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

DREAMIDEAS, LLC,

Appellant,

DCA Case No. 4D23-3084
L.T. Case No. CACE21016073

vs.

CALIBER HOME LOANS, INC.,
JULIO ENRIQUE LEAL, and ENVIRON
CONDOMINIUM 1 ASSN, INC.,

Appellees.
_____/

ANSWER BRIEF OF APPELLEE,
CALIBER HOME LOANS, INC.

Appeal from a NonFinal Order of the Circuit Court

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STATEMENT OF CASE AND FACTS[1]

Appellant Dreamideas, LLC, wants a second try at opposing Caliber's motion to vacate as void the condominium lien foreclosure judgment, realizing in hindsight it should have requested an evidentiary hearing. Dreamideas's request for an evidentiary hearing is too late and waived, and it was not entitled to an evidentiary hearing to begin with. Dreamideas also failed to demonstrate it met the requirements of section 702.036, Florida Statutes. And, the statute applies to condominium lien foreclosures only since the July 1, 2023 amendment. These substantive amendments should not be retroactively applied. This Court should affirm.

Julio Leal took out a $109,250 mortgage loan with Caliber on August 11, 2017. [DA57-73.] Caliber's mortgage was recorded on August 18, 2017. [DA57.] Environ Condominium I Association, Inc. ("**Environ COA**"), recorded a claim of lien for past-due assessments

[1] The appendix filed with the initial brief, which contains all documents necessary for this Court to decide this appeal, is referenced by page number (*i.e.* [DA1] refers to Dreamideas's appendix, page 1). Appellee Caliber Home Loans, Inc. is referenced as "**Caliber**."

on April 29, 2021. [DA19.] Environ COA then filed an action to foreclose the lien on August 20, 2021. [DA10-20.]

Environ COA named Caliber in the complaint, and Caliber was served with the complaint on August 30, 2021. [DA10, 21-22.] Caliber did not respond to the complaint and was defaulted on October 25, 2021. [DA 23.] A summary final judgment of foreclosure was entered in Environ COA's favor and against Caliber on November 3, 2022. [DA40-44.] The judgment purports to foreclose out Caliber's senior mortgage lien. [*Id.*] The property was sold at foreclosure sale for $31,800 on December 6, 2022 to Dreamideas, which took title on December 19, 2022. [DA47-48.]

Caliber moved to vacate the judgment on June 14, 2023, arguing that its mortgage was superior to Environ COA's lien, a junior lienor may not name a senior lienor in a foreclosure action, and the foreclosure judgment as to Caliber was void. [DA50-93.] The motion attached a copy of Caliber's mortgage, a copy of Environ COA's claim of lien, the complaint, and the foreclosure judgment. [DA57-93.]

Dreamideas filed a memorandum in opposition to the motion to vacate, arguing Caliber's mortgage was not the first mortgage on the property and thus Environ COA properly foreclosed Caliber's

mortgage under sections 718.116 and 720.3085, Florida Statutes. [DA95-108.] Dreamideas alleged Caliber's mortgage was inferior to a mortgage in favor of Beluga Investments, LLC (the "**Beluga mortgage**"), which was recorded on July 28, 2016. [DA96-97.] Dreamideas also argued the court could not vacate the judgment as to Caliber under section 702.036, Florida Statutes. [DA97-98.] Dreamideas did not request an evidentiary hearing in its memorandum. [*See* DA95-98.]

Dreamideas's memorandum attached a copy of the Beluga mortgage and the accompanying assignment of rents. [DA100-108.] The mortgage secures a promissory note, which is incorporated in its entirety into the mortgage. [DA101.] The note reflects that "the entire principal balance of this note and all accrued interest shall be due and payable in full" on July 22, 2017. [*Id.*] Dreamideas did not attach any other documents to its memorandum.

A hearing on the motion to vacate took place on November 13, 2023. [DA94.] Dreamideas did not provide a transcript of this hearing. [*See* DA generally.] The court granted Caliber's motion by order dated November 20, 2023. [DA110-111.] The foreclosure judgment was "deemed void and vacated as to Caliber." [DA110.]

The court also ruled that vacation of the judgment as to Caliber did not impact Dreamideas's certificate of sale or title. [DA111.]

This appeal followed. [DA112-114.]

