The Case For Overturning Florida Foreclosure Ruling

By **Sara Accardi and Paige Knight** (April 25, 2024)

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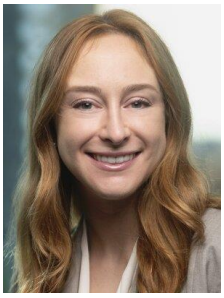

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In an opinion written in under 1,000 words, Florida's Fourth District Court of Appeal put foreclosure cases across Florida in jeopardy in Desbrunes v. U.S. Bank National Association in February.

Namely, in all foreclosure cases in which a borrower is deceased, unless the legal representative of the borrower's estate is joined as a defendant — as opposed to a guardian ad litem or the heirs of the estate, which is the typical practice — "all action after [a] suggestion of death [could be] a legal nullity and invalid."[1]

Desbrunes

In Desbrunes, an heir of the deceased borrower appealed the entry of a final summary judgment of foreclosure, claiming that the court erred in denying a motion to abate the proceedings pursuant to a suggestion of death previously filed in the case.

The Court of Appeal reversed, holding that "[b]ecause the court entered judgment without the presence of the deceased [borrower's] legal representative, the final summary judgment of foreclosure is a nullity."

Counsel in Desbrunes followed a very common practice in Florida: When the borrower died, his attorney filed a suggestion of death. The foreclosing plaintiff then moved to amend its complaint to add the heirs of the borrower, including appellant, as party defendants, which the trial court granted.

Then, after the appellant and the other heirs were served with the complaint, and they failed to respond, the mortgagee obtained a clerk's default and secured the trial court's appointment of an administrator ad litem and guardian ad litem to represent any unknown heirs.

The appellate court found this procedure improper under Florida Rule of Civil Procedure 1.260(a), which requires the joinder of all proper parties. The district court insisted that for a deceased party, the joinder of the estate's legal representative, such as the personal representative, was required.

The court made clear that a "decedent's heirs are not legal representatives of the decedent." The appellate court also found the appointment of an administrator ad litem and guardian ad litem to represent any unknown heirs improper, again, insisting that only "a legal representative of the mortgagor's estate" is the proper party.

The appellate court's remedy was to declare all proceedings after the filing of the suggestion of death a legal nullity, essentially voiding all progress in the case that occurred thereafter.

Currently, the appellee in Desbrunes has moved for rehearing, which is pending before the district court. In the event such motion is unsuccessful, the appellee could then appeal to the Supreme Court of Florida certifying a question of great public importance. There are

strong reasons for the district court to reverse course.

The Case for Overturning Desbrunes

Florida Rule of Civil Procedure 1.260(a) requires the joinder of the proper parties. In a strictly in rem foreclosure proceeding, which does not seek the payment of monies held by a person or estate, Florida jurisprudence has never required the substitution of a party defendant under Rule 1.260(a) or the administration of probate.

Rather, courts have permitted foreclosing plaintiffs to drop the decedent and amend to include the new property owners, and parties who many have an interest in the property.

The reasoning is essentially that because an in rem foreclosure action does not seek funds from a person, but rather, only directs the sale of a property without recourse for a deficiency, there is no real effect on a probate estate.

To quote Florida's Second District Court of Appeal in Aluia v. Dyck-O'Neal in 2016: "A judgment of foreclosure is a judgment in rem or quasi in rem that directs the sale of the mortgaged property to satisfy the mortgagee's lien. As such, it 'applies only to the property secured by the mortgage and does not impose any personal liability on the mortgagor.'"[2]

In other words, a foreclosure does not seek the payment of monies held by a person or estate. In contrast, a "claim against the estate … is payable from funds held by the estate."[3]

This is further demonstrated by the fact that the indispensable party that must be joined in a foreclosure action is the record title owner of the mortgaged property.[4] Junior lienholders are included to obtain marketable title, but they are not indispensable to the action because a judgment can be rendered without them.[5]

Furthermore, in cases where the property is homestead, as it was in Desbrunes, there is further support for overturning Desbrunes. Homestead property passes entirely outside of the decedent's estate.[6] Homestead protection derives from the Florida Constitution, which states, among other things, that homestead exemption inure to the owner's surviving spouse or heirs.[7]

Finally, Desbrunes should be reconsidered because the appellate court's remedy is not supported by Florida Rule of Civil Procedure 1.260(a). The district court declared all the proceedings following the filing of the suggestion of death a nullity.

