

FOURTH DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

CONSOLIDATED APPEAL NO. 4D23-0325

LOWER TRIBUNAL NO.  
502013CA011730

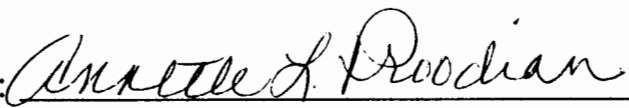
KEVIN J. PROODIAN AND ANNETTE L. PROODIAN,  
Appellants,

v.

JP MORGAN CHASE BANK, N.A.,  
Appellee

REPLY BRIEF TO CORRECTED ANSWER BRIEF  
OF APPELLEE JPMORGAN CHASE BANK, N.A.

BY:   
KEVIN J. PROODIAN

BY:   
ANNETTE L. PROODIAN,

Fourth District Court of Appeal  
2023 OCT 11 PM 12:50

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## ARGUMENT

### I. **Appellants Dispute Appellee Statement Of The Case As It Contains Falsities And Is Not Supported By The Record.**

Appellee states that:

“Chase’s Mortgage lien interest in Appellants’ Property was valid, enforceable, and did not constitute a cloud on Appellants’ title to the Property at issue”

There is no court ruling adjudicating that Chase has a mortgage lien on the property. The court below simply declared that the mortgage is valid in its current form without declaring who holds an interest in said mortgage. In fact, Wells Fargo is claiming a lien interest based on the same mortgage and despite this Court’s affirmance in favor of Chase, Wells Fargo is proceeding on its counterclaim to have the lower court declare that Wells Fargo holds a mortgage interest in the property and not Chase. Chase is fully aware of Wells Fargo’s moves in the lower court and has not objected and has in fact

supported Wells Fargo's moves. Furthermore, despite this Court's affirmance that the mortgage is valid in its current form, Wells Fargo with the tacit support for Chase, is seeking to reform the very mortgage in which the lower court declared to be valid in its current form.

**II. The Circuit Court Did Abuse Its Discretion In Denying Appellants' Motion To Vacate Final Judgment.**

The Circuit Court erred when it denied Appellants' Motion to Vacate the Final Judgment. Appellants' motion was facially sufficient and demonstrated a colorable basis for relief under Florida Rule of Civil Procedure 1.540(b)(3). The motion did not challenge the merits of the Final Judgment. Instead, the motion asserted a basis for relief from judgment under Rule 1.540(b). Appellants' motion for relief from judgment also sufficiently set forth legitimate grounds to

vacate the Final Judgment entered in favor of Chase.

**A. Appellants' Motion To Vacate Final Judgment Was Facially Sufficient And Asserted A Colorable Basis For Relief. Therefore, An Evidentiary Hearing Was Required.**

The Circuit Court erred when it denied Appellants' Motion to Vacate the Final Judgment without an evidentiary hearing because the Appellants' motion was facially sufficient and demonstrated a colorable basis for relief under Florida Rule of Civil Procedure 1.540(b)(3).

Under Florida Rule of Civil Procedure 1.540(b), a court may relieve a party from a final judgment for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing;
- (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

- (4) that the judgment, decree, or order is void; or
- (5) that the judgment, decree, or order has been satisfied, released, or discharged, or a prior judgment, decree, or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment, decree, or order should have prospective application...

Under Florida Rule of Civil Procedure 1.540(b)(3), a court may relieve a party from a final judgment for fraud. *Flemenbaum v. Flemenbaum*, 636 So. 2d 579, 580 (Fla. 4th DCA 1994). Florida Rule of Civil Procedure 1.120(b) requires that the circumstances constituting fraud be stated with such particularity as the circumstances may permit. *Id.* This means that a rule 1.540(b)(3) motion must clearly and concisely set out the essential facts of the fraud, and not just legal conclusions. *Id.*; *see also Hembd v. Dauria*, 859 So. 2d 1238, 1240 (Fla. 4th DCA 2003) (where a litigant seeks to inject the issue of fraud into a lawsuit, Florida law

requires that it be pled with precision, not just flung into the case willy-nilly).

