

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

CASE NO. 4D24-0089

Lower Tribunal Case No. 2019-CA-007898

SCHWISTOV LAND TRUST,

Appellant,

v.

**SECRETARY OF THE U.S. DEPARTMENT
OF HOUSING AND URBAN DEVELOPMENT,**

Appellee.

***ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA***

APPELLEE'S ANSWER BRIEF

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INTRODUCTION

This is an appeal of an Order overruling an Amended Objection to Sale, Motion to Vacate Sale, and Motion to Vacate Judgment (“Order”) dated December 12, 2023 entered by the Honorable James Sherman, Circuit Judge of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (the “Trial Court”). This appeal is, the latest in an extremely long and drawn out dispute between the Appellant, SCHWISTOV LAND TRUST, (referred to herein as “SCHWISTOV” or “Appellant”) and Appellee, SECRETARY OF THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (referred to herein as “HUD” or “Appellee”).

Citations to Appellant’s Initial Brief are denoted as “(I.B.____).”

Citations to Appellant’s Appendix are denoted as “Ap. Appx.”)

Citations to Appellee’s Appendix are denoted as “Ae. Appx.”).

STATEMENT OF THE CASE AND FACTS

BACKGROUND

Appellant's statement of the case and facts fails to account for facts and proceedings critical to this appeal. HUD provides the following alternative Statement of the Case and Facts.

This is an action to foreclose a reverse mortgage where the borrower is deceased.¹ The subject property is located in The Dorchester of Palm Beach Condominium and is governed by The Dorchester of Palm Beach Condominium Association, Inc.² (“Association”), The Association previously foreclosed on the property for unpaid maintenance and the current owner SCHWISTOV LAND TRUST was the successful bidder at the foreclosure sale.³ HANNA DEVELOPMENT CORPORATION, an entity related to SCHWISTOV LAND TRUST, held a mortgage on the property.⁴ On June 18, 2019, HUD filed its foreclosure action to foreclose its mortgage, naming SCHWISTOV LAND TRUST, among others, as defendants.⁵

Over the course of approximately four (4) years, the parties litigated,

¹ (Ap. Appx. 1). Amended Complaint, Paragraph 2.

² (Ap. Appx. 1). Amended Complaint, Paragraph 4.

³ (Ae. Appx. 1). Certificate of Title Issued to Schwistov Land Trust on December 26, 2018. In connection with the Association’s Foreclosure Action.

⁴ (Ae. Appx. 2). Hanna Development Corporation Mortgage.

⁵ (Ap. Appx. 1). Amended Complaint.

engaged in discovery, and on September 6, 2023, the Court entered its Final Judgment of Foreclosure in favor of HUD for \$696,550.17, setting a foreclosure sale date for October 10, 2023.⁶ The sale was properly noticed, published, and placed on the online foreclosure sale calendar.

The sale took place as scheduled. SCHWISTOV did not bid but there were three independent bidders in addition to HUD. HUD was prepared to credit bid up to its judgment amount but only needed to bid \$1,100.00 to be the successful bidder.⁷ On October 20, 2023, SCHWISTOV filed its Objection to Sale to which, on October 23, 2023, HUD responded.⁸ On November 21, 2023, SCHWISTOV filed its Amended Objection to Sale,⁹ reasserting its original Objection and asserting additional grounds for relief related to a purported defect in the property address (not the legal description), to which, on December 4, 2023, HUD responded.¹⁰ On December 12, 2023 the Trial Court overruled the objection and directed the Clerk of the Court to issue its Certificate of Title to HUD.¹¹ It is from the December 12, 2023 order that SCHWISTOV appeals.

⁶ Ap. Appx. 2.

⁷ Ae. Appx. 3. Foreclosure Sale Bid Log.

⁸ Ap. Appx. 4 and Ap. Appx. 5

⁹ Ap. Appx. 6.

¹⁰ Ap. Appx. 7.

¹¹ Ap. Appx. 8.

SUMMARY OF THE ARGUMENT

The Trial Court was well within its discretion to overrule Appellant's Objection to Sale. The Objection was unsupported by law or fact. The Trial Court Order should be affirmed.

Although it is Appellant's burden to demonstrate Trial Court error, Appellant has completely failed to do so in its Initial Brief. Appellant failed to show there was any abuse of the Trial Court's discretion, much less a gross abuse of discretion as required by the nature of this appeal. As Appellant failed to meet its burden to demonstrate Trial Court error and gross abuse of discretion, and as the Order on Appeal was properly entered meeting requirements under Florida law, this Court should affirm the Order in all respects.

