representative testifies about Wells Fargo's intent and execution of the Subordination Agreement

To support its entitlement to foreclose, Wells Fargo presented the testimony of its corporate representative, Jodie Hawkins, a Senior Loan Documentation Specialist who has worked for Wells Fargo for more than 15 years, since before its merger with Wachovia. (R. 1841:14-23). Ms. Hawkins testified that it was common for a borrower to take out a fixed rate loan along with a line of credit at or near the same time in connection with the purchase of a residential property. (R. 1851:4-1852:13). She confirmed that Wells Fargo's intent here was that the First Mortgage act as a first-priority lien on the Property, while the Second Mortgage be inferior. (R. 1852:14-1853:3).

As for the 2017 Foreclosure Action, Ms. Hawkins testified that it is Wells Fargo's policy to always foreclose the most junior lien in default. (R. 1868:16-1869:13). She confirmed that at the time of filing the 2017 Foreclosure Action, the loan associated with the First Mortgage was not in default and thus could not have been foreclosed in any event. (R. 1869:2-8). She testified that when Wells Fargo's outside counsel realized the recording error, Wells Fargo reviewed the account and executed the Subordination Agreement, which would subordinate the Second Mortgage to the First Mortgage as the parties originally intended. (R. 1862:14-1863:6; R. 1869:14-1870:13).

Ms. Hawkins testified that subordination agreements are common to correct liens mistakenly recorded out of order, which was precisely what occurred here. (R. 1863:16-1865:19; R. 1866:5-1868:7). It was her testimony that when the 2017 Final Judgment was entered, and based on the prior recordation of the Subordination Agreement, the First Mortgage was in first-priority lien position. (R. 1872:16-1873:1).

On cross, the Allens again focused heavily on the fact that the Subordination Agreement had not been filed in the 2017 Foreclosure Action, that it was not "provided" to the Trial Court in that case or

“brought to [the court’s] attention.” (R. 1888:7-12; R. 1895:10-18; R. 1900:20-1901:18; R. 1979:18-1980:4). Indeed, the Allens specifically referenced Judge Williams when questioning Ms. Hawkins about Wells Fargo’s decision not to file a copy of the Subordination Agreement in the 2017 Foreclosure Action. (R. 1913:4-11).

ii. The current servicer of the First Mortgage loan testifies about Borrowers’ default

Wells Fargo then presented the testimony of William Fogleman, corporate counsel for SN Servicing Corporation, who is the current servicer of the loan associated with the First Mortgage on behalf of the current investor, U.S. Bank. (R. 1933:5-23). Mr. Fogleman testified that the Loan was outstanding for the February 11, 2017 payment and remained in default, and that the balance due on the loan as of January 16, 2024, is \$406,042.95, including attorneys’ fees and daily interest. (R. 1962:12-15). He clarified that the total amount sought based on Wells Fargo’s proposed final judgment was \$377,290.45, which excluded (but reserved) attorneys’ fees and included the per diem interest amount of \$37.75. (R. 1964:4-6). Mr. Fogleman testified that based on his review of the publicly recorded

documents, including the Subordination Agreement, the First Mortgage survived the 2017 Foreclosure Action as the first-priority lien on the Property. (R. 1980:17-1981:23).

iii. Mr. Allen testifies about his actual knowledge of the Subordination Agreement

Mr. Allen then testified about his knowledge of the Subordination Agreement and purchase of the Property. (R. 1992:11-12). He testified that before deciding whether to purchase the Property, he sought help from a title company to perform a title search. (R. 2000:19-2001:1). At first, Mr. Allen testified that he only learned of the Subordination Agreement after he purchased the Property when the 2018 Foreclosure Action was filed. (R. 2001:9-2002:15). He then admitted that he was in fact aware of the Subordination Agreement and the First Mortgage, that he was concerned about it showing up on the title report, and that he questioned the title company about it. (R. 2002:17-2004:24).

Indeed, Mr. Allen confirmed that the title report he received from the title company showed the Subordination Agreement. (R. 2030:4-10). He testified that despite being confused by the Subordination Agreement and the First Mortgage showing up on the title report (R.

2037:3-25), he did not seek out the advice of any attorney to help explain the potential consequences and instead sought the advice of “someone else.” (R. 2033:9-2034:5). Nor did he obtain a title policy of insurance before purchasing the Property to protect his interests. (R. 2034:8-11). Despite having concerns about the First Mortgage and his actual knowledge of the Subordination Agreement (R. 2031:8-23; R. 2036:10-19), Mr. Allen purchased the Property anyway. He claimed that he relied on the language within the 2017 Final Judgment that the Second Mortgage was the “first mortgage” on the Property. (R. 1999:4-10).

iv. Wells Fargo’s expert witness testifies about the commonplace use of subordination agreements and the Allens’ notice of same

To further support the validity of the Subordination Agreement, Wells Fargo presented the testimony of Gary Rosner, an attorney and expert witness in Florida title and lien priority disputes. (R. 2117:24-2122:11). Mr. Rosner testified that in his years of experience doing title curative work, mis-recording is a commonplace error that he has seen many times. (R. 2141:18-2143:8). He testified that the easiest and most efficient way to resolve a recording error like the one in this case is to obtain a subordination agreement. (R. 2143:9-2144:12).

Mr. Rosner testified that he reviewed the Subordination Agreement and it was “about as standard as it gets.” (R. 2146:18-20). He opined that the Subordination Agreement cured the recording mistake, placing the First Mortgage back in first-lien priority position as intended by the parties. (R. 2149:19-2150:15; R. 2155:18-2156:22). By filing the Subordination Agreement in the public records, the world was put on notice that the First Mortgage moved to a first-priority lien position as it was always intended to be. (R. 2155:18-2156:22).