To entitle a movant to an evidentiary hearing on a motion for relief from judgment, a Rule 1.540(b)(3) motion must specify the fraud with particularity and explain why the fraud, if it exists, would entitle the movant to have the judgement set aside. *Freemon v. Deutsche Bank Trust Co. Americas*, 46 So. 3d 1202, 1204 (Fla. 4th DCA 2010) (citing *Flemenbaum*, 636 So. 2d at 580); *see also Stirberg v. Fein as Co-Trustee of Nat Stirberg Revocable Residence Trust*, 357 So. 3d 1233, 1236 (Fla. 4th DCA 2023) (upholding the *Flemenbaum* two-prong test to all cases of fraud). “If a motion does not set forth a basis for relief on its face, then an evidentiary hearing is unnecessary, the time and expense of needless litigation is avoided, and the policy of preserving the finality of judgment is enhanced.” *See*

*Freemon*, 46 So. 3d at 1204 *citing Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, 20 So. 3d 952, 955 (Fla. 4th DCA 2009). The matter alleged must affect the outcome of the case and not merely be “*de minimis*.” *Id.* Thus, to obtain a hearing on a Rule 1.540(b)(3) motion, the law requires a movant to demonstrate a prima facie case of fraud, not just nibble at the edges of the concept. *See id. citing Hembd*, 859 So. 2d at 1240.

Appellants’ fraud motions are not an attempt to rehash a matter fully explored at trial. This is because there was not trial on the merits. Appellants filed a verified motion under penalty of perjury in alleging the fraud. As such, Appellants made a Prima Facia case showing, which would justify relief from judgment. The verified motion was not rebutted with an affidavit by Appellee. As such the motion should have been granted or at the very least an evidentiary

hearing should have been held. The eagerness to conserve judicial resources cannot be done at the expense of denying Appellants their day in court and to be heard, and the matters adjudicated on the merits. Doing otherwise, manifests injustice. The court below did not make a finding that the motion is legally insufficient, rather it denied the motion for one reason only, that the motions were duplicative. A review of both motions would readily reveal that the lower court failed to review the motions and simply presumed they were the same.

Here, the Circuit Court reversibly erred when it denied Appellants' Motion to Vacate the Final Judgment without an evidentiary hearing because Appellants' motion was facially sufficient and demonstrated a colorable basis for relief under Florida Rule of Civil Procedure 1.540(b)(3).

Appellants' Motion to Vacate Judgment was predicated on the verified alleged facts that "Chase committed fraud on the court by alleging that it held a Mortgage lien interest in Appellants' Property when in fact it did not." *Id.* Appellants also allege that "Chase fraudulently filed a motion for summary judgment where in the motion it made numerous misrepresentations to the Circuit Court regarding its alleged interest in the documents titled "Mortgage." Appellants also claimed that Chase "confessed error" and claimed that the final judgment was rendered in error because Chase did not have an actual mortgage lien interest in the Property. This Court can take judicial notice of the counterclaim filed in the case below where Wells Fargo seeks a declaration that it holds a mortgage lien on the Property. Chase is aware of Wells Fargo's actions and provide its tacit support.

However, the foregoing allegations of “fraud” are not refuted by Appellee and are legally sufficient to be granted relief from the judgment. Appellants’ motion and supporting affidavit(s) sets forth factual and evidentiary basis to vacate the judgment.

As a result of Appellants’ pleading a colorable basis for relief from the judgment, the Circuit Court was required to conduct an evidentiary hearing on the Motion to Vacate Final Judgment. *See Flemenbaum*, 636 So. 2d at 580 (“If a motion on its face does not set forth a basis for relief, then an evidentiary hearing is unnecessary, and the time and expense of needless litigation are avoided and the policy of preserving the finality of judgments is enhanced.”). In light of the foregoing pleading sufficiency, the Circuit Court erred when it denied Appellants’ Motion to Vacate the Final Judgment.

