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

CASE NO.: 4DCA#: 14-1385

L.T. CASE NO.: 2013CA004260XXXXMB

PUDLIT 2 JOINT VENTURE, LLP,
a Florida limited liability partnership,

Appellant,

v.

WESTWOOD GARDENS HOMEOWNERS ASSOCIATION, INC.,
a Florida corporation not-for-profit,

Appellee.

APPELLEE'S MOTION FOR REHEARING, MOTION FOR CERTIFICATION OF QUESTIONS OF GREAT PUBLIC IMPORTANCE, AND MOTION FOR CERTIFICATION OF CONFLICT

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APPELLEE WESTWOOD GARDENS HOMEOWNER'S ASSOCIATION, INC.'s MOTION FOR REHEARING, MOTION FOR CERTIFICATION OF QUESTION OF GREAT PUBLIC IMPORTANCE AND MOTION FOR CERTIFICATION OF CONFLICT

The Appellee Westwood Gardens Homeowner's Association, Inc. ("Appellee") by and through undersigned counsel, and pursuant to Fla. R. App. P. 9.330, moves this Honorable Court for:

(a) Rehearing of its Opinion reversing the trial court's final judgment in favor of Appellee and remanding for entry of final summary judgment in favor of Appellant;

(b) Certification of this case and each of the following questions to the Supreme Court of Florida as issues of great public importance for Supreme Court review under Article V, section 3(b)(4), of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030 (a)(2)(A)(v):

i. **When Do Contractual Rights Vest For Third Party Purchasers Of Real Property At Foreclosure Sale, Who Purchased After Enactment Of Florida Statute Section 720.3085 (2)(b)?**

ii. **Does The District Court Have The Power To Limit The Prospective Effect Of Florida Statute Section 720.3085(2)(b) And Impede The Legislature's Ability To Announce State Wide Public Policy And Enact Mandatory Law?**

(c) Certification of conflict of the Court's Opinion in this matter with

the Third District Court of Appeals decision in *Jakobi v. Kings Creek Village Townhouse Association, Inc*., 665 So.2d 325 (Fla. 3rd DCA 1995) as to whether Fla. Stat. § 720. 3085 (b)(2) in effect at the time of purchase, determines the rights of the parties to the purchase even if the statute was not in effect at the time of the inception of the original Declaration recording for Supreme Court review pursuant to Article V, section 3(b)(4), of the Florida Constitution and Florida Rule of Appellate Procedure 9.030 (a)(2)(A)(vi):.

The Appellee relies on the following argument and authorities in support of this motion:

I. Misapprehended Points of Fact and Law Supporting Rehearing

Appellee files this Motion for Rehearing with the utmost respect for this Honorable Court's Opinion rendered in this matter. Appellee is compelled to file the instant Motion because of the far reaching effect of this Opinion and both its immediate and long term, significant impact on the citizens of Florida and the literally thousands of Homeowners Associations located in the State. The following is a list of points of law and fact that Appellee believes this Honorable Court misapprehended that warrant rehearing:

A. This Honorable Court Overlooked Critical Distinctions In the Timing Of The Facts Of The Instant Appeal and Nature of Appellant's Purchase As An Investor At The Foreclosure Sale That Distinguish The Facts of This Appeal From *Coral Lakes Community Association, Inc. and Ecoventure WGV, Ltd* Which Has Resulted In

An Unsupported Expansion Of These Two Cases And That Has Essentially Rendered Fla. Stat. § 720.3085 (2)(b) A Nullity

The below timeline illustrates Appellee's argument, one which Appellee believes this Court may have misapprehended based on this Court's reliance on the 2013 version of Florida Statute 720. 3085 (2)(b) in the Opinion rather than the 2008 version as cited by both parties in their briefs:

i. **4/12/84:** Original Declaration is recorded.

ii. **7/1/07:** Florida Statute Section 720.3085 (2) was enacted and deemed effective. The substantive portion provides:

> (2) A parcel owner is jointly and severally liable with the previous parcel owner for all unpaid assessments that came due up to the time of transfer of title. This liability is without prejudice to any right the present parcel owner may have to recover any amounts paid by the present owner from the previous owner.

iii. **7/1/08**: Florida Statute Section720.3085 (2) is amended to add subparts and what was previously Section (2) stated above becomes Section (2)(b) The amendments were effective July 1, 2008:

> (2)(b)A parcel owner is jointly and severally liable with the previous parcel owner for all unpaid assessments that came due up to the time of transfer of title. This liability is without prejudice to any right the present parcel owner may have to recover any amounts paid by the present owner from the previous owner.

iv. **12/2/09**: Appellant acquires title to Woodmill Property at issue at Foreclosure.

v. **11/9/10**: Appellant acquires title to Golden Eagle Property at issue at Foreclosure. The Foreclosure Judgment specifies:

> "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 of all estate or claim in the property, ***except as to claims or rights under chapter 718 or 720, Florida Statutes, if any***." (Emphasis added). R. Vol. 1, Pg. 180,¶ 6.