As to the 2017 Final Judgment and Mr. Allen’s claimed reliance thereon, Mr. Rosner testified that the 2017 Final Judgment was a boilerplate form that could not foreclose the First Mortgage given the timely recording of the Subordination Agreement. (R. 2158:3-22). As for the Notice of Dropping Party, Mr. Rosner testified that while such a filing helps “clean up” the pleadings, the notice was unnecessary because a junior mortgagee cannot extinguish a senior mortgagee. (R. 2156:23-2157:19). As to Wells Fargo’s purported failure to file the Subordination Agreement in the 2017 Foreclosure Action, Mr. Rosner testified that it is not customary to file subordination agreements with the court as such agreements must be filed in the

public records to effectively put the world on notice. (R. 2172:3-19; R. 2170:1-25).

When asked whether a foreclosure judgment for Wells Fargo would adversely affect the Allens' title, Mr. Rosner testified that it would not, as the Allens would be entitled to the statutory redemption period during which they could redeem the Property. (R. 2181:23-2182:14). Mr. Rosner stated that based on his experience and his review of the relevant documents, the Allens were unfortunately misled by their title agent; he would have advised the Allens before purchasing the Property that they were purchasing the Property subject to the First Mortgage. (R. 2161:1-2162:14).

v. During closing arguments, the Allens keep appealing to the Trial Court's involvement in the 2017 Foreclosure Action

In closing, Wells Fargo argued as it had throughout the case and trial that the 2017 Final Judgment did not extinguish its First Mortgage on the Property given its timely recording of the Subordination Agreement. The Subordination Agreement effectively swapped the priorities of the First and Second Mortgage back to where the parties originally intended and, by recording the Subordination Agreement in the public records, both the world and

the Allens were on notice of the priorities of the liens. Wells Fargo walked through its evidence establishing its entitlement to foreclose and asked that the Trial Court grant foreclosure in its favor.

The Allens, consistent with their apparent trial strategy, primarily focused not on the legal arguments or even the facts as developed through the testimony but on the fact that Wells Fargo did not file the Subordination Agreement in the 2017 Foreclosure Action or otherwise bring it to the Trial Court's attention in that case. (*See, e.g.*, R. 2214:12-19). The Allens seemingly placed an undue emphasis on the Trial Court's personal involvement in the 2017 Foreclosure Action, arguing Wells Fargo's position contradicted "what Your Honor signed" (R. 2214:12-14), that "Your Honor didn't know about [the Subordination Agreement]" (R. 2247:22-24), and the Subordination Agreement shouldn't "override this Court's judgment." (R. 2214:25-2215:6). The Allens emphasized that the 2017 Final Judgment was "signed by Your Honor" (R. 2238:17-20), that "Your Honor's words have supreme meaning" (R. 2246:16-17), and "Your Honor's judgment has precedence." (R. 2246:23-25; *see also* R. 2237:11-16; R. 2241:4-12).

At the close of trial, the Trial Court accepted the parties' Joint Stipulation of Facts. (R. 2266:15-19). The Trial Court found that (i) there was no dispute that the recording of the Second Mortgage before the First Mortgage was done in error (R. 2267:4-6); (ii) the Subordination Agreement was recorded in the public records before the 2017 Final Judgment (R. 2267:1-18); and (iii) the Allens were aware of the Subordination Agreement before bidding on the Property. (R. 2268:6-9).

Despite these dispositive findings, the Trial Court, misled by the Allens' arguments throughout trial, narrowed in on the fact that the Subordination Agreement was not filed in the 2017 Foreclosure Action, that Wells Fargo did not amend its pleadings in that case or "notify" the court that the case involved a second mortgage, and that Wells Fargo did not otherwise make the Trial Court aware of the Subordination Agreement. (R. 2267:14-24; R. 2268:21-24; R. 2269, Tr. 157:21-24). Finding that the 2017 Final Judgment "controlled" over the Subordination Agreement timely recorded three months' before, the Trial Court found that section 702.036 protected the Allens' interest in the Property. (R. 2271:16-22).

The Trial Court memorialized its findings in a Final Judgment entered on March 21, 2024 (“Final Judgment”), which dismissed with prejudice Wells Fargo’s foreclosure action and quieted title to the Property in favor of the Allens. (R. 2337-45). The Trial Court noted its reliance on this Court’s decision in *Vista Financial Group v. The Bank of New York Mellon*, 325 So. 3d 986 (Fla. 2d DCA 2021), and the Fourth District’s decision in *Wells Fargo Bank, N.A. v. Chi Peng Tan*, 320 So. 3d 782 (Fla. 4th DCA 2021). (R. 2343). This timely appeal followed.

SUMMARY OF THE ARGUMENT

The Court should reverse the Final Judgment because (i) section 702.036 is inapplicable and does nothing to shield the Allens from Wells Fargo’s timely recorded first-priority lien on the Property; (ii) the Trial Court’s other stated reasons for dismissing the foreclosure action with prejudice were erroneous; (iii) the Allens failed to establish any right to quiet title to the Property; and (iv) Wells Fargo otherwise established its right to foreclose the First Mortgage.

First, section 702.036 is inapplicable here where Wells Fargo did not seek to vacate, set aside, or invalidate the 2017 Final Judgment or otherwise seek to establish or reestablish any lien in

abrogation of it. Instead, Wells Fargo properly sought to foreclose a separate, senior mortgage lien — the First Mortgage. The plain language of the statute controls, and the unique circumstances of this case render section 702.036 inapplicable.