Nothing in Florida Rule of Civil Procedure 1.260(a) or in the cases relied upon by the court provided a legal basis for declaring an in rem foreclosure proceeding pending against indispensable parties, undisputed heirs and current owners of the property to be a nullity.

Proceeding With Foreclosure Cases Considering Desbrunes

While the request for rehearing remains pending in Desbrunes, foreclosing plaintiffs should assess pending, anticipated and even completed foreclosure cases to identify any cases with a deceased borrower. Plaintiffs affected by Desbrunes should carefully consider their options.

One option for pending foreclosure cases is to request a stay of the case pending a final decision in Desbrunes. The clear downside to this approach is it could take many months for

a final determination and for Desbrunes to work its way through Florida's appellate system.

Another option would be to proceed in the foreclosure case and argue that Desbrunes is distinguishable or erroneously decided. Of course, this is a risky option as it could create a contested and dangerous appealable issue based on the current status of the law.

Finally, the conservative option would be to move to vacate all prior rulings entered following the filing of the suggestion of death, which would put the case back to where it was when the borrower died. Then, assuming a personal representative has been named in the borrower's probate case, or that a probate case has even been opened at all, which is a large assumption, the personal representative of the deceased borrower's estate should be named as a defendant.

Otherwise, foreclosing plaintiffs may need to go through the process of opening probate and requesting that a personal representative be appointed to proceed with foreclosure.

Once the personal representative is joined as a defendant, plaintiffs may then proceed with foreclosure. While all options are frustrating and somewhat uncertain, it is the unfortunate landscape left in Florida following Desbrunes.

It goes without saying that foreclosing plaintiffs need to formulate a procedure for how to deal with Desbrunes for the foreseeable future to insulate themselves from its effects as best as possible.

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[1] Desbrunes v. U.S. Bank Nat'l Ass'n as Tr. for Structured Asset Sec. Corp. Mortg. Pass-Through Certificates, Series 2006-AM1, No. 4D2022-2647, 2024 WL 591432 (Fla. 4th DCA Feb. 14, 2024).

[2] Aluia v. Dyck-O'Neal, Inc., 205 So. 3d 768, 773-74 (Fla. 2d DCA 2016).

[3] Thompson v. Hodson, 825 So. 2d 941, 952 (Fla. 1st DCA 2002); Scott v. Morris, 989 So. 2d 36, 37 (Fla. 4th DCA 2008) ("The purpose of rule 1.260 is to facilitate the rights of persons having lawful claims against estates being preserved ….") (internal citation omitted); see also Fla. Stat. § 733.710 (specifically exempting foreclosure actions from the time limitations applicable to probate claims).

[4] See Citibank, N.A. v. Villanueva, 174 So. 3d 612, 613 (Fla. 4th DCA 2015) ("The fee simple title holder is an indispensable party in an action to foreclose a mortgage on property.") (citations omitted).

[5] See Quinn Plumbing Co. v. New Miami Shores Corporation, 100 Fla. 413, 129 So. 690 (Fla. 1930) (citations omitted).

[6] See Buettner v. Fass, 21 So. 3d 114, 115 (Fla. 4th DCA 2009) ("As the court had already determined that the property was homestead, and thus not part of the decedent's estate, the personal representative had no possessory interest in it.").

[7] Art. X, § 4(a) & (b), Fla. Const.