ARGUMENT

I. STANDARD OF REVIEW

"In appellate proceedings, the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d

1150, 1152 (Fla. 1979); see *Schmitt v. Maile*, 946 So. 2d 60, 62 (Fla. 4th DCA 2006).

The ruling at issue here is the Order overruling Appellant's Objection to Sale. Appellate courts review such post-judgment requests for relief under a gross abuse of discretion standard. *U.S. Bank, N.A. v. Vogel*, 137 So. 3d 491, 493 (Fla. 4th DCA 2014); *Croston v. Yale Mortg. Corp.*, 75 So. 3d 338, 338 (Fla. 3d DCA 2011). Generally, under this standard, "discretion is abused only where no reasonable person would take the view adopted by the trial court." See *Toler v. Bank of America*, 78 So. 3d 699, 701 (Fla. 4th DCA 2012).

Appellants' Initial Brief does not make any attempt to demonstrate that the Trial Court grossly abused its discretion in any way, such that reversal of the Order on appeal is warranted. This Court must affirm.

II. THE ORDER OVERRULING THE OBJECTION TO SALE WAS PROPERLY ENTERED

A. SCHWISTOV'S NEW OBJECTION REGARDING THE STREET ADDRESS IS UNTIMELY

Objections to foreclosure sales must be raised within ten days of the sale. § 45.031(8), Fla. Stat. SCHWISTOV timely filed its original objection to the foreclosure sale ten days after the sale date. That original objection

was based on HUD posting its maximum bid on the online auction site and SCHWISTOV'S perception of inequity. The original objection did not include any objection regarding the legal description or street address. SCHWISTOV cites to no authority permitting later objections; that a later objection would somehow relate back to the date of the original objection. Rather than attempt to address the untimeliness, SCHWISTOV makes the following statement in its Initial Brief: "An Amended Objection was filed listing the defects in the address that relates back to the original objection to sale which involved the original pleadings and defects therein." [I.B.5] SCHWISTOV includes no cases in support of said statement. In fact, the law is the opposite.

Simply put, SCHWISTOV raised its objection in an untimely manner.

Said objection cannot be considered by this Court.

We do not reach the merits of the borrower's objection based upon the alleged defect in the advertisement. Objections to foreclosure sales must be raised within 10 days of the sale. § 45.031(8), Fla. Stat. The borrower argues that the stay it obtained extended the time to file further objections. That stay, however, was not entered to allow the borrower to raise further objections. Instead, as requested by the borrower, the trial court entered the stay for the express purpose of allowing the borrower to redeem and purchase the property, which the borrower never did.

McIntyre v. CIT Bank, N.A., 353 So. 3d 694, 695 (Fla. 3d DCA 2023).

In *McIntyre*, with facts similar to the instant case with a correct legal description but a minor error in the street address, the trial court denied the borrower's objection to the sale based upon an allegation that the clerk's advertisement was defective because, while the legal description of the property was correct, the advertisement also included a street address with one digit mistyped. The appellate court did not reach the merits of the objection as the objection, as in the instant case, was untimely filed. See *also Ryan v. Countrywide Home Loans, Inc.*, 743 So. 2d 36, 37 (Fla. 2d DCA 1999) (corrected objection to sale does not "relate back" to the original objection)

Accordingly, the objection regarding the street address was properly rejected by the Trial Court and should be rejected by this Court.

B. THE LEGAL DESCRIPTION IS CORRECT AND A MINOR OMISSION IN THE UNIT NUMBER IN THE STREET ADDRESS DOES NOT WARRANT REDOING THE SALE

SCHWISTOV fails to disclose any particular error in the mortgage, note, Notice of Sale, and Final Judgment and SCHWISTOV'S authorities do not support the relief SCHWISTOV seeks. Upon review, the legal description in the complaint, mortgage, Notice of Sale, and Final Judgment is correct (mortgage legal description below):

EXHIBIT "A"

Unit S-410, DORCHESTER OF PALM BEACH, a condominium, according to the Declaration of Condominium thereof, as recorded in Official Records Book 2994, Page 1518, as thereafter amended, of the Public Records of Palm Beach County, Florida.

