IN THE FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

TIMOTHY FRANTZ,

Garnishee/Appellant,

vs.

EM PAVING CORP,

Plaintiff/Appellee.
_____/

Case No. 5D19-379
LT No. 2009-CA-650

INITIAL BRIEF

ON APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

Gray R. Proctor, Esq.
LAW OFFICE OF GRAY PROCTOR
Florida Bar No. 48192
1108 East Main Street, Suite 803
Richmond, VA 23219
Ph: (888) 788-4280
Email: gray@allappeals.com

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INTRODUCTION AND QUESTIONS PRESENTED

This is an appeal of a judgment of garnishment, issued to enforce a money judgment against Defendant general contractor Margherio Construction Corporation ("Margherio"). The lower court held that Margherio's attorney, Garnishee/Appellant Timothy Frantz, Esq. ("Mr. Frantz"), was liable for repayment of the entire $30,000 in settlement funds that he disbursed to Margherio's president personally after Plaintiff/Appellee subcontractor EM Paving Corporation ("EM" or "EM Paving") served him with a writ of garnishment directed to those funds.

Mr. Frantz admits that garnishment would be a proper remedy if there existed an enforceable judgment against Margherio. He argues that no enforceable judgment exists because, after EM obtained the money judgment against Margherio for breach of contract, it sought and obtained a judgment of foreclosure to recover for the same debt. EM bought the property for $100 at a foreclosure sale and prevailed, temporarily, in a priority-of-lien dispute with other creditors in a separately-styled consolidated case. EM would lose the property around a year later, however, after the mortgagee amended its complaint to allege superior title by virtue of equitable subrogation.

The questions presented in this case are:

1) After EM Paving foreclosed on the subject property in satisfaction of the same debt owed by Margherio, could it recover on the previously-issued money

judgment against Margherio without first obtaining a deficiency judgment by proving that the foreclosure did not satisfy the debt?

2) If so, did the circuit court err in taking up the issue of the amount due on Margherio's debt after the foreclosure at the garnishment hearing, where Margherio was not named as a party and the only issue framed in the pleadings was entitlement to garnishment, not amount?

3) If not, did the circuit court err by failing to offset the amount of the money judgment to account for the value EM received from the foreclosure?

STATEMENT OF THE CASE AND FACTS

The underlying issues in this case arise from mortgage fraud that took place more than ten years ago. Events can usefully be grouped into three periods of time: EM's acquisition and loss of the foreclosure property, EM's efforts to garnish a settlement payment due Margherio, and Mr. Frantz's defense in his personal capacity.

I. Background: EM Paving obtains both a money judgment against Margherio and a foreclosure judgment against Mana International; EM forecloses but only temporarily prevails in the priority-of-lien issue in consolidated case.

Plaintiff, subcontractor EM Paving, and Defendant contractor Margherio are two of many defrauded by convicted felon Pedro "Pete" Benevides.[1] Mr. Benevides stole the money he had borrowed to pay Margherio, EM, and many other contractors for their work on his commercial properties. This case involves a commercial development in Lake County.

There was no real dispute that EM and the other contractors had all done the work and deserved to be paid. In this case, the paving subcontractor EM Paving Corp. filed a two-count complaint, to foreclose its construction lien on the subject

[1] Mr. Benevides pleaded guilty in federal court to conspiracy to commit bank fraud in case 6:13-cr-234 (M.D. FL). His criminal acts, including mortgage fraud of more than $40 million, are set out in detail in the government's sentencing memorandum in that case. (R. 1291). He is currently serving a nine-year sentence.

property against the lender Mana International Corp. (Count I) and to recover against the general contractor Margherio Construction Corp. for breach of contract (Count II). (R. 1).

While the other claimants proceeded in consolidated case 2008-CA-5486, EM acting unilaterally in this case quickly obtained first a money judgment against Margherio (R. 1254 (July 13, 2010 Judgment)) and later a judgment of foreclosure against the subject property. (R. 1263 (December 6, 2010)). EM bought the property for $100 on February 9, 2011. Certificate of title issued on February 23, 2011. (R. 299-300, 1270).