**B. Appellants' Motion To Vacate Final Judgment Did Not Challenge The Merits Of The Final Judgment. Appellants Asserted Fraud As A Basis For Relief Under 1.540.**

The Circuit Court abused its discretion in denying Appellants' Motion to Vacate the Final Judgment because Appellants set forth grounds for relief from judgment under Rule 1.540. The motion does not attack the merits of the judgment but instead provided the grounds that it is no longer equitable to enforce the judgment.

**C. Appellants' Motion To Vacate Final Judgment Set Forth Legitimate Grounds To Set Aside The Judgment.**

The Circuit Court did not abuse its discretion in denying Appellants' Motion to Vacate the Final Judgment because the motion set forth legitimate grounds for relief from the Final Judgment.

Appellants' Motion to Vacate Final

Judgment raised three main arguments that requires this Court to divert its attention to the parallel 2019 Action – as Appellants’ support for their arguments are found in that action.<sup>13</sup> *Id.* at pp. 962-1035. All of these arguments go to the grounds why it is no longer equitable to enforce the judgment.

**1. Chase Had An Interest In Appellants’ Property.**

Appellants argue that the Final Judgment entered in the 2013 Action should be vacated because Chase allegedly “filed papers with the Circuit Court in the parallel 2019 Action informing everyone that it did not have an interest in Appellants’ Property.” *Id.* at pp. 964- 965. Appellants argue that the Circuit Court in the related 2019 Action made a ruling that Chase only had a “potential interest” in the subject Property, as opposed to an “actual interest” in the Property, when the Court entered an ordering Chase’s Motion to Intervene in the 2019 Action. *Id.*

Here, Appellee' argument in response is meritless and attempts to inject confusion into this matter by intentionally misinterpreting the plain language of the Order Granting Chase's Motion to Intervene in the parallel 2019 Action. The Order Granting Chase's Motion to Intervene in the 2019 Action (dated October 31, 2019) states:

Chase's Motion to Intervene in the 2019 Action is granted...

*This Court finds that in applying Florida Rule of Civil Procedure [1.230] Chase has a sufficient potential interest in this instant litigation to warrant intervention.*

Appellants' reliance on the plain language "potential interest" to argue that the Court in the 2019 Action made a finding of fact that Chase's interest in Appellants' Property was merely a "potential interest" is unavoidable and justified. The plain language on the order does

not comport with Rule 1.230 - which requires, at a minimum, an “interest” and not a “potential interest” in the litigation to allow intervention in that action. *See Fla. R. Civ. P. 1.230* (“Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention.”). The Order Granting Chase’s Motion to Intervene in the 2019 Action found that Chase may have a potential interest, implying a future interest, rather than the required interest by the rule... a current direct and immediate interest.

Appellee’s argument that an argument in support of a motion for leave to amend and a ruling thereon precludes the use of the same argument for other purposes is nonsensical.

[Intentionally left blank]

Chase, in its answer brief attempts to confuse the Court by claiming the lower court ruled that Chase holds a valid lien in the property. The record does not support such an assertion. In fact, the record supports that the judgment does not speak as to the party holding the interest in the “Mortgage”. The order granting the motion for summary judgment speaks to the “Mortgage” itself being valid and enforceable. Furthermore, with Chase’s full knowledge, Wells Fargo as trustee is claiming a lien interest in the “Mortgage” but not in its current form but to be a reformed version of it. In light of this revelation, it is clear that Chase does not hold a lien interest in the “Mortgage” as it blatantly and falsely asserts in its answer brief.