Section 702.036(1) is further inapplicable because the Allens are not the innocent third-party purchasers the statute is intended to protect. The Allens admittedly had both actual and constructive knowledge of the Subordination Agreement and the existence of the First Mortgage on the Property. They bought the Property anyway. Unlike the property owners in the *Tan* and *Vista* cases cited by the Trial Court, the Allens are not the bona fide purchasers the legislature sought out to protect when enacting section 702.036.

Second, none of the other bases outlined by the Trial Court in support of dismissal of the foreclosure action are rooted in fact or in law. There was no requirement that Wells Fargo file the Subordination Agreement in the 2017 Foreclosure Action or otherwise notify the Trial Court of the recording. While in hindsight such actions could have been the better practice, there was no legal obligation for Wells Fargo to do so. Rather, Wells Fargo's filing of the Notice of Dropping Party otherwise gave the Trial Court the required

notice of Wells Fargo's intent to not proceed as to the First Mortgage, and effectively divested the Trial Court's jurisdiction over Wells Fargo (as defendant for the First Mortgage) as a matter of law. The Allens' purported reliance on the language of the 2017 Final Judgment also does not serve as any valid basis to dismiss Wells Fargo's foreclosure claim given the Allens' admitted actual and constructive knowledge of the Subordination Agreement. In any event, given the timely and properly recorded Subordination Agreement, even if the 2017 Foreclosure Judgment had purported to foreclose the First Mortgage (it did not, because Wells Fargo was no longer a defendant), the 2017 Final Judgment would be a legal nullity or void, and would have no ability to foreclose out the First Mortgage.

Third, based on the established first-priority position of the First Mortgage, the Allens failed to prove its entitlement to quiet title to the Property, warranting reversal of the Final Judgment quieting title in favor of the Allens.

Finally, Wells Fargo otherwise established all elements necessary to foreclose the First Mortgage, including proving the existence of an agreement, a default, acceleration, the amounts due and owing, and standing to foreclose. The Allens presented zero

evidence to the contrary. As the entry of Final Judgment for the Allens based on section 702.036 was erroneous as was the judgment quieting title, the Trial Court should have instead entered a final judgment of foreclosure for Wells Fargo.

For all these reasons, the Court should reverse the Final Judgment and remand with instructions to enter a final judgment of foreclosure for Wells Fargo.

ARGUMENT

I. STANDARD OF REVIEW

The Trial Court found that the Allens' interest in the Property took priority over Wells Fargo's interest based on its erroneous application of section 702.036, Florida Statutes. The Trial Court also concluded as a matter of law that the Allens were entitled to judgment quieting title to the Property. As these are issues of law, this Court's review is de novo. *See, e.g., Oliveros v. Adventist Health Sys./ Sunbelt, Inc.*, 45 So. 3d 873, 876 (Fla. 2d DCA 2010) (trial court's application of statutes to undisputed facts is an issue of law reviewed de novo) (citing *Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010) (holding that a question of law arising from undisputed facts is reviewed de novo));

Lehmann v. Cocanut Bayou Ass'n, Inc, 269 So. 3d 599, 607 (Fla. 2d DCA 2019) (legal conclusions are reviewed de novo).

II. THE TRIAL COURT ERRONEOUSLY APPLIED SECTION 702.036 WHEN IT DISMISSED THE FORECLOSURE ACTION

The Trial Court primarily found for the Allens based on its erroneous application of section 702.036, which is inapplicable based on the undisputed facts and Record evidence. Section 702.036 provides limited protection to the purchaser of a foreclosed property when a party later challenges a foreclosure judgment:

(1)(a) In any action or proceeding in which *a party seeks to set aside, invalidate, or challenge the validity of a final judgment of foreclosure of a mortgage* or to *establish or reestablish a lien or encumbrance on the property in abrogation of the final judgment of foreclosure of a mortgage*, the court shall treat such request solely as a claim for monetary damages and may not grant relief that adversely affects the quality or character of the title to the property, if:

1. *The party seeking relief from the final judgment of foreclosure* of the mortgage was properly served in the foreclosure lawsuit as provided in chapter 48 or chapter 49.
2. The final judgment of foreclosure of the mortgage was entered as to the property.
3. All applicable appeals periods have run as to the final judgment of foreclosure of the mortgage with no appeals having been taken or any appeals having been finally resolved.

4. The property has been acquired for value, by a person not affiliated with the foreclosing lender or the foreclosed owner, at a time in which no lis pendens regarding the suit to set aside, invalidate, or challenge the foreclosure appears in the official records of the county where the property was located.

Fla. Stat. § 702.036(1) (emphasis added).

The Trial Court denied Wells Fargo's entitlement to foreclose the First Mortgage, finding that the Allens were entitled to protection under section 702.036. This was error because (i) section 702.036 is inapplicable based on the plain language of the statute as Wells Fargo was not seeking to invalidate, set aside, or vacate the 2017 Final judgment; (ii) the Trial Court's reliance on the *Tan* and *Vista* cases was erroneous, as those cases are both factually and legally distinguishable; and (iii) the Allens are not the bona fide purchasers section 702.036 was intended to protect.