As the above timeline demonstrates, Appellant, an institutional investor, was on notice of Fla. Stat. 720. 3085 (b)(2) at the time of purchase and the clear language of the Foreclosure Judgment itself which states that Appellant is buying at foreclosure subject to claims and rights of the Association under Chapter 720.

The timing of events in this Appeal is crucial because, unlike the events in *Coral Lakes Community Association, Inc. and Ecoventure WGV, Ltd.*, in this case Florida Statute§ 720.3085 was in effect prior to the time Appellant, an investor, purchased the properties at issue at foreclosure. *Coral Lakes Community Association, Inc. v. Busey Bank, N.A.*, 30 So.3d 579 (Fla. 2nd DCA 2010)(statutory change occurred ***after*** mortgage at issue was recorded and involved a lender)(emphasis added); *Ecoventure WGV, Ltd. V. Saint Johns*

Northwest Residential Association, Inc., 56 So.3d 126 (Fla. 5th DCA 2011)(Court concluded that imposing Fla. Stat. § 720.3085 (2)(b), that had been enacted ***after*** the mortgage was granted altered Ecoventure's vested rights)(emphasis added). Both *Coral Lakes Community Association,* I*nc. and Ecoventure WGV, Ltd.*, involve lenders that had recorded mortgages on the properties at issue ***prior*** to the enactment of the statute. A lender with a recorded mortgage on property is in an entirely different relationship to the property than a random investor purchasing multiple properties at foreclosure sales.

A lender with a recorded mortgage has an obvious existing stake in the property, a pre-existing relationship with the property so to speak which a new purchasing investor does not. While this Honorable Court found that the language of the Declaration "expressly created rights" for "successors in title", Appellant purchased the properties as an investor, not with any existing vested rights in the property like a lender. Appellant came to the foreclosure sale under the mandate of Florida Statute § 720. 3085 (b)(2), not as a successor in title. Opinion, Pg. 7-8.

Appellant was on notice of the Amended Statute and its effect on Appellant when purchasing at foreclosure. Florida Statute § 720. 3085 (b)(2) was in effect during the foreclosure sale process and when Appellant took title

to the property. Expanding the scope of *Coral Lakes Community Association, Inc. and Ecoventure WGV, Ltd.* To include an unknown and random institutional investor, who is not a party to the Declaration and that takes title after enactment of Florida Statute § 720. 3085 (b)(2) renders the statute a nullity. Pursuant to the findings of the Court's Opinion, the only time the law would arguably have any effect would be if the Declaration language comported with that statutory language or was amended to comport with the statutory language. Outside of this incredibly narrow and limited context, Florida Statute Section 720.3085 (2)(b) has absolutely no effect. The statute becomes nothing more than words on paper with absolutely no effect or consistent applicability.

The general rule is that substantive statutes and amendments thereto apply prospectively only, unless there is clear manifestation of legislative intent that it intended that statute to operate retroactively. *Florida Insurance Guaranty Association, Inc. v. Devin Neighborhood Association, Inc*., 67 So.3d 187 (Fla. 2011). The Florida Legislature enacted Florida Statute Section 720.3085 in 2007 and the statutory language at issue in Section 2: "A parcel owner is jointly and severally liable with the previous parcel owner for all unpaid assessments that came due up to the time of transfer of title" was effective July 1, 2007. This Honorable Court's Opinion creates a result and

expansion of Florida case law that runs contrary to the general rule of statutory application and interpretation.