The subject condominium property is made up of two buildings, a north building, and a south building. Unit numbers have an S or an N as part of their designation. Where the street address in the pleadings appears, however, the "S" was left off of the street address. The street address is not part of the legal description. The legal description in the Complaint is correct. See, *McIntyre v. CIT Bank, N.A.*, 353 So. 3d 694, 695 (Fla. 3d DCA 2023). The units are either S-410 or N-410.

The Final Judgment describes the foreclosed property as follows:

Unit S-410 of The Dorchester of Palm Beach, a Condominium according to the Declaration of Condominium thereof, recorded in Official Records Book 2994, Page(s) 1518, of the Public Records of Palm Beach County, Florida, and any amendments thereto, together with its undivided share in the common elements.

Property Address: 3250 S. Ocean Blvd. # 410, Palm Beach, Florida 33480

The omission of the "S" in the street address does not affect the substance of the judgment, sale, or proceedings of the case as the legal description is correct. If anything, the omission in the street address is a mere clerical error that does not affect the substance of what was decided by the court or sold at the foreclosure sale. *Baker v. Courts at Bayshore I Condo.*

Ass'n, Inc., 279 So. 3d 799, 801 (Fla. 3d DCA 2019). Finally, the legal description is “[a] description of the property to be sold.” See § 45.031(2)(a), Fla. Stat. Therefore, the Notice of Sale complied with § 45.031(2)(a) because it contained “[a] description of the property to be sold.”

While no Florida case could be found that had a ruling on the merits similar to the instant facts regarding a correct legal description and a minor error in the street address, cases from Georgia state and federal court, and Georgia and Colorado Statutes are instructive: “In the case of real property, such advertisement shall include the legal description of such real property and may include the street address of such real property, if available, but *provided that no foreclosure shall be invalidated by the failure to include a street address or by the insertion of an erroneous street address.*” *RBC Real Estate Fin., Inc. v. Winmark Homes, Inc.*, 318 Ga. App. 507, 507, 736 S.E.2d 117, 118 (2012), citing Georgia Statute §9-13-140(a) Similarly, Colorado Statutes provide: Should any variance or ambiguity result from the inclusion of a street address, identifying number, or assessor's schedule number or parcel number on a document, the legal description of the property shall govern. Colo. Rev. Stat. Ann. § 38-35-122 (West)

Baker, cited by SCHWISTOV to the Trial Court, included a scrivener error in a legal description regarding the book and page of the

condominium's declaration. The Court did not find the error to be material but granted a motion to correct the scrivener's error in the legal description. In the instant case, the legal description contains no error. See, for example, *Neves v. Flannery*, 149 So. 618, 620 (Fla. 1933) ("The rule is well settled in this state, and was early announced in the case of *Campbell v. Carruth*, 32 Fla. 264, 13 So. 432 (Fla.1893), that if the description of the land conveyed in a deed is such that a surveyor, by applying the rules of surveying, can locate the same, such description is sufficient, and a deed will be sustained, if it is possible from the whole description to ascertain and identify the land intended to be conveyed.")

See also, *Regions Bank v. Deluca*, 97 So. 3d 879, 885 (Fla. 2d DCA 2012):

From an examination of the Regions Bank mortgage, it would be immediately apparent to anyone with minimal knowledge of real estate practice that the scrivener of the instrument neglected to insert an appropriate reference to Exhibit "A" in the blank space provided on page two of the document. This was clearly a mistake. However, the mistake is capable of being corrected by the placement of Exhibit "A" within the four corners of the mortgage, the particular language used in Exhibit "A," and the internal links between Exhibit "A" and the remainder of the instrument. Under these circumstances, the Regions Bank mortgage operated as constructive notice for the Olde Cypress property.

The Judgment was not appealed. Any errors in the substance of the judgment should have been raised on appeal. *Bazzichelli v. Deutsche Bank Tr. Co. Americas*, 274 So. 3d 414, 415 (Fla. 3d DCA 2019).

In the instant case, there was no issue as to what property was being foreclosed, there was no error in the legal description, and SCHWISTOV failed to seek rehearing or appeal the court's Final Judgment of Foreclosure.