On February 28, 2011, EM filed a motion for summary judgment in the consolidated case, arguing that its lien had priority over First Security Bank and Trust, who now owned Mana's mortgage on the property. On April 26, 2011, EM's first motion for summary judgment was granted. On March 13, 2012, however, the court reversed itself in the consolidated case. (R. 1279). First Security Bank had amended its complaint to allege priority based on equitable subrogation. (R. 1281). Final judgment of foreclosure issued on January 16, 2013, and on February 27, 2013, First Security's successor, RLK Santa Rosa Center LLC, purchased the property for $100 at auction.

II. Margherio settles its claims and EM Paving moves to garnish the settlement funds to enforce the original money judgment.

Meanwhile, Margherio was moving towards a resolution of its claims. On March 5, 2015, it reached a settlement with Mana's successor, RLK. (R. 492). Margherio dismissed appeal No. 5D14-3863 in return for $30,000. The settlement provided for the funds to be paid directly to Michael J. Nemec, Margherio's president.

Although Mr. Frantz and Margherio had each been served with a writ of garnishment on or around February 26, 2016, Mr. Frantz nevertheless released the funds to Mr. Nemec pursuant to the terms of the settlement agreement. On March 18, 2015, Mr. Frantz filed an answer to the writ of garnishment asserting that he did not owe money to Margherio and did not, in his personal capacity, have property belonging to Margherio. (R. 385). EM filed its reply on March 19, 2015. (R. 399).

On April 8, 2015, Mr. Frantz filed a motion to dissolve the writ of garnishment. Mr. Frantz argued, *inter alia*, that no further recovery could occur on the money judgment, because EM had foreclosed on the subject property in satisfaction of the same debt that underlay the money judgment. (R. 438).

III. Garnishment proceedings against Mr. Frantz in his personal capacity.

A. Pre-hearing litigation.

On August 7, 2015, EM filed a motion for entry of final judgment of garnishment against Mr. Frantz. (R. 495). On August 28, 2015, Mr. Frantz filed his answer to the motion, stating in relevant part that the monetary judgment "was satisfied upon the Plaintiff EM PAVING taking possession of the property which was the subject of the lawsuit. The Debt was satisfied by the Plaintiff upon receipt of the title to the property for which the debt was foreclosed upon *in rem.*" (R. 567).

On February 23, 2017, EM filed a motion for final summary judgment of garnishment against Mr. Frantz. (R. 692). EM addressed two arguments it expected Mr. Frantz to make "[b]ased upon Garnishee's discovery responses." (R. 700). First, the settlement proceeds belonged to Margherio, not Mr. Nemec personally. (R. 700). Second, the funds were held by Mr. Frantz personally because "Timothy Frantz, PA" had been administratively dissolved years before the settlement occurred. (R. 701).

On June 7, 2017, Mr. Frantz filed his response. (R. 711). He explained that in underlying suit, "Plaintiff was suing multiple defendants for the exact same set of facts. The Plaintiff sued because he completed asphalt and paving work on a parcel of property and was not fully compensated. Nothing else." (R. 713). EM

would receive a double recovery if it could enforce the original money judgment after an intervening judgment of foreclosure and judicial sale occurred. Pursuant to Section 713.28(3), Florida Statutes, the judgment on EM's construction lien was enforceable "in the same manner and under the same conditions as deficiency decrees." (R. 714). This meant that EM had to obtain a deficiency judgment before any further recovery could legally occur. (R. 714-15) (citing *Farah v. Iberia Bank*, 47 So. 3d 850 (2010); *Century Group, Inc. v. Premier Fin. Servs. East, L.P.*, 724 So. 2d 661 (Fla. 2d DCA 1999); *Flagship Bank of Orlando v. Bryan*, 384 So. 2d 1323, 1324 n.3. (Fla. 5th DCA 1980).

EM Paving did not file a reply.

On June 23, 2017, the Court denied the motion for summary judgment because "the record clearly demonstrates that issues of material fact exist as to the ownership of the funds paid to Mr. Nemec." (R. 792).