Accordingly, Appellee believes that this Honorable Court misapprehended the timing of events in this Appeal, the nature of Appellant's status as an investor (not a lender), and lack of any relationship between the Association property and Appellant that would create any vested rights that took effect prior to its purchase of the property. If Appellant had no vested rights until it purchased the property, which at that time was subject to Florida Statute Section 720.3085 (2)(b), then the statute could not unconstitutionally impair Appellant's right to contract. *See In re Will of Martell*, 457 So.2d 1064, 1067 (Fla. 2nd DCA 1984)("A statute is not unconstitutionally retrospective in its operation unless it impairs a substantive, vested right. A Substantive vested right is an immediate right of present enjoyment, or a present fixed right of future enjoyment"). A crucial distinction herein is the fact that application of Florida Statute Section 720.3085 (2)(b) to Appellant is not a retrospective application of the statute. The application of Florida Statute Section 720.3085 (2)(b) to the facts of this Appeal is prospective in nature. Therefore, the constitutionality issue arising with retrospective application of a statute and the impact on vested rights is not an issue in the instant Appeal. To be clear, Florida Statute Section 720. 2085 (2)(b) went into effect July 1, 2008. The

language creating joint and several liability on a parcel owner for a previous owners unpaid assessments was effective July 1, 2007. Again, Appellant acquired title to the Woodmill Property on December 2, 2009 and acquired title to the Golden Eagle property on November 9, 2010. There is no retrospective application of the statute that would create a constitutional issue for review.

B. This Honorable Court Misapprehended The Legislature's Ability To Set Public Policy By Abrogating The Effect Of Fla. Stat. § 720.3085 (2)(b)

Our system of governance is based on the supreme lawmaking powers of the Legislature. That power is subject only to limitations contained in the State and Federal Constitution. *State ex rel. Young v. Duval County*, 79 So. 692 (Fla. 1918); *State ex rel. Davis v. City of Clearwater*, 139 So 377 (Fla. 1932); and *Ex parte White*, 178 So. 876 (Fla. 1938). The Florida Supreme Court has specifically stated that:

> The reasonableness or justice of a deliberate act of the Legislature, the wisdom or folly thereof, the policy or motives prompting it, so long as the act does not contravene some portion of organic law, are all matters for legislative consideration, and are not subject to judicial control. **The courts are bound to uphold a statute, unless it is clearly made to appear beyond a reasonable doubt that it is unconstitutional.** *Ex parte White*, supra, page 880.(emphasis added)

Appellant did not argue that the statute was unconstitutional. This Honorable Court mentioned the unconstitutional impairment of rights in its Opinion, but did not hold that the statute was invalid or unconstitutional. This Court instead found that the language in Appellee's Declaration that: "the personal obligation for delinquent assessments shall not pass to his successors in title unless expressly assumed by them" and "sale or transfer of any Lot…pursuant to…foreclosure…shall extinguish the lien of such assessments as to payments thereof which become due prior to such sale or transfer" controlled over the statute. Opinion, Pg. 7. The Court then found that this language "expressly created rights" for successors in title to properties which assumes third parties at foreclosure sales fall into such a category, and because the declarations provisions benefit successors in title, Appellant becomes an intended third-party beneficiary and holds "vested rights in the declaration." Opinion, Pg. 8.

The Opinion's effect is that now every possible future purchaser of property in the Association, whether at foreclosure or by any other means, holds a pre-determined vested right in the HOA Declaration, steps into the shoes of the original purchaser regardless of how far back in time that Declaration was originally recorded, and no statutory amendment, whether pre-dating the sale or post-dating the sale, will ever have any effect if the Declaration has language that contradicts the statute, including Florida Statute

§720.3085 (2)(b). This Court's Opinion strips Florida Statute § 720. 3085 (2)(b) of any efficacy and essentially renders it void unless an HOA amends its Declaration to adhere to same.

Briefly stated, it is Appellee's position that Florida Statute Section 720. 3085 (2)(b) applies prospectively to the facts of this Appeal and established a mandatory law governing allocation of liability for unpaid assessments accruing prior to foreclosure sales.

Based on the above, Appellee respectfully requests that this Honorable Court grant Appellee's Motion for Rehearing.

II. Certification of Issues of Great Public Importance

The Court's May 27, 2015 Opinion is the first District Court Opinion to be rendered on the issue of liability of third party purchasers of property at foreclosure sales pursuant to Florida Statute Section 720.3085 (2)(b) when the Declaration at issue includes language absolving successors in interest from liability. This Court's Opinion ruled on several important issues that have enormous statewide impact, including (a) when do contractual rights vest for prospective unknown third party purchasers at foreclosure under Florida Statute Section 720.3085 (2)(b), (b) the effect of Fla. Stat. 720. 3085 (2)(b) when a Declaration, recorded before the amendment to the statute, contains contrary language, (c) the prospective application of mandatory statutory

amendments, and (d) the ability of the Florida Legislature to set public policy and make laws that apply on a statewide basis and not a Declaration by Declaration basis.