SUMMARY OF ARGUMENT

The court did not abuse its discretion in granting Caliber's motion to vacate Environ COA's foreclosure judgment as to Caliber. The documents the parties submitted to the court left no question Environ COA foreclosed Caliber's first mortgage on the property, which is prohibited under *Cone Brothers Construction Company v. Moore*, 141 Fla. 420, 193 So. 288 (Fla. 1940), and its progeny, and also impermissible under sections 718.116 and 720.3085.

Dreamideas is not entitled to an evidentiary hearing. It did not request an evidentiary hearing, cites no case requiring an evidentiary hearing based on arguments made in a response to a motion to vacate to a judgment, and did not present colorable arguments in opposition to the motion to vacate. Dreamideas had notice and an opportunity to heard—it was not denied due process.

Dreamideas also did not meet the requirements of section 702.036, Florida Statutes, so the court was not required to treat Caliber's motion to vacate as a wrongful foreclosure claim for

monetary damages against Environ COA. Dreamideas simply did not purchase the property "for value." Further, amendments to section 702.036, effective July 1, 2023, provided that the statute would, for the first time, be applicable to condominium lien foreclosures. The amendments were a substantive change in the law affecting the rights of both Environ COA and Caliber. Section 702.036 may not be applied retroactively to a case which had been pending for almost 2 years.

Finally, affirmance of the order granting Caliber's motion to vacate is warranted under *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979).

ARGUMENT

Standard of Review.

An order granting a rule 1.540(b) motion to vacate a judgment is reviewed for abuse of discretion. *See Handel v. Nevel*, 147 So. 3d 649, 651 (Fla. 3d DCA 2014) ("We review a trial court's ruling on a rule 1.540(b) motion to vacate for an abuse of discretion, and we will not disturb that ruling unless no reasonable judge would have reached the same decision.").

Argument.

Dreamideas has not provided a transcript of the hearing on the motion to vacate the judgment. *See Applegate*, 377 So. 2d at 1152. "[I]n the absence of a record of the … hearing, [this Court] must assume that the trial court's order was correctly decided." *Zarate v. Deutsche Bank Nat'l Trust Co. As Trustee*, 81 So. 3d 556, 558 (Fla. 3d DCA 2012) (emphasis added). This is because this Court cannot know what concessions, statements, or arguments, if any, were made at the hearing. *See Stanley v. Wells Fargo Bank*, 937 So. 2d 708, 709 (Fla. 5th DCA 2006). No error appears on the face of the order at issue. *See 7550 Bldg., Inc. v. Atlantic Rack & Shelving, Inc.*, 999 So. 2d 663, 664 (Fla. 3d DCA 2008). This alone warrants affirmance.

I. AN EVIDENTIARY HEARING WAS NOT REQUIRED.

A. Dreamideas Never Requested An Evidentiary Hearing.

There is nothing in the record which reflects Dreamideas requested an evidentiary hearing. It did not do so in its memorandum in response to the motion to vacate, and it does not even claim it asked the court to conduct an evidentiary hearing.

This alone is fatal to its argument it should have been afforded an evidentiary hearing. "[I]n order to preserve an issue for appellate

review, the appellant must present a record indicating that an adequate and timely objection was interposed in the proceedings below challenging the action sought to be reviewed on appeal." *Saka v. Saka*, 831 So. 2d 709, 711 (Fla. 3d DCA 2002); *see also Charles v. State*, 258 So. 3d 549, 552 (Fla. 3d DCA 2018) ("[T]o be preserved for appeal, the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal."). "[U]nless the error complained of is adequately brought to the attention of the trial judge, it is not preserved and cannot be considered by this Court." *Cornwell v. State*, 425 So. 2d 1189, 1190 (Fla. 1st DCA 1983).

Dreamideas attempts to remedy the fact it did not request an evidentiary hearing by claiming that the court's failure to conduct an evidentiary hearing was fundamental error because it violated Dreamideas's due process rights. Dreamideas cites 8 cases in support of this argument [*see* IB 8-9], but none hold a party has a due process right to an evidentiary hearing on a motion to vacate a judgment, let alone on a response to a motion to vacate a judgment. Instead, "[t]he basic cornerstones of procedural due process are notice of the case and an opportunity to be heard." *A & S Entm't, LLC*

v. Fla. Dep't of Rev., 282 So. 3d 905, 908 (Fla. 3d DCA 2019). Dreamideas had both notice of the hearing on the motion to vacate and an opportunity to be heard.

