

PUBLICATION

Florida Inferior Liens Not Extinguished If Recorded After Foreclosure Judgment – What To Do Now

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The Fourth District has ruled that inferior liens are extinguished in a foreclosure proceeding when the final judgment is entered, not when the certificate of sale is issued, putting 30 years of established law into question.

On August 24, 2016, the Florida Fourth District Court of Appeal released a decision that conflicts with Florida statutes and 30 years of established precedent. In *Ober v. Town of Lauderdale-by-the-Sea*, No. 4D14-4597 (Fla. 4th DCA Aug. 24, 2016), the court held that the municipal liens of Lauderdale by the Sea (LBTS) – all inferior to the first mortgage and recorded post *lis pendens* – were not extinguished when the subject property was sold at the first lienholder's foreclosure sale. The court ruled that the interests of all junior lienholders and any unrecorded interests were extinguished when the final judgment was entered such that all the liens of the municipality that were recorded after the judgment were not affected by the foreclosure and survived. The court noted that the *lis pendens* statute (§ 48.23, Fl. Stat.) did not expressly contain a date when the *lis pendens* was to expire, it was necessary for the court to create an "end date." It deemed entry of the judgment to be the operative event that ended the life of the *lis pendens*. However, since the enactment of section 43.0315 in 1993, the law has been that the interests of all junior lienholders are extinguished upon the issuance of the certificate of sale, not the entry of the final judgment.

Summary of the Case

The context for this case is relatively simple. The lender recorded a *lis pendens* on the property as part of its foreclosure proceeding, and obtained a final judgment of foreclosure in September 2008 on a parcel of residential real property. However, the foreclosure sale was not held until September 2012 – four years later. During this time, LBTS recorded a total of seven liens on the property after the judgment was entered, and an additional three liens after the Certificate of Title was issued for the sale. Ober ultimately purchased the property from the lender and then filed a quiet title action in order to remove the liens from the property because they all post-dated the recording of the foreclosure *lis pendens*.

Both parties apparently believed that the *lis pendens* statute did not provide an "end date" for a *lis pendens*, and the court agreed that it had to determine "an implied end date" within the statute, to avoid the absurd result of a *lis pendens* precluding any lien from ever being placed on the property into perpetuity. LBTS argued that the entry of judgment ends the life of the *lis pendens*, while Ober argued that the *lis pendens* should remain in force up to the date of the foreclosure sale. The court interpreted section 48.23(1)(a) to mean that the *lis pendens* is the equivalent of the "action," and that therefore when the "action" is concluded, the *lis pendens* is terminated. The court held that the rendition of the final judgment marked the end of the action (or thirty days after the rendition of the judgment to account for any appeal, if an appeal is not taken).

The court found precedent in this ruling in the earlier *Quadomain* case (*U.S. Bank Nat'l Ass'n v. Quadomain Condo. Ass'n*, 103 So. 3d 977, 979-80 (Fla. 4th DCA 2012)), when it stated that the court presiding over an action which created a *lis pendens* has exclusive jurisdiction from the date of the *lis pendens* until the date it enters final judgment along with other non-foreclosure cases that stated a *lis pendens* expires upon rendition of the final judgment.

The court also noted possible conflict in what it labeled a "misstatement" in Form 1.996(a) of the Florida Rules of Civil Procedure, which is the Florida Supreme Court's form final judgment of foreclosure. The form contains a statement that is included in every foreclosure judgment that states: "**On filing the certificate of sale**, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed." (emphasis added).

Decision in Conflict with Other Districts

The decision appears to be in conflict with other courts that have considered the issue. The court failed to recognize the effect of Florida Statute 45.0315, which governs the right of redemption of the mortgagor and any junior lienholder in a foreclosure action. The statute reads:

At any time before the later of the filing of a certificate of sale by the clerk of the court or the time specified in the judgment, order, or decree of foreclosure, the mortgagor or the holder of any subordinate interest may cure the mortgagor's indebtedness and prevent a foreclosure sale by paying the amount of moneys specified in the judgment, order, or decree of foreclosure, or if no judgment, order, or decree of foreclosure has been rendered, by tendering the performance due under the security agreement, including any amounts due because of the exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor. § 45.0315, Fla. Stat. Ann. (emphasis added)

This statute, when read in conjunction with the lis pendens statute (§ 48.23, Fl. Stat.), clearly provides the "end date" to the lienholders' interests and their redemption rights, and in doing so provides the end date for the lis pendens. It also specifically states that the language in the final judgment can dictate the "end date" by outlining when the equity of redemption will end. Per the statute, if the judgment does not address the issue, then the statute applies, and the "end date" becomes the issuance of the certificate of sale.