The judgement Chase obtained in the lower 2019 companion case, was based on *res judicata* and not on the merits of the case. As such it can

only speak to the validity and enforceability of the judgment without identifying Chase as holding an interest in the "Mortgage". Chase argued that Wells Fargo may need to pursue a counterclaim if Chase obtains a judgment. This argument was presented to convince the court to grant Chase a judgment while knowing that Wells Fargo intends to fully pursue the counterclaim. Chase's argument was based on the premise that if the Court grants it a final judgment, it necessarily disposes of all claims including the counterclaims. Without a full disposition of the case, no appeal of the judgment can be taken. When the judgment was affirmed it became the law of the case. Chase however does not acknowledge the affirmance as the law of the case, and instead, supports Wells Fargo as trustee in pursuing the counterclaim. Chase is trying to have it both ways, one is to say its judgment was final and

two, is to say the judgment is not final and therefore allows Wells Fargo to pursue its counterclaim.

Appellants are not confused; Chase is attempting to confuse the Court by attempting to now say it does not mean what it said. The statement made by Chase that “there is only one legal issue that is in dispute in the 2019 Action,” is clear and unambiguous. It meant, there is remaining one legal “issue” in dispute which has to be adjudicated at a trial which had been set by the court below.

**2. Chase’s Interest And The Trust’s Interest Are Not Aligned.**

Appellants’ Motion to Vacate the Final Judgment argues that Chase and the Trust have taken opposing positions in the 2019 Action, and therefore Chase has “perpetrated fraud on the court.” at 966-967. Appellants’ arguments are supported by the record in the

in the 2019 Action. at pp. 1251-1252. Chase claims to hold a note and mortgage for the benefit of another. As such, it is at best a custodian with no powers vested in Chase by the note and mortgage. As such there is no obligation by Appellants to Chase and no obligation by the property to Chase. In fact, Wells Fargo as trustee is claiming that Appellants are obligated to Wells Fargo as trustee under the note and mortgage in Chase's custody for the benefit of another.

**D. The Law Of The Case Doctrine Is Not Applicable Here.**

The denial of Appellants' Motion to Vacate the Final Judgment was an error because the claims asserted in the motion were not barred by the law of the case doctrine. The arguments raised in the motion were made in support of seeking an equitable relief from the judgment and not to attack the validity of the judgment which

upon affirmance became the law of the case. An adjudication on the validity of the judgment does not operate to deny the equitable relief from the enforcement of the judgment for the reasons stated in the motion.

**III. The Circuit Court Abused Its Discretion In Denying Appellants' Second Motion To Vacate Final Judgment Because The Motion Is Authorized And Is Not A Successive Motion For Relief From Judgment.**

The second motion is premised on new grounds only became available after the first motion was ruled upon without a hearing. A review of the first and second motion will readily reveal that that the premise upon which the two motion was based are different. As such the second motion is permissible as it presents new grounds for relief from judgment that were not considered by the court in ruling on the first motion.

Here, the Circuit Court's denial of Appellants' (second) Motion to Vacate Judgment

was improper because the Circuit Court has jurisdiction to entertain a second motion for relief from judgment based on new grounds, and which does not attempt to re-litigate matters settled by a prior order denying relief. In the second motion, Appellants introduced new evidence obtained from SPS informing Appellants that neither Chase nor Wells Fargo as trustee are the servicer or the creditor but rather a third party is. This matter was not argued nor adjudicated in any prior motion.

Appellants' initial and subsequent motion to vacate judgment asserted that Chase never serviced the loan on behalf of the Trust. *Id.* at pp. 1042-1043. Appellants support their assertion by attaching a letter from the new loan servicer, Select Portfolio Servicing, Inc. ("SPS"), dated June 14, 2021, where SPS erroneously identified the "owner". Furthermore, Appellants

could not have raised the issue in the first motion because such evidence was discovered after the court disposed of the first motion.

**IV. The Circuit Court Abused Its Discretion in Denying Appellants' Second Motion To Vacate Judgment Because The Motion Demonstrated A Colorable Claim For Relief From Judgment.**

To entitle a movant to an evidentiary hearing on a motion for relief from judgment, a Rule 1.540(b)(3) motion must specify the fraud with particularity and explain why the fraud, if it exists, would entitle the movant to have the judgement set aside. *Freemon*, 46 So. 3d at 1204 (citing *Flemenbaum*, 636 So. 2d at 580).