A. Section 702.036 is Inapplicable Because Wells Fargo Did Not Seek to Invalidate, Set Aside, or Vacate the 2017 Final Judgment

To start, the Trial Court's reliance on section 702.036 fails at the first element. Based on its plain language, protection under section 702.036(1) necessarily requires that the action be one in which "a party seeks to set aside, invalidate, or challenge the validity

of a final judgment of foreclosure” or otherwise “establish or reestablish a lien . . . in abrogation of the final judgment.” Fla. Stat. § 702.036(1). In this case, Wells Fargo sought none of those things. Wells Fargo did not seek to set aside, invalidate, or challenge the validity of the 2017 Final Judgment, nor did it seek to establish or reestablish any lien in abrogation of the 2017 Final Judgment. Rather, Wells Fargo sought to foreclose a completely separate, timely recorded, first-priority lien—the First Mortgage. The Trial Court necessarily recognized this distinction, noting in the Final Judgment that “Wells Fargo filed *another* Foreclosure Complaint on the larger mortgage.” (R. 2340 ¶ 13) (emphasis added). The filing of a “another” foreclosure action on a separate, senior lien (the First Mortgage) is simply not the same as an action seeking to invalidate, set aside, or challenge a final judgment previously entered on a junior lien (the Second Mortgage). The Trial Court necessarily conflated the nature of Wells Fargo’s foreclosure action to make it so section 702.036(1) applied. This was error.

B. The Trial Court's Reliance on *Tan* and *Vista* Was Misplaced

The Trial Court's misapplication of section 702.036 is underscored by its reliance on *Wells Fargo Bank, N.A. v. Chi Peng Tan*, 320 So. 3d 782 (Fla. 4th DCA 2021), and *Vista Fin. Group v. The Bank of New York Mellon*, 325 So. 3d 986 (Fla. 2d DCA 2021), both of which are wholly distinguishable. This Court need look no further than the first sentence of the *Tan* opinion to distinguish it from this case, as *Tan* involved an order denying a motion to vacate a final judgment of foreclosure. 320 So. 3d at 783. The same is true of the *Vista* case, which involved an appeal from a motion to set aside a foreclosure judgment. 325 So. 3d at 986. Actions or proceedings seeking to vacate a foreclosure judgment like in *Tan* or to set aside a foreclosure judgment like in *Vista* fall squarely within the purview of section 702.036. *Accord Nationstar Mortg. LLC v Diaz*, 227 So. 3d 726, 730 (Fla. 3d DCA 2017) (applying section 702.036 in case in which foreclosure plaintiff moved to vacate a final judgment of foreclosure).

Here, unlike in *Tan* and *Vista*, Wells Fargo did not move to vacate or set aside the 2017 Final Judgment. This action was a

completely separate foreclosure action brought by Wells Fargo on a separate, senior lien, with no overlap with the 2017 Final Judgment other than that the liens encumbered the same property. The Trial Court was (and this Court is) “limited by the text of the statute,” *Tan*, 320 So. 3d at 786, and the statute only applies to actions or proceedings seeking to invalidate, set aside, or vacate a final judgment of foreclosure or otherwise seeking to establish or reestablish a lien in abrogation of a final judgment. As this case did not involve any action to invalidate, set aside, or vacate a final judgment of foreclosure or any other attempt to “abrogate” the 2017 Final Judgment, section 702.036 is simply inapplicable, and the Trial Court’s reliance on it constitutes reversible error.

Notably, *Tan* is further distinguishable because unlike the third-party titleholders in that case, a final judgment of foreclosure in favor of Wells Fargo here would not adversely affect the Allen’s title to the property. A brief discussion of the facts in *Tan* illustrates this important distinction. In *Tan*, it was undisputed that the lender held a first-priority lien on the property. *Id.* Despite this, junior lienholder First Magnus filed a foreclosure action naming the superior lienor lender as a defendant. *Id.* After the lender defaulted, the trial court

entered a foreclosure judgment for First Magnus. *Id.* First Magnus then purchased the property at the judicial sale and deeded it to a successor in interest, the Shanis. *Id.*

More than five years later, the first lienor lender moved to vacate First Magnus's final judgment as void because its interest in the property was superior. *Id.* at 784. While the trial court agreed the judgment was void based on well-established Florida law on the inability of a junior lienholder to foreclose a senior lienholder's interest, the trial court found that section 702.036 prevented the first lienor lender from vacating the final judgment because, among other reasons, it would have adversely affected the Shanis' ownership in the property. *Id.* The Fourth District agreed. *Id.* at 785. Critically, the Fourth District found that if the final judgment were vacated, so too would the Shanis' title to the property, *see id.*, satisfying the requirement under section 702.036 that the requested relief "adversely affect[] the quality or character of the title to the property." Fla. Stat. § 702.036(1).

Entering final judgment for Wells Fargo here would not adversely affect the Allens' title to the property unlike in *Tan*. Wells Fargo here was not seeking to vacate or set aside the 2017

Foreclosure Judgment. Vacating or setting aside a judgment vitiates any legal force or effect that judgment had in the first place. See, e.g., *Sterling Factors Corp. v. U.S. Bank Nat'l Ass'n*, 968 So. 2d 658, 665 (Fla. 2d DCA 2007) (noting that a “judgment has legal force and effect unless and until it is vacated”). Had the trial court in *Tan* granted the motion to vacate, the foreclosure judgment from which the Shanis’ title derived would have also lost all legal force or effect, effectively nullifying the Shanis’ title. *Tan*, 320 So. 3d at 785 (“If the judgment were vacated, so too would [the Shanis’] title to the property.”).

Here, the Allens’ title derived from the 2017 Final Judgment, and Wells Fargo was not trying to vacate or set that aside, nor was it trying to reestablish a lien in abrogation of it. A foreclosure judgment here for Wells Fargo on its first-priority First Mortgage would not nullify the Allens’ title, and the Allens’ title would not automatically disappear or vitiate. The Allens, as a third-party owner of the Property, would remain titleholders until the Property went through a judicial sale. And the Allens would have the right to avoid the sale by exercising their redemption rights as contemplated by Florida law. See *Popescu v. Laguna Master Ass’n, Inc.*, 184 So. 3d 1196, 1200 (Fla.

4th DCA 2016) (The right of redemption “belongs to the mortgagor and those claiming under or through him [or her].”).