Moreover, it was this statute that likely prompted the Florida Supreme Court to include the language in the form final judgment. Prior to the enactment of section 45.0315 in 1993, under the common law, the liens of junior lienholders, as well as all redemption rights, were extinguished when the judgment was entered. *AG Group Investments, LLC v. All Realty All. Corp.*, 106 So. 3d 950, 951–52 (Fla. 3d DCA 2013). The legislature changed all that in 1993 when it extended the time for redemption, and hence the life of the junior lienholder's interests, until the sale. The ruling in *Ober* is a clear departure from the long-standing history of the lis pendens statute, the redemption statute and foreclosure law in general.

The fifth district addressed the issue and held that Florida Statute section 48.23 operates as a statute of repose and is the source for the "end date" of the lis pendens. *Adhin v. First Horizon Home Loans*, 44 So. 3d 1245, 1252–53 (Fla. 5th DCA 2010) ("Of importance here, section 48.23(1)(b) bars holders of unrecorded interests in the property from enforcing their interests against the property if they do not intervene in pending litigation within twenty days of the filing and recording of the notice of lis pendens, **provided that the property is later sold at a judicial sale**") (emphasis added). Moreover, the fifth district concluded that the language in the statute was clear and unambiguous, and so required no further inquiry. *Id.*, at 457 ("There is no ambiguity in language of the statute, and thus, we need not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." (citing *Macola v. Gov't Emps. Ins. Co.*, 953 So.2d 451, 457 (Fla. 2006))).

The Third District also addressed the issue of what marks the time when junior liens who are joined in a foreclosure (and, by extension, those whose interests arose after the recorded lis pendens) are extinguished, and held that the language of the final judgment stating liens would be extinguished upon the issuance of the certificate of sale combined with section 45.0315's language referencing the certificate of sale as the cut-off,

compelled the conclusion that the a junior lienholder's rights are extinguished when the certificate of sale is issued, not when the judgment is entered. *AG Group Investments, LLC v. All Realty All. Corp.*, 106 So. 3d 950, 951–52 (Fla. 3d DCA 2013) ("Before the Statute was enacted in 1993, the common law rule provided that a junior mortgagee's lien was extinguished at the entry of the final judgment of foreclosure. However, ***the Statute provides that a junior lien holder's interest cannot be extinguished before the issuance of a certificate of sale.***") (emphasis added) (citations omitted). The Third District also found it significant that the language of the final judgment itself stated that the junior liens will be extinguished upon the filing of the certificate of sale, not upon the entry of the final judgment. *Id.* at 952.

Because there appears to be a legal basis to support Ober's position that all liens recorded post lis pendens were extinguished at the time of the issuance of the certificate of sale, and the final judgment in the underlying foreclosure included language dictating that the rights would be extinguished "upon confirmation of the sale" by the Clerk issuing the Certificate of Sale, a motion for rehearing is expected. The complete language in the judgment read:

"Upon the confirmation of the sale of the property, whether by the Clerk filing the Certificate of Sale herein or by order of the Court ruling upon objections to the sale, the Defendants, and any and all persons claiming by, through, and under them since the date of the filing of the Lis Pendens, are forever barred and foreclosed of any and all right, title, interest, claim or demand of any kind or nature in and to the property and upon the issuance of the Certificate of Title the purchaser at the sale shall be let into possession of the property."

The Impact on Financial Institutions in Mortgage Foreclosures in Florida

The decision will adversely impact foreclosure actions going forward in this district, raising new issues regarding marketable title because it creates doubt regarding when the rights of junior lienholders are extinguished, and appears to conflict with the other jurisdictions on the issue. Parties whose liens are recorded after the final judgment but before the sale will now assert that their liens are not extinguished upon the filing of the certificate of sale. This may prompt potential lienors to wait until a judgment is entered, and then record liens, in order to preserve them from the effect of the lis pendens.

This holding will have the additional consequence of undermining the public policy behind a foreclosure sale at which the fair market value is sought, and will chill the foreclosure sale process by discouraging investors from bidding when the status of the liens is unknown. Previously, the bidders could rely on the fact that any liens that may have been recorded after the lis pendens but before they bid on the property would be extinguished. The bidding process is designed to protect not only the plaintiff lender, but also the foreclosed owner so that the owner has an opportunity to realize whatever equity may be present from any surplus proceeds. It will create uncertainty as to the status of title that will discourage what otherwise would be fair market bids. Under this ruling, a purchaser at a foreclosure sale will not be protected from an intervening, post-judgment, lien.

Not only will a prospective purchaser be unable to protect against intervening post-judgment liens, but there does not appear to be a remedy for the lender to incorporate these post-judgment liens into the existing judgment such as they would be extinguished. Under this scenario, the lender will be penalized for delays that may be totally out of their control, where the delays are caused by the borrower – who may wish to further delay the enforcement of the judgment, by filing bankruptcy or by continuing to pursue loss mitigation thereby postponing the sale.

For questions about this or other decisions, statutes and regulations affecting your business, please contact the author of this alert or any of our Consumer Finance and Litigation attorneys.