Here, the Circuit Court's denial of Appellants' second Verified Motion to Vacate Final Judgment was improper because Appellants sufficiently pled colorable grounds for relief from judgment. (Chase App'x pp. 1040-1058.) In support of the motion, Appellants

argued that: (i) Chase never serviced the Loan at issue on behalf of the Trust; (ii) the Trust was never the “owner” of the Loan at issue; instead, the owner was Freddie Mac; (iii) the Final Judgment entered in favor of Chase was procured through “fraud”; (iv) Chase never held a Mortgage lien interest in Appellants’ Property; and (v) Chase never held possession of the original wet-ink Note executed by Appellants. All these allegations are sufficient to justify holding an evidentiary hearing to allow the presentation of evidence and for the court to consider same before adjudication the matter before it.

Furthermore, it goes without say that a fraud if proven will vitiate all orders and judgments procured through fraud. All appellants had to do is prove the fraud occurred and the court would have granted the relief from the judgment.

**CONCLUSION**

For the foregoing reasons, Chase respectfully requests that this Court reverse the Circuit Court's Orders Denying Appellants': (i) Initial Motion to Vacate Final Judgment; (ii) Motion for Rehearing of Order Denying Motion to Vacate Final Judgment; (iii) Amended Motion for Rehearing of Order Denying Motion to Vacate Final Judgment; and (iii) Second Motion to Vacate Final Judgment.

Respectfully submitted,

BY:   
KEVIN J. PROODIAN

BY:   
ANNETTE L. PROODIAN

**CERTIFICATE OF COMPLIANCE WITH RULE 9.045(e)**

I certify that the instant Reply Brief complies with the applicable font and word count limit requirements. Subject to the word count exclusions set forth in Rule 9.045(e), this motion has approximately 3273 words. The undersigned is relying on the word count of the word-processing system used to prepare the instant motion.

BY: Kevin J. Proodian  
KEVIN J. PROODIAN

BY: Annette L. Proodian  
ANNETTE L. PROODIAN,

## CERTIFICATE OF SERVICE

We certify that on October 11, 2023, a true and correct copy of foregoing was mailed to parties in the attached service list.

**SERVICE LIST: Case Number: 4D23-0325**

WASHINGTON MUTUAL BANK, FA: BRYAN CAVE LEIGHTON PAISNER LLP

*Counsel for Defendant*

201 S. Biscayne Boulevard

Suite 400

Miami, Florida 33131

Telephone: (786) 322-7500

Facsimile: (786) 322-7501

E-mail: [bard.brockman@bclplaw.com](mailto:bard.brockman@bclplaw.com)

E-mail: [ezequiel.romero@bclplaw.com](mailto:ezequiel.romero@bclplaw.com)

JP MORGAN CHASE BANK, N.A.: BRYAN CAVE LEIGHTON PAISNER LLP

*Counsel for Defendant JP Morgan Chase Bank, N.A.*

200 S. Biscayne Blvd.

Suite 400

Miami, Florida 33131

Telephone: (786) 322-7500

Fax: (786) 322-7501

E-mail: [bard.brockman@bclplaw.com](mailto:bard.brockman@bclplaw.com)

E-mail: [ezequiel.romero@bclplaw.com](mailto:ezequiel.romero@bclplaw.com)

By: \_\_\_\_\_

  
Kevin J. Proodian

2790 Yarmouth Drive

Wellington, Florida 33414

Telephone: (561) 703-3097

E-mail: [proodian3@bellsouth.net](mailto:proodian3@bellsouth.net)

By: \_\_\_\_\_

  
Annette L. Proodian

2790 Yarmouth Drive

Wellington, Florida 33414

E-mail: [proodian3@bellsouth.net](mailto:proodian3@bellsouth.net)