Dreamideas argues "fundamental error was evident when" the court made "findings" in the order granting the motion to vacate based on "unsworn representations" of counsel. [IB 9-10.] But Dreamideas does not elaborate on what those "findings" were or what "unsworn representations" of counsel based those findings.

This argument is perplexing because the order vacating the judgment simply sets forth the court's ruling—it does not contain any "findings." [*See* DA110-111.] And, Caliber's motion to vacate does not contain unsworn representations of counsel—it is legal argument based on facts established in the record. [*See* DA50-53.] The court's ruling instead based on the documents attached to the motion to vacate and the memorandum in response to the motion vacate which, as explained below, left no doubt that Caliber was entitled to vacation of the judgment even without an evidentiary hearing.

B. No Colorable Entitlement To Relief.

Dreamideas claims that it was entitled to an evidentiary hearing because its memorandum in response to the motion to vacate set forth a colorable entitlement to relief. [IB 7-8.] But, the requirement of evidentiary hearings only applies when a motion to vacate, as opposed to a response to a motion to vacate, sets forth a colorable entitlement to relief. And, even if the evidentiary hearing requirement applied, Dreamideas did not set forth a colorable argument in its response to the motion to vacate.

First, Dreamideas cites several cases for the proposition that a party who files a motion to vacate is entitled to an evidentiary hearing if the motion to vacate alleges a colorable entitlement to relief. [IB 7-8.] None of these cases holds that a party who responds to a motion to vacate to is entitled to an evidentiary hearing based on arguments in opposition to the motion. Dreamideas opposed the motion without seeking any relief. Dreamideas is simply not entitled to an evidentiary hearing on its response to Caliber's motion to vacate, especially when Dreamideas did not even request a hearing.

Second, even if a party responding to a motion to vacate could invoke the evidentiary hearing requirement, Dreamideas did not present a colorable argument in its response.

The Florida Supreme Court established 80 years ago in *Cone Brothers Construction Company v. Moore*, 141 Fla. 420, 193 So. 288 (Fla. 1940), that a senior mortgagee is neither a necessary nor proper party to an action seeking to foreclose a junior mortgage lien—and any resulting judgment is ineffectual to foreclose the senior mortgage. *See also Kipps* in *Bank of New York Mellon v. Sperling*, 291 So. 3d 697 (Fla. 4th DCA 2016). This is because "foreclosure does not terminate interests in the foreclosed real estate that are senior to the mortgage being foreclosed." *U.S. Bank, N.A. v. Bevans*, 138 So. 3d 1185, 1187 (Fla. 3d DCA 2014).

There is no question that Caliber's mortgage was recorded on August 18, 2017 and Environ COA's lien was recorded on April 29, 2021. Caliber's mortgage is superior to Environ COA's lien.

Dreamideas claimed below that Environ COA could properly foreclose Caliber's mortgage under sections 718.116 and 720.3085, Florida Statutes, because Caliber's mortgage was not the first mortgage of record.

Section 718.116(5)(a) provides:

> The association has a lien on each condominium parcel to secure the payment of assessments. Except as otherwise provided in subsection (1) and as set forth below, the lien is effective from and shall relate back to the recording of the original declaration of condominium, or, in the case of lien on a parcel located in a phase condominium, the last to occur of the recording of the original declaration or amendment thereto creating the parcel. However, as to first mortgages of record, the lien is effective from and after recording of a claim of lien in the public records of the county in which the condominium parcel is located.

Section 720.3085(1) provides:

> When authorized by the governing documents, the association has a lien on each parcel to secure the payment of assessments and other amounts provided for by this section. Except as otherwise set forth in this section, the lien is effective from and shall relate back to the date on which the original declaration of the community was recorded. However, as to first mortgages of record, the lien is effective from and after recording of a claim of lien in the public records of the county in which the parcel is located.

Dreamideas claimed that Caliber's mortgage was not a first mortgage, and thus is could be foreclosed, because it was inferior to the Beluga mortgage recorded on July 28, 2016 and because there is no recorded satisfaction of the Beluga mortgage. But the Beluga

mortgage secured a note that was payable in full on July 22, 2017.[2] The Beluga mortgage clearly reflects that the loan matured on that date. As a matter of law, the Beluga mortgage was only valid and enforceable until the 5-year statute of repose ran on July 22, 2022. *See Houck Corp. v. New River, Ltd., Pasco*, 900 So. 2d 601, 602 (Fla. 2d DCA 2005) ("Section 95.281(1)(a) provides that the lien of a mortgage terminates five years after the date of maturity when a final maturity date is ascertainable from the record of the mortgage."). The foreclosure judgment was not entered until November 3, 2022, which is after the Beluga mortgage terminated. Even without an evidentiary hearing, it is clear Environ COA's foreclosure of Caliber's mortgage was foreclosure of a first mortgage, which is prohibited under *Cone Brothers* and impermissible under sections 718.116 and 720.3085.