As Wells Fargo argued at trial, the facts here are no different from the common situation in which a party purchases a property at a judicial sale following an HOA foreclosure subject to (and with knowledge of, as discussed more below) a senior lien and then the property is later foreclosed by the senior lienholder. (R. 2260:12-21). Unlike in *Tan*, the Allens continue to have certain rights under Florida law, and they can exercise those rights even after judgment. *Popescu*, 184 So. 3d at 1200 (right of redemption does not require court approval and exists until it’s been waived or extinguished). This critical distinction from the facts in *Tan*, i.e., the lack of any truly adverse effect on the Allens’ title to the Property as required for applicability of section 702.036, further supports reversal.

C. The Allens Are Not The Innocent Third-Party Purchasers Section 702.036 Was Intended to Protect

The Trial Court also erred in applying section 702.036 (and *Tan* is even more distinguishable) because the undisputed evidence showed that the Allens are not the innocent third-party purchasers the statute was intended to protect. Section 702.036 was created to

“protect[] *bona fide purchasers* of a property at a foreclosure sale and ensure[] the validity of the title where a party seeks to set aside, invalidate, or challenge the validity of a final judgment or to establish or reestablish a lien.” See Fla. Staff An., H.B. 87, p. 6, June 13, 2013, <https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0087z1.CJS.DOCX&DocumentType=Analysis&BillNumber=0087&Session=2013>. (emphasis added). The legislature specifically noted that the statute is meant to protect “innocent purchasers” who “purchased in good faith.” *Id.* at 6-7. Indeed, as this Court has noted, “[t]he legislature chose to balance the protections of the former property owner against those of the *innocent* third-party purchaser to bring finality and security to the mortgage foreclosure process.” See *Vista*, 325 So. 3d at 989.

The Allens are not innocent bona fide purchasers of the Property. By now it is a fundamental tenet of Florida jurisprudence that “[t]o be a bona fide purchaser, a buyer must have had no knowledge of the claimed interest against the challenged property at the time of the transaction.” *Soknoh Partners, LLC v. Audio Visions S., Inc.*, 319 So. 3d 175, 179 (Fla. 2d DCA 2021) (citation omitted); Fla. Stat. § 695.01(1). Here, the undisputed facts show that the

Allens had both actual and constructive notice of the Subordination Agreement and the priorities of the liens *before* they purchased the Property, excluding them from any protection under section 702.036.

As to constructive notice, the Allens stipulated and the Trial Court found, that the Subordination Agreement was recorded in the public records before entry of the 2017 Final Judgment and before the Allens purchased the Property. (R. 2031:8-23; R. 2036:10-19). Indeed, the Subordination Agreement appeared on the title report ordered by the Allens, a title report Mr. Allen testified he reviewed and relied on in deciding whether to purchase the Property. (*Id.*). As a matter of law, the timely recording of the Subordination Agreement in the public records gave the Allens constructive notice of the First Mortgage and its first-lien priority position. *See Regions Bank v. Deluca*, 97 So. 3d 879, 884 (Fla. 2d DCA 2012) (“‘Constructive notice’ is the inference of such knowledge by operation of law, as under a recording statute.”).

The Allens also had actual knowledge of the Subordination Agreement, making them far from the innocent bona fide purchasers section 702.036 was intended to protect. Mr. Allen testified that he had actual knowledge of the Subordination Agreement recorded

before the 2017 Final Judgment and that the Property was encumbered by two mortgages. (R. 2031:8-23; R. 2036:10-19). Even the Trial Court noted multiple times both at trial and in its Final Judgment that the Allens knew about the Subordination Agreement. (R. 2268:6-9; R. 2271:7-10; R. 2342 ¶ 25).

Indeed, the Record evidence shows that before purchasing the Property, Mr. Allen became “concerned” about the First Mortgage and asked his title escrow officer for advice as to how that may affect his title to the Property. (R. 2003:3-2004:3). Despite his concerns, he did not seek out the advice of any attorney to help explain the consequences and instead sought the advice of “someone else.” (R. 2033:9-2034:5). As Mr. Rosner testified in his experience as a title attorney, he would have cautioned the Allens that they were indeed purchasing the Property subject to the First Mortgage. (R. 2161:1-2162:14).

While it is unfortunate that the Allens failed to retain counsel and instead detrimentally relied on their title agent’s flawed interpretation of the law, Florida is a notice jurisdiction. The Allens cannot be excused from the consequences of failing to exercise due diligence or sticking their head in the sand. *See generally U.S. Bank*

Nat'l Ass'n v. Rios, 166 So. 3d 202, 210 (Fla. 2d DCA 2015) (“A purchaser of property at a judicial sale is generally subject to the rule of caveat emptor.”); *Crenshaw v. Holzberg*, 503 So. 2d 1275, 1277 (Fla. 2d DCA 1987) (“[A]n instrument of record is notice not only of its own existence and contents, but also of other facts that would have been learned from the record if it had been examined and that inquiry suggested by it would have disclosed.”); *see also Graham v. Commonwealth Life Ins. Co.*, 154 So. 335 (Fla. 1934) (holding that where a purchase money mortgage stated it was second mortgage, but incorrectly designated the first mortgagee, and the assignee had actual and constructive notice of a subordination agreement, the mortgagee of the building construction loan was entitled to priority over the assignee of the purchase money mortgage).

As the undisputed testimony and Record evidence demonstrates the Allens were not bona fide purchasers and in fact had both actual and constructive knowledge of the Subordination Agreement and therefore the existence of the First Mortgage on the Property, they are not entitled to protection under section 702.036, and the Trial Court’s application of the statute was reversible error.