Whether a legal description in a mortgage is ambiguous is a question of law which we review de novo. *Cf. City of Clearwater v. BayEsplanade.com, LLC*, 251 So. 3d 249, 253 (Fla. 2d DCA 2018 ... A description of land is patently ambiguous if “the Court, reading the language of the instrument in light of all the facts and circumstances referred to therein, is unable to derive therefrom the intention of the parties as to what land was to be conveyed.” *Mathews v. Fla. Crossbreeds, Inc.*, 330 So. 2d 183, 185 (Fla. 2d DCA 1976) (quoting *Carson v. Palmer*, 139 Fla. 570, 190 So. 720, 722 (1939)); see also *Clayton v. Poggendorf*, 237 So. 3d 1041, 1047 (Fla. 4th DCA 2018) ...

Deutsche Bank Nat'l Tr. Co. as Tr. for Holders of GSAMP Tr. 2005-AHL Mortgage Pass-Through Certificates, Series 2005-AHL v. Cope, 311 So. 3d 120, 124–25 (Fla. 2d DCA 2020). **“Because we are able to derive the singular intention of the parties from the language of the mortgage, it is not patently ambiguous.”** *Id.* at 125. (emphasis added)

SCHWISTOV cites *Caddy v. Wells Fargo Bank, N.A.*, 198 So. 3d 1149 (Fla. 4th DCA 2016) for the proposition that an error in the **legal description** requires a vacatur of the final judgment and sale. In *Caddy*, the error in the

legal description resulted in the judgment not properly ordering the sale of the correct property. The case did not involve an error in the street address. The case involved an error in the legal description. A review of the lower court case, Broward County Case No: CACE09-015298 indicates the error. The correct legal description of the property to be sold is (note blocks 33 and 64):

A portion of Lots 1 and 3, Block 64, BRYAN'S SUBDIVISION OF BLOCKS 33 AND 64, FORT LAUDERDALE, according to the Plat thereof as recorded in Plat Book 1, Page 29 of the Public Records of Dade County, Florida and being more fully described as follows:

But, the legal description in the judgment reflected blocks 33 and 34:

A portion of Lots 1 and 3, Block 64, BRYAN'S SUBDIVISION OF BLOCKS 33 AND 34, FORT LAUDERDALE, according to the Plat thereof as recorded in Plat Book 1, Page 29 of the Public Records of Dade County, Florida and being more fully described as follows:

In the instant case, the foreclosed property was correctly described in the mortgage, complaint, judgment, and notice of sale. The legal description has always been correct. There was no such ambiguity or sale of a non-existent property. *Fed. Nat. Mortg. Ass'n v. Sanchez*, 187 So. 3d 341, 342 (Fla. 4th DCA 2016) cited by SCHWISTOV had a similar legal description error, See Palm Beach Circuit Case no: 50-2009-CA-042296. The legal description in that case, including the mortgage, included condominium unit

102, but the correct legal description should have included unit 33102. The lender was required to obtain a corrective deed before proceeding. Incorrect legal description below:

Condominium Unit No. 102, SANDPIPER COVE, a Condominium, according to the Declaration of Condominium thereof, as recorded in Official Records Book 19225, page 139, and any amendments thereto, Public Records of Palm Beach County, Florida, together with an undivided interest in the common elements appurtenant thereto.

In *Lucas v. Barnett Bank of Lee Cnty.*, 705 So. 2d 115, 116 (Fla. 2d DCA 1998), also cited by SCHWISTOV, the mortgage contained an incorrect legal description resulting in the foreclosure purchaser obtaining title to a property that was not properly ordered for sale. *Wells Fargo Bank, N.A. v. Giesel*, 155 So.3d 411 (Fla. 1 DCA 2014) and *Fisher v. Villamil*, 62 Fla. 472, 56 So. 559 (Fla. 1911) , cited by SCHWISTOV, also dealt with a mortgage containing an incorrect legal description.

Here, despite SCHWISTOV'S argument that HUD has a property with an incorrect legal description, it is uncontroverted that Plaintiff's legal description is correct; there was no ambiguity requiring any factual evidence, and this Court should reject SCHWISTOV's appeal and affirm the Trial Court's Order.

C. THERE WERE NO DEFECTS IN THE SALE PROCESS OR EQUITABLE ARGUMENTS WARRANTING A NEW SALE

HUD disclosed its maximum bid which is a credit bid of its judgment amount of \$696,550.17. It is a common procedure for lenders to post their maximum bid amount so that potential bidders would know the minimum they would be required to bid to obtain the property. A review of the Clerk's foreclosure website evidences some Plaintiffs display their maximum bids and some do not.