Dreamideas invoked the applicability of sections 718.116 and 720.3085 and had the burden of demonstrating these statutes

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[2] Based on the "payable in full date" of the Beluga mortgage of July 22, 2017, and the August 18, 2017 recording date of Caliber's mortgage, it appears that, at an evidentiary hearing, Caliber would be able to show that its loan to Mr. Leal paid off the Beluga mortgage. However, this evidence is not necessary to show that Caliber's mortgage was the first mortgage when the foreclosure occurred.

applied. Dreamideas woefully failed to do so. Under both statutes, when foreclosing any lien other than a first mortgage lien, the condominium lien "relates back to the date on which the original declaration of the community was recorded." A condominium association only is permitted to foreclose non-first mortgage liens which were recorded after the recording date of the declaration. Dreamideas did not establish when the Environ COA declaration was recorded. While Dreamideas attached the Beluga mortgage to its response, it failed to attach the declaration and did not even allege the declaration was recorded prior to Caliber's mortgage.

II. SECTION 702.036 DOES NOT APPLY.

Baldly asserting its purchase of the property met all of the requirements of section 702.036, Florida Statutes, Dreamideas argues the court was required to treat Caliber's motion to vacate as a wrongful foreclosure claim for monetary damages against Environ COA. [IB 12-13.] But, Dreamideas's purchase did not meet the requirements of section 702.036, and, even if it did, the statute should not be applied in this case.

A. Dreamideas Did Not Acquire The Property For Value.

Section 702.036 only applies if "[t]he property has been acquired for value." Fla. Stat. § 702.036(2)(a)(4). Dreamideas purchased the property for $31,800 at the December 6, 2022 foreclosure sale in this action [DA047], which was only $3,000 more than the condominium lien foreclosure judgment amount of $28,792.31 [DA41].

While "for value" is not defined in the statute, this court should interpret "for value" as the market value of the property. Merriam-Webster defines "value" as "the monetary worth of something : MARKET PRICE."[3] The legislative history of section 702.036 supports application of this definition of "for value":

> The bill creates s. 702.036, F.S., to provide for finality of mortgage foreclosure judgments. This provision protects bona fide purchasers of a property at a foreclosure sale and ensures 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.

[3]https://www.merriam-webster.com/dictionary/value#:~:text=%3A%20relative%20worth%2C%20utility%2C%20or%20importance, last viewed March 1, 2024.

House of Representative Final Bill Analysis, CS/CS/HB 87, June 13, 2013, p. 6 (emphasis added).[4]

To be a "bona fide purchaser" in Florida, a purchaser must have "paid the value of … the property." *2000 Presidential Way, LLC v. Bank of N.Y. Mellon*, 326 So. 3d 64, 68 (Fla. 4th DCA 2021); *Harkness v. Laubhan*, 278 So. 3d 728 (Fla. 2d DCA 2019).

In context of section 702.036, the necessity of the interpretation of the statute in this manner is apparent. This is not a case where Environ COA purchased the property at its own foreclosure sale and then later sold the property to Dreamideas for its market value. Instead, Dreamideas purchased at the foreclosure sale for $31,800, yet, under Dreamideas's interpretation of section 702.036, Environ COA may now be liable for monetary damages for the wrongful foreclosure of a mortgage which, very conservatively, would now have

[4]https://www.flsenate.gov/Session/Bill/2013/87/Analyses/h0087z1.CJS.PDF, last viewed February 16, 2024.

at least a principal balance of $90,000[5] and may also have accrued significant interest and expenses.

While there is nothing in the record reflecting the approximate market value of the property on December 6, 2022, this Court may reasonably infer that the market value was far greater than $31,800 based on: (**1**) record evidence that the August 2017 mortgage on the property was for $109,250; and (**2**) common knowledge that property values in South Florida have dramatically increased since 2017.