III. THE TRIAL COURT'S OTHER GROUNDS FOR DISMISSAL CONSTITUTE REVERSIBLE ERROR

A. The Trial Court's Undue Emphasis On Wells Fargo's Actions Or Inactions In The 2017 Foreclosure Judgment Was Error

Misled by the Allens, the Trial Court seemingly placed undue emphasis on Wells Fargo's actions or inactions in the 2017 Final Judgment when it found the Allens' title was superior to Wells Fargo's First Mortgage. As discussed above, the Allens consistently argued throughout trial that Wells Fargo tricked or "misled" the Trial Court in the 2017 Foreclosure Action, arguing Wells Fargo should have notified the Trial Court of the Subordination Agreement and that its failure to do so somehow nullified the Subordination Agreement. Based on these arguments, the Trial Court seemingly found that the Final Judgment "took priority" over the Subordination Agreement, foreclosed Wells Fargo's First Mortgage, and therefore the Allens purchased the Property free and clear at the judicial sale.

This rationale ignores the timely recorded Subordination Agreement, which put both the Allens and the world on notice that the Second Mortgage was subordinate to the First Mortgage as the signing parties always intended it to be. Moreover, Wells Fargo's

filing of the Notice of Dropping Party effectively notified the Trial Court that Wells Fargo no longer sought any relief against Wells Fargo on the First Mortgage; nothing else was required. The resulting 2017 Final Judgment had no effect on the priority of Wells Fargo's First Mortgage, and the Trial Court's undue emphasis on Wells Fargo's actions or inactions in alerting her to the recorded Subordination Agreement in the 2017 Foreclosure Action was misplaced.

B. The Timely Recorded Subordination Agreement Placed The First Mortgage Back In First-Priority Position, Regardless of Any Court Filing

The Allens argued, and the Trial Court similarly found, that Wells Fargo did not file the Subordination Agreement in the 2017 Foreclosure Action or otherwise make the Trial Court aware of it. (R. 2267:19-24). The Trial Court noted that Wells Fargo did not move to amend its pleadings or notify the Trial Court that Wells Fargo was seeking to foreclose on a second mortgage. (R. 2268:21-24; R. 2359-61). But the Allens cited no legal precedent for this theory at trial, and the undersigned can locate none now. The Subordination Agreement was timely and properly recorded in the public records, and by recording it in the public records, Wells Fargo placed the

world on notice of the swapping of the lien priorities. Moreover, Wells Fargo did notify the Trial Court of the intent not to pursue foreclosure of the First Mortgage by filing a Notice of Dropping Party. Nothing more was required.

Indeed, Florida law allows for parties to bargain for and swap priorities, and subordination agreements are common in the mortgage industry. See Fla. Stat. § 679.339 (recognizing the rights of parties to freely contract for “priority swapping”). A mortgagee, for various reasons, may agree to subordinate, i.e., lessen its priority, of its mortgage lien to a subsequent mortgage made to the mortgagor. See 47 Fla. Jur 2d Secured Transactions § 278 (describing a subordination agreement as “whereby one creditor voluntarily subordinates its secured position to the secured position of another secured creditor.”). These agreements are designed to cure the very problem Wells Fargo faced in the 2017 Foreclosure Action when it realized its inadvertent recording error.

As a matter of law, upon the execution of the Subordination Agreement, Wells Fargo’s First Mortgage became the superior mortgage on the Property. And when Wells Fargo filed the Subordination Agreement in the public records, the world was

effectively on notice. From that point forward, Wells Fargo was not required to defend its First Mortgage in the 2017 Foreclosure Action, as it is settled law in Florida that a junior lienholder lacks the legal ability to name and foreclose the interest of a superior lienholder in the junior lienholder's foreclosure action. *See Cone Bros. Constr. Co. v. Moore*, 193 So. 2d 288, 290-91 (1940); *Wells Fargo Bank, N.A. v. Rutledge*, 148 So. 3d 533, 534-35 (Fla. 2d DCA 2014); *Citimortgage, Inc. v. Henry*, 24 So. 3d 641, 643 (Fla. 2d DCA 2009).

There was no legal requirement for Wells Fargo to file the Subordination Agreement in the 2017 Foreclosure Action. While in hindsight this may have been helpful as further explanation of the dropped party, the Trial Court erroneously placed a burden on Wells Fargo that simply does not exist.

C. The Notice of Dropping Party Notified the Trial Court of Wells Fargo Intent Not To Pursue Any Claims Against Wells Fargo

While unnecessary to carry out the priority swapping, Wells Fargo's filing of the Notice of Dropping Party acted to put both the parties and the Trial Court on notice that Wells Fargo no longer sought any relief from Wells Fargo as holder of the First Mortgage. Within days after Wells Fargo executed the Subordination

Agreement, Wells Fargo (as mortgagee of the First Mortgage) was formally dropped a party defendant in the 2017 Foreclosure Action. Once that Notice was filed, any subsequent judgment could not affect the priority of Wells Fargo's First Mortgage as a matter of law.

A party may file a notice of dropping party any time before submission of a nonjury case to the court so long as the notice is in writing and served on the opposing parties. See Fla. R. Civ. P. 1.250(b) (incorporating by reference rule 1.420(a)(1)(A)). After the timely filing of a notice of dropping party, "the court has no discretion to deny the dropping of a defendant by a plaintiff." *Chrysler Corp. v. Hames*, 345 So. 2d 813, 814 (Fla. 4th DCA 1977). In fact, the filing of a Rule 1.250(b) notice "divest[s] the court of jurisdiction over the dropped party without any regard to the underlying motivations of the party filing the notice." *Nat'l Bank of Commerce v. Jupiter Mortg. Corp.*, 890 So. 2d 553, 556 (Fla. 2d DCA 2005) (quoting *Fed. Ins. Co. v. Fatolitis*, 478 So. 2d 106 (Fla. 2d DCA 1985)). In other words, the notice of dropping party acts as an automatic dismissal of that party from the action.