The Florida Supreme Court should review this Court's Opinion because these issues have far reaching and expansive impact throughout the State of Florida, and this Opinion affects thousands of citizens and Homeowners' Associations. Further, the Opinion directly affects the ability of the Legislature to prospectively pronounce public policy throughout the State of Florida. With all due respect to this Court, the Opinion abrogates the Legislature's power to create public policy and make statutory amendments to provide the vehicle for the public policy.

The Opinion creates a situation where, in order for a Legislative statute or amendment to have effect on an existing community or a particular unit owner, the community must amend its Declaration every time there is a Legislative Amendment. Hence, Florida Statute § 720.3085(2)(b) is only given effect when an HOA's Declaration has corresponding similar language or when an HOA amends its Declaration to include similar language. When the Florida Legislature amends a statute it does so with the intent that it will govern across the State of Florida, it shouldn't require a Declaration's

amendment. That would create a piecemeal application of State law and breed confusion.

The Opinion also indicates that HOA communities across the State of Florida must add/amend their Declarations language to include the *Kaufman* language in order for Legislative Amendments made subsequent in time to the recordation of the Declaration to have any effect.

A large majority of the Homeowner's Association Declarations were recorded well before the foreclosure crisis in 2006. The Declarations that were originally recorded were drafted at a time when Homeowner's Association wanted to make purchasing within their community easy and wanted to entice purchasing. The foreclosure crisis of 2006 changed the real estate climate in Florida and had a monumental negative impact on HOA's and Condominium Associations throughout the state. In 2008, the Florida Legislature, in response to the sweeping number of foreclosures, stepped in and amended Florida Statute Section 720 to create joint and several liability to alleviate the current homeowners from assuming responsibility of prior owners delinquent assessments through payment of special assessments. The bottom line is that in order for the HOA's to continue functioning someone has to assume responsibility for the delinquent assessments of former owners that are in foreclosure. The Florida Legislature made a pronouncement, via amendment

to Florida Statute Section 720 and the addition of Section 720.3085 (2)(b), to place the liability for prior unpaid assessments on third party purchasers and to relieve the current homeowners who abide by the Declaration and pay their assessments from being punished by their delinquent neighbors and the inevitable facing of special assessments to cover the loss.

The Opinion of this Court is the first to find the statute inapplicable and not mandatory on purchasers of property at foreclosure that was purchased *after* the statute went into effect. *The Coral Lakes Community Association, Inc.* and *Ecoventure WGV, Ltd.* decisions relied on by this Court in its Opinion both involved mortgages recorded prior to institution of the Fla. Stat. 720.3085 (2)(b). That is not the case here and the Court should grant a rehearing of its Opinion.

III. Certification of Conflict with the Third District Court of Appeals Decision In *Jakobi v. Kings Creek Village Townhouse Association, Inc.*, 665 So.2d 325 (Fla. 3rd DCA 1995)

Appellee suggest that there should be a certification of conflict of this Court's Opinion in this matter with the Third District Court of Appeals decision in *Jakobi v. Kings Creek Village Townhouse Association, Inc*., 665 So.2d 325 (Fla. 3rd DCA 1995). The conflict concerns the question of whether a Statute in effect at the time of a purchase by a third party at a foreclosure sale or any sale/transfer of a unit from one owner to another will determine

the rights and obligations of the parties to the sale or whether the original Declaration, to which the new owner will be subject to upon the transfer of ownership, will control when a conflict arises between the Declaration and the Statute.