Dreamideas claims section 702.036 applies but did not even attempt to prove the value of the property on December 6, 2022. It could have requested an evidentiary hearing and provided such evidence. Dreamideas is well aware that the property was worth far more than $31,800 on December 6, 2022, and it would be a waste of the parties' and trial court's resources to hold an evidentiary hearing in an attempt to prove otherwise.

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[5] This calculation is based on conservative assumptions that the August 2017 loan was a traditional, as opposed to an interest only, loan with an interest rate of 3 percent, which is significantly lower than the rate available in 2017. If the loan instead was an "interest only" loan for a term of years, then the current principal balance would be even higher.

B. Section 702.036 Should Not Be Applied.

Prior to July 1, 2023, section 702.036 only applied to mortgage foreclosures. Effective July 1, 2023, the statute was amended and, as a result, now also applies to lien foreclosures. Laws of Fla. Ch. 2023-215, s. 3. The statute as amended should not be applied retroactively in the instant case, which is a pending lien foreclosure action and not a mortgage foreclosure action.

The July 1, 2023 amendments were substantive.

> Section 3 of the bill amends s. 702.036(1), F.S., relating to proceedings to set asides invalidate or challenge the validity of final judgment of foreclosure of a mortgage to add that all forms of liens, such as community associate liens and construction liens are governed by s. 702.036, F.S. The section is also amended to discourage junior lienholders from initiating improper foreclosure proceedings against senior lienholders.

Florida Senate Bill Analysis and Fiscal Impact Statement, CS/SB 286, March 7, 2023, p. 6.[6] Section 702.036 also was amended to provide for an award of attorneys' fees to the party prevailing on a motion to vacate a judgment of foreclosure of a senior lien. Laws of Fla. Ch. 2023-215, s. 3.

[6]https://www.flsenate.gov/Session/Bill/2023/286/Analyses/2023s00286.rc.PDF, last viewed February 19, 2024.

These substantive amendments to the statute may not be applied retroactively. As Judge Padovano opined:

> The courts presume that a statute will apply prospectively only and that it will not apply to conduct occurring before the statute was enacted. Attempts to apply statutes retroactively to pre-enactment conduct are generally looked upon with disfavor in the law. *See Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). The retroactive application of legislation runs contrary to one of the most basic functions of a statute: to give notice of the conduct the government seeks to regulate. As the Supreme Court stated in *Eastern Enterprises v. Apfel,* 524 U.S. 498, 532, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998), summarizing the entire body of the law on this point, "Retrospective laws are, indeed, generally unjust." (quoting 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891)).

Fitchner v. Lifesouth Cmty. Blood Ctrs., Inc., 88 So. 3d 269, 279 (Fla. 1st DCA 2012).

If a statute attaches new legal consequences to events completed before its enactment, the courts will not apply the statute to pending cases, absent clear legislative intent favoring retroactive application. *See Landgraf v. USI Film Prods.,* 511 U.S. 244, 270 (1994); *Arrow Air, Inc. v. Walsh,* 645 So. 2d 422, 425 (Fla. 1994). There is no legislative intent that the July 1, 2023 amendments to section 702.036 were to be applied retroactively. Laws of Florida, Chapter 2023-215, section 5, in fact, specifically provides for

retroactive application of amendments to section 117.201, Florida Statutes, not to section 702.036.

When Environ COA filed its complaint it 2021 it had no way of knowing that it could be subject to monetary damages and attorneys' fees for improperly foreclosing a senior lien. When Caliber filed its motion to vacate in June 2023, it did not know there was a possibility it would only be entitled to monetary damages if it prevailed on its motion to vacate. It would be unjust and unfair to both Environ COA and Caliber to apply section 702.036 in a lawsuit filed almost 2 years before the statute was amended to apply to lien foreclosure actions.

CONCLUSION

Dreamideas is not entitled to an evidentiary hearing it never requested. And, an evidentiary hearing would be waste of resources because the documents of record reflect that the court did not abuse its discretion in granting Caliber's motion to vacate the judgment. Dreamideas did not meet the requirements of section 702.036, which should not be applied retroactively in this case anyhow. Caliber respectfully asks this Court to affirm the order granting its motion to vacate the judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of March 2024 a true and correct copy of the foregoing has been electronically uploaded to the Fourth District Court of Appeal's ePortal and a copy was furnished by E-Mail to all parties listed below.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation and font requirement set forth in Rules 9.045(b), Florida Rules of Appellate Procedure. This brief contains 3,759 words. It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Bookman Old Style font.

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