It was reversible error for the Trial Court to find that the 2017 Final Judgment foreclosed the First Mortgage or that the First Mortgage was affected by the 2017 Final Judgment because the Trial Court could not have entered *any* judgment either for *or* against Wells Fargo, as defendant, as to the First Mortgage after the Notice of Dropping was filed. *See Nat'l Bank of Commerce*, 890 So. 2d at 555 (finding reversal error when trial court entered judgment for party that had been dropped from the lawsuit); *see also Clarke*, 239 So. 3d at 125 (explaining that trial court was without authority to enter any further order as to dropped defendant and reversing order on appeal).

Wells Fargo anticipates the Allens will argue that because the Notice of Dropping Party was not recorded in the public records, it was somehow ineffective or the First Mortgage somehow remained subject to the lis pendens filed in the 2017 Foreclosure Action. But this interpretation reads far more into Rule 1.250 than the plain language of the rule warrants. Under the rule, “[i]f notice of lis pendens has been filed in the action against a party so dropped, the notice of dismissal shall be recorded and cancels the notice of lis pendens without the necessity of a court order.” Fla. R. Civ. P. 1.250(b).

Based on the principles of statutory interpretation, this recording requirement in actions involving lis pendens simply acts to eliminate the requirement that a court order be obtained first. *Id.* The failure to file the Notice in the public records did not nullify the Notice for the case or the Trial Court’s notice of Wells Fargo’s intent. Interpreting the rule differently would contradict the plethora of caselaw, including of this Court, that holds that the filing of a notice of dropping party automatically divests the court of jurisdiction over that party. *See Nat’l Bank of Commerce*, 890 So. 2d at 556 (the filing of a notice of dropping party “divest[s] the court of jurisdiction over the dropped party without any regard to the underlying motivations of the party filing the notice.”); *Fatolitis*, 478 So. 2d at 106; *Two Islands Dev. Corp. v. Clarke*, 239 So. 3d 115, 124 (Fla. 3d DCA 2018) (“[T]he effect of a plaintiff’s announcement of a voluntary dismissal is immediate, final, and irreversible, terminating the trial court’s authority to enter further orders as to that defendant who has been dropped from the action.”) (quotations omitted).

Moreover, the Notice of Dropping Party effectively amended the foreclosure complaint filed in the 2017 Foreclosure Action and removed Wells Fargo as a party. This “amendment” to the complaint

also effectively amended the lis pendens. *See Nikooie v. JPMorgan Chase Bank, N.A.*, 183 So. 3d 424, 433 (Fla. 3d DCA 2014). The lis pendens merely acts “[a]s a notice to the lawsuit itself—not to a particular and forever-limited universe of parties and claims.” *Id.* And, as explained above, the undisputed evidence shows that the Allens indeed had notice. In sum, the failure to record the Notice of Dropping Party did not affect Wells Fargo’s stated intent to drop Wells Fargo as a party and or nullify the notice to the Trial Court and parties.

D. The Allens’ Purported Reliance on the 2017 Final Judgment is Irrelevant

The Trial Court also found that the Allens’ stated “reliance” on the 2017 Foreclosure Judgment warranted dismissal of the 2018 Foreclosure Action “notwithstanding any prior recording of the Subordination Agreement.” (R. 2361 ¶ 25). In addition to this finding being in complete degradation of Florida’s notice jurisprudence, this rationale is merely a red herring.

The Allens argued at trial that they relied on the following language in the 2017 Final Judgment when bidding on the Property:

5. Plaintiff, whose address is Wells Fargo Bank, N.A., 18700 NW Walker Road #92, MAC #P6053-022, Beaverton, Oregon 97006, holds a first mortgage lien for the total sum specified in Paragraph 3 herein. The lien of the Plaintiff is superior in dignity to all rights, titles, interests, or claims, of the Defendant(s) and all persons, corporations, or other entities claiming by, through, or under the Defendant(s), or any of them and the property will be sold free and clear of all claims of the Defendant(s), with the exception of any assessments that are superior pursuant to sections 718.116 and 720.3085, Florida Statutes. The Plaintiff lien encumbers the subject property located in Pinellas County, Florida and described as:

(R. 819; R. 1999:4-10). The Allens argued that they read this to mean that the Second Mortgage was superior to all other potential claims and interests in the Property and therefore the Allens would be purchasing the Property free and clear of any liens. The Trial Court bought this argument. This was error, for two reasons.

First, the only evidence of any exclusive reliance on the 2017 Final Judgment language is the Allens' own self-serving testimony. (R. 1999:4-10). In contrast, there is competent, substantial evidence that the Allens did not in fact rely solely on the language of the 2017 Final Judgment and instead also relied on the title report and the Allens' title agent when determining whether to purchase the Property, as discussed above. Indeed, the Record shows that Mr. Allen was not only actually and constructively aware of the Subordination Agreement and the swapping of the lien priorities, but

he even acknowledged that the Subordination Agreement or the First Mortgage on the Title Report may affect his potential interest in the Property. Wells Fargo's First Mortgage should not lose its first-priority lien position just because Mr. Allen detrimentally relied on the purported legal advice of his title agent.