While *Jakobi* does not involve application of Fla. Stat. 720. 3085 (2)(b), it sits in direct conflict with this Court's Opinion herein regarding whether the Declaration or the Statute controls when there is a conflict in their wording. Here, the Court has ruled that Fla. Stat. § 720.3085(2)(b) had no effect on a third party purchaser of property at foreclosure, who purchased that property after enactment of the statute, and instead found that a third party purchaser of property at foreclosure was a third party beneficiary to the Declaration (as if that third party purchaser was stepping into the shoes of the original owner that was a party to the original Declaration) and had vested rights in same. The Third District Court of Appeal in *Jakobi* came to the opposite conclusion. The Third District Court of Appeal in *Jakobi* found that "a townhouse deed transfer to an owner constituted a novation of the bylaws and declaration of covenants and restrictions such that owner could claim benefit of statute even though bylaws and declaration originally came into being before statute's effective date." *Jakobi v. Kings Creek Village Townhouse Association, Inc*., 665 So.2d 325 (Fla. 3rd DCA 1995). The court in Jakobi specifically found

that "A statute in effect at the time of a novation" i.e. a transfer of title to a new owner, "will determine the rights and obligations of the parties to the novation even if the statute was not in effect at the inception of the original contract." *Jakobi*, 665 So. 2d at 327. The Third District found that a subsequent contract was formed upon the townhouse purchase and a novation occurred finding the required elements of novation satisfied. *Id*.

Novation or formation of a substitute contract has four essential elements: (1) the existence of a previously valid contract; (2) the agreement of the parties to cancel the first contract; (3) the agreement of the parties tha the second contract takes the place of the first; and (4) the validity of the new contract. *Id*. The Third District held that the first and fourth elements were clearly met because, like the instant Appeal, the declaration and bylaws are contractual. *Id*. The Third District found the second and third elements were met-agreement by all parties to cancel the first contract and replace it with a new contract by the terms and provisions of the declaration which specifically stated the following:

- 'Owner' shall mean and refer to the record owner, whether one or more persons or entities, of the fee simple title to any Unit which is part of the Property…."

- The declaration and bylaws both provide that in addition to a lien on the townhouse unit, the owner is personally liable for any unpaid assessments.

The court found that based on the above provisions "when the current owner took title with record notice of this scheme he assumed a new personal contractual obligation with the master and townhouse associations and his seller was discharged of his personal contractual obligations. This meets the requirement of mutual consent to the novation." *Id*. at 327-328.

The Declaration at issue in the instant Appeal contains nearly identical language as that cited to above. Based on the above analysis and Third District Court of Appeals finding that a "new" contact was formed upon transfer of title to new owner, the court found the Statute in effect at the time of the transfer and formation of "new" contract was effective. Application of *Jakobi* to this Court's Opinion would result in affirmance of the Trial Court's Final Judgment in favor of Appellee. Furthermore, this Court's Opinion and *Jakobi* conflict on this essential question and will create confusion and result in differing outcomes with the same sets of facts in courts across the State of Florida.

CONCLUSION

WHEREFORE, the panel having overlooked or misapprehended controlling questions of fact and law, rehearing should be granted. The Opinion having raised questions of great public importance, this Court should permit further review by the Supreme Court of Florida. Finally, this Court's Opinion herein being in conflict with the Third District Court of Appeals Opinion in *Jakobi v. Kings Creek Village Townhouse Association, Inc*., 665 So.2d 325 (Fla. 3rd DCA 1995), this conflict should be certified to the Supreme Court for review. Appellee respectfully suggests the following wording for the certified questions:

i. **WHEN DO CONTRACTUAL RIGHTS VEST FOR THIRD PARTY PURCHASERS OF REAL PROPERTY AT FORECLOSURE SALE, WHO PURCHASED AFTER ENACTMENT OF FLORIDA STATUTE SECTION 720.3085 (2)(b)?**

ii. **DOES THE DISTRICT COURT HAVE THE POWER TO LIMIT THE PROSPECTIVE EFFECT OF FLORIDA STATUTE SECTION 720.3085(2)(b) AND IMPEDE THE LEGISLATURE'S ABILITY TO ANNOUNCE STATE WIDE PUBLIC POLICY AND ENACT MANDATORY LAW?**

Dated: June 11, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Appellees' Motion for Rehearing, Motion for Certification of Questions of Great Public Importance, and Motion for Certification of Conflict was served on June 11, 2015 via E-Mail Service of Court Document pursuant to Administrative Order served on Robin I. Frank, Esq., Counsel for Appellant/Plaintiff, Shapiro, Blasi, Wasserman & Gora, P.A., 7777 Glades Rd., Suite 400, Boca Raton, FL 33434, rifrank@sbwlawfirm.com and nlewis@sblawfirm.com; Veronica Limia, Esq., Co-Counsel for Appellant/Plaintiff, 3930 Max Place, Boynton Beach, FL 33436, veronicamsplegal@gmail.com and alexandramsplegal@gmail.com.

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