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MORTGAGE MELTDOWN Consequences of filing fake documents weighed

Florida Supreme Court wades into robo-signing scandal

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Mortgage fraud by lenders and their agents went on trial Thursday before the Florida Supreme Court, with hints coming from the bench that the state judiciary might need new rules.

The justices waded into *Roman Pino v. Bank of New York Mellon*, a closely monitored dispute focusing on the robo-signing scandal by testing whether lenders and servicers using fraudulent documents can escape judicial review by voluntarily dismissing suspicious cases.

The case is of major interest to the mortgage industry. National and state land title associations filed friend-of-the-court briefs, as did the Mortgage Bankers Association.

Under current practice, circuit judges cannot open evidentiary hearings when defendants try to prove a court document is fraudulent if the plaintiff bringing the lawsuit gives notice it will voluntarily dismiss its case.

In *Pino*, the homeowner claimed the mortgage assignment was a forgery. A Palm Beach Circuit Court judge insisted the court's hands were tied by the notice, and the Fourth District Court of Appeal agreed. However, a dissent by Judge Mark Polen criticized the majority's reasoning, which held the bank received no benefit by pulling the case.

Polen adopted a dissent actually written by retired 4th DCA Judge Gary Farmer, who withdrew from the case before it was decided. BNY Mellon benefited by avoiding depositions and sheltering its agents from discovery that could have been incriminating, the dissent said.

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Read the briefs on
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FORECLOSURES: Justices circle around questions of harm

In Thursday's arguments, the justices circled around the question of harm and how the court defines harm.

Justice R. Fred Lewis asked bank attorney Bruce Rogow of Fort Lauderdale for help.

Rogow said the party seeking dismissal must take something of value, but he sought to confine value in this case to Pino's property.

Justice Barbara Pariente asserted Pino was seeking too broad an interpretation of harm, adding she felt using the word harm changes the language of the rule on voluntary dismissals. She suggested the court instead think in terms of what relief the homeowner obtained.

"Their argument is not that they were harmed by fraud but that the court system was harmed by fraud," Rogow said. "The point I'm making is that there are other mechanisms to address fraud."

Rogow said the court could report the attorney using false documents to The Florida Bar or it could find him in contempt.

Speaking for Pino, Amanda Lundergan of the Ice Legal law firm in Royal Palm Beach said the courts should not have to rely on The Bar or other agencies to police fraud on the court.

Roman Pino settled his case with the bank. However, the Supreme Court ordered that the appeal continue in the public interest.

Justice Peggy Quince said the harm to homeowners is that they must fight the case a second time if the bank files a new complaint as it did in Pino's case.

That's why homeowner would ask that judges be allowed to permanently dismiss cases where fraud is exposed, she said.

Rogow argued a court should have no say when a notice of voluntary dismissal has been entered. The "inconvenience" of having to go to court again is built into the system, he said.

While Pino's case concerns an allegedly fraudulent mortgage assignment, Pariente recognized fraud could occur in all kinds of civil cases. She noted Florida's rule on voluntary dismissals provides more protection for plaintiffs than the federal rule, which allows judges to preserve jurisdiction and impose sanctions.

"Maybe we've gone too far the other way," Pariente suggested, adding judges perhaps should have the right to hold an evidentiary hearing before granting dismissal or retain jurisdiction.

Rogow said that in general there has been no problem with the rule. It is only because the robo-signing scandal drew so much attention to the mortgage foreclosure crisis that the rule is being questioned.

"You're saying this is much ado about nothing? They didn't need to create this fraudulent assignment?" Pariente asked.

Rogow said he wouldn't put it in those terms, only that there is no basis for setting aside the rule when there are other remedies.

In 2010 as the mortgage foreclosure crisis pummeled Florida's housing market, the Supreme Court created a rule requiring sworn verification of mortgage foreclosure complaints. That rule stated in part that it was intended "to give trial courts greater authority to sanction plaintiffs who make false allegations."

Pariente recalled the opinion but noted its weakness.

"We really didn't give a mechanism for how that sanction would work," she said.

Lundergan argued the system is fundamentally flawed.

"If you do not give the courts permission to address fraud, it sets up a system where every litigant's bad acts are not only condoned but encouraged. They can lie and cheat. If they get caught, they simply dismiss," Lundergan said.

On rebuttal, Lundergan pointed out that in many cases homeowners cannot afford a lawyer, and finding and proving fraud to the court is extremely difficult, while banks have the resources to hide their bad acts and refile cases over and over.

"We are talking about great inequities here. That is a benefit to the banks and a tangible burden to these homeowners," Lundergan said. "Voluntary dismissal should never be used as a shield, and the court should have the power to take it away when it is abused."

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