Second, even if the Allens did rely on the language in the 2017 Final Judgment (which Wells Fargo submits is unsupported by the Record evidence), the language in the 2017 Final Judgment aligns with Wells Fargo's argument that its First Mortgage was unaffected by the 2017 Final Judgment. As drafted, the 2017 Final Judgment states that Wells Fargo's Second Mortgage (the mortgage attached to the Complaint in the 2017 Foreclosure Action) is superior to all rights and interests of ***the Defendants***. (R. 819). The fact that this paragraph also characterizes the Second Mortgage as a "first mortgage" is at best a clerical error based on the use of a "Uniform" form and otherwise immaterial given Wells Fargo (as mortgagee of the First Mortgage) was dropped as a party defendant months before and the Allens' demonstrated actual and constructive knowledge of the Subordination Agreement and First Mortgage, as discussed above.

IV. THE TRIAL COURT ERRED BY QUIETING TITLE IN FAVOR OF THE ALLENS

Along with its erroneous application of section 702.036 and the other stated reasons for dismissing Wells Fargo's valid foreclosure action, the Trial Court also erred by quieting title to the Property in favor of the Allens. An action to quiet title action requires proof of, among other things, (i) the alleged cloud or defect on title and (ii) why defendant's claim to the property is not well founded. *Helman v. Udren Law Offices, P.C.*, 85 F. Supp. 3d 1319, 1330 (S.D. Fla. 2014) (citing Fla. Stat. § 65.061). Put differently, a plaintiff seeking to quiet title to property "must show with clearness, accuracy, and certainty the validity of his or her title and the invalidity of the title of the opposing party." *Rhodes v. JPMorgan Chase Bank, N.A.*, 12-80368-CIV, 2012 WL 5411062, at *3 (S.D. Fla. Nov. 6, 2012).

For all the reasons discussed above, the Trial Court erred when it necessarily found that the Allens showed the invalidity of Wells Fargo's superior interest in the Property. Wells Fargo's Second Mortgage became subordinate to Wells Fargo's First Mortgage through the April 16, 2018 Subordination Agreement. After Wells Fargo was dropped from the 2017 Foreclosure Action based on the

Subordination Agreement, the Trial Court no longer had jurisdiction to enter *any* judgment related to Wells Fargo's First Mortgage. It follows that the 2017 Final Judgment did not affect Wells Fargo's First Mortgage, and the First Mortgage remains a first-priority, secured lien on the Property. The Allens had both constructive and actual notice of this priority through the recorded Subordination Agreement, the Title Report they purchased, and the publicly available foreclosure docket. *See supra*. The undisputed Record evidence therefore shows that the Allens did not meet their burden to show how or why Wells Fargo's interest is a cloud on their title to the Property, nor could they overcome Wells Fargo's well-founded superior claim to the Property. Accordingly, the Allens' counterclaim to quiet title failed as a matter of law, and the Court should reverse the Final Judgment quieting title in favor of the Allens.

V. WELLS FARGO ESTABLISHED ITS ENTITLEMENT TO A JUDGMENT OF FORECLOSURE ON THE FIRST MORTGAGE

Having established that the Trial Court erroneously dismissed Wells Fargo's foreclosure claim based on section 702.036 and erroneously entered Final Judgment for the Allens quieting title to

the Property, it follows that the Trial Court should have entered final judgment of foreclosure for Wells Fargo.

Throughout trial, Wells Fargo established its entitlement to foreclosure, including the existence of an agreement, a default, compliance with conditions precedent, acceleration, and the amounts due and owing. *Black Point Assets, Inc. v. Fed. Nat'l Mortg. Ass'n (Fannie Mae)*, 220 So. 3d 566, 568 (Fla. 5th DCA 2017) (to establish foreclosure, a plaintiff must prove “1) an agreement, 2) a default, 3) an acceleration of the amount due, and 4) the amount due.”).

The original Note and Mortgage were entered into evidence without objection. (R. 1845:14-21). The testimony established that the First Mortgage loan was in default and that Borrowers had made no payment since January 2017. (R. 1879:23-1880:16). Wells Fargo introduced without objection the default letter mailed to Borrowers in compliance with paragraphs 15 and 22 of the Mortgage. (R. 1882:10-1884:5; R. 1346-58). Wells Fargo further established through the testimony of Mr. Fogleman that the loan remained outstanding for the February 11, 2017 payment, remained in default (R. 1950:23-1951:13), and that the outstanding balance due on the

loan as of the date trial and as reflected in the proposed final judgment is \$377,290.45, with per diem interest of \$37.75. (R. 1964:4-6; R. 1436).

As for standing, Wells Fargo had physical possession of the original Note at trial, which alone gave it standing to foreclose as holder. Fla. Stat. § 673.3011; (R. 1845:14-21). The original Note produced at trial matched the copy of the Note attached to the Complaint (R. 1846:20-1847:4), and Wells Fargo's counsel had possession of the original Note as of November 6, 2018, before filing the operative Complaint. (R. 1876:9-13).

The Allens presented zero evidence to contradict Wells Fargo's evidence in support of foreclosure. Given the Record establishes Wells Fargo's entitlement to foreclose the First Mortgage, this Court should reverse the Final Judgment entered for the Allens and remand with instructions to enter a Final Judgment of Foreclosure for Wells Fargo.

CONCLUSION

WHEREFORE, for all these reasons and authorities, Wells Fargo requests that the Court reverse the Final Judgment and remand with instructions to enter Final Judgment for Wells Fargo.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word count limit requirements of Florida Rule of Appellate Procedure 9.210(2)(B), as it contains 9,771 words, excluding the exempted portions of the brief.

2. This brief complies with the typeface requirements of Florida Rule of Appellate Procedure 9.045(b), as it has been prepared in a proportionally spaced typeface using Microsoft Word in Bookman Old Style 14-point font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by email on August 12, 2024 to the following:

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