HUD was the successful bidder. Three bidders registered. The Clerk of Court bid sheet evidences one bidder who placed a bid of \$1,000.00 and the other two bidders who failed to provide a sufficient deposit to support their bids. The foreclosure sale was properly noticed and advertised for sale and there were three other pre-sale bids on the property. SCHWISTOV does not allege any defect in the sale procedure. *See, IndyMac Fed. Bank FSB v. Hagan*, 104 So.3d 1232, 1236 (Fla. 3d DCA 2012) ("Florida case law is clear that the substance of an objection to a foreclosure sale under section 45.031(5) must be directed toward conduct that occurred at, or which related to, the foreclosure sale itself.")

SCHWISTOV'S Motion to Vacate failed to show either that the foreclosure sale bid was grossly or startlingly inadequate or that the bid price

was the result of any mistake, fraud or other irregularity in the sale. Therefore, as a matter of law SCHWISTOV'S motion was properly denied.

Moreover, SCHWISTOV certainly could have bid on the property but for whatever reason, did not do so. And even assuming the property is, as SCHWISTOV claims, worth in excess of \$1,000,000.00, which it is not, HUD'S maximum bid was not "grossly inadequate." In *Action Realty and Investments, Inc. v. Grandison*, 930 So.2d 674 (Fla. 4th DCA 2006), the Court upheld a sale at roughly 59% of the fair market value of the property. See also *Blue Star Invs. v. Johnson*, 801 So.2d 218 (Fla. 4th DCA 2001) where the Court held that a purchase price of 69.09% of the property's appraised value was an amount that was not grossly or startlingly inadequate.¹²

Lastly, the cases cited by SCHWISTOV did not support the Trial Court providing SCHWISTOV relief. For example, *Arsali v. Chase Home Finance LLC*, 121 So.3d 511 (Fla. 2013) dealt with the equitable considerations for vacating a foreclosure sale where the borrower and lender reached a settlement prior to the foreclosure sale date. The borrower timely sent a

¹² It is worth noting that the Palm Beach Property Appraiser indicates the market value of the property as \$740,000.00 for 2023. To dispel any thought of inequity, SCHWISTOV purchased the subject property in December 2018 at a condominium association foreclosure sale for the price of \$33,800.00.

cashier's check to the lender's counsel who received the check prior to the sale but neglected to cancel said sale.

Ultimately, SCHWISTOV completely failed to set forth any arguments in its Initial Brief to support the reversal of the Order. In *E & I, Inc. v. Excavators, Inc.*, 697 So. 2d 545, 547 (Fla. 4th DCA 1997) the Fourth District noted that:

“[t]he borrower, however, has made no effort in its brief to explain whether the lender carried its burden of demonstrating that there were no issues of fact in regard to the affirmative defenses. The borrower merely says that “genuine issues of material fact existed as to the allegations of the complaint, the affirmative defenses, and the compulsory counterclaim.” Under these circumstances we do not deem it our responsibility to sift through the pleadings and affidavits to determine whether there are material issues of fact.

The *E&I* Court reiterated the settled Florida law that “the appellant has the burden of making “any reversible error clearly, definitely, and fully appear.” *Id. quoting Strate v. Strate*, 328 So. 2d 29, 30 (Fla. 3d DCA 1976).

As Appellant has failed to demonstrate *any* error and failed to demonstrate a gross abuse of discretion, this Court must affirm.

CONCLUSION

WHEREFORE, for the reasons stated above, the Appellee SECRETARY OF THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, an agency of the UNITED STATES OF AMERICA respectfully requests that this Court affirm the Order in all respects and enter any other relief this Court deems proper.

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

The undersigned hereby certifies that the foregoing Initial Brief complies with the font and word count limit requirements of Rules 9.045 and 9.210 of the Florida Rules of Appellate Procedure, and it was prepared utilizing double-spaced Arial 14-point font and contains less than 13,000 words.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was electronically filed with the Fourth District Court of Appeal via the Florida Courts E-Filing Portal on this **29th Day of February, 2024**. I also certify that a copy of the foregoing document is being served this day **via the Clerk's Electronic E-Service Email** on James R. Ackley, Esq., Attorney for Appellant, Law Offices of James R. Ackley, P.A., 828 Quartz Terrace, West Palm Beach, FL 33413 [E-Service email: eservice@ackleylegal.net] in accordance with Florida Rule of Judicial Procedure 2.516.

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