On December 21, 2017, EM filed a renewed motion for summary judgment. (R. 978). The motion argued only that "the subject settlement proceeds remained the property of Defendant Margherio, and not Michael Nemec," at the time Mr. Frantz took possession of them. (R. 985).

On April 4, 2018, Mr. Frantz filed his response to the renewed motion. (R. 1026). Mr. Frantz again argued that EM could not recover on the money judgment

any longer, and that garnishment was improper unless EM first obtained a deficiency judgment against Margherio. (R. 1029).

B. Hearing on motion for final judgment of garnishment.

On May 15, 2018, EM filed a motion for an order scheduling an evidentiary hearing on "Plaintiff's Motion for Entry of Final Judgment of Garnishment Against Timothy Albert Frantz, certificate of service date August 7, 2015." (R. 1071). The lengthy motion discusses issues related to the ownership of the funds in detail, (R. 1073-80), but does not mention the double recovery issue. The matter was eventually set for December 17, 2018, as a two hour "evidentiary hearing/trial" on the August 7, 2015 motion. (R. 1118).

The hearing occurred on Monday, December 17, 2018. EM Started with the July 13, 1010 money judgment for 71,849.12. EM sought to recover the $30,000 settlement based on that judgment. (R. 1404). Its opening statement addressed only the ownership of the settlement funds, not the double recovery issue, which it contended the court had already ruled upon. (R. 1404-1414).

Mr. Frantz explained that the court actually never had made "a conclusive ruling on the issue of double recovery." He asked the court to remember that the foreclosure claim against Mana's property and the breach of contract claim against Margherio were based on the same completed paving and asphalt work at the Benevides job site in Lake County. (R. 1418 (reminding that the two-count

complaint was "based on one set of facts)). Although EM had a clear right to obtain both a money judgment and a foreclosure judgment on the same debt, after foreclosing on the property it had to obtain a deficiency judgment proving that it had not been thereby adequately compensated for its work. (R. 1419-23). EM's "rights to collect against Margherio Construction ended on February 23rd, 2011 when they became the record titleholder of the property." (R. 1424). Mr. Frantz explained that "forcing me to pay EM Paving $30,000 would be inequitable because they have already been made whole under the law" through foreclosure. (R. 1426).

EM began the direct examination of Oman Munoz, asking whether he had heard Mr. Frantz's argument and establishing that EM had not received any money in satisfaction of "the final judgment in favor of EM Paving Corp. and against Margherio Construction" entered July 13, 2010. (R. 1448). As for the foreclosure, EM had not received "any value" from the property because its interests had in turn been foreclosed in the consolidated case. (R. 1449).

On cross examination, Mr. Munoz admitted he had not had the property appraised. (R. 1449). He did not remember how long he had owned the property, but thought it was probably more than six months. (R. 1250). He had visited the property at least once. He stated there were no tenants that he "was aware of" during his ownership and he denied collecting any rent. (R. 1251).

Mr. Frantz was then examined at length about the details of the settlement payment, the organization of his law practice, and his discovery responses. (R. 1431-41). A discussion was had regarding Mr. Frantz's arguments that the money judgment against Margherio could not be enforced after the foreclosure, and EM Paving's arguments that the Court lacked jurisdiction to grant Mr. Frantz declaratory relief. (R. 1442). Noting the jurisdictional nature of EM Paving's arguments in response to Mr. Frantz's petition, and EM's repeated failure to engage the arguments in the pleadings related to summary judgment, Mr. Frantz had occasion to remark that "you've never really addressed on a legal standpoint any of my double recovery arguments." (R. 1443). Although the court attempted to step in, counsel for EM berated Mr. Frantz, arguing "that's a false statement, isn't it, sir? Didn't we fully brief that issue?" Mr. Frantz maintained that he had "never seen anything fully briefed on that" from EM. (R. 1444).

In closing, EM argued that "there's a judgment in place. It's in full force and effect. It's never been collaterally attacked." (R. 1445). It was "mixing apples and oranges" to rely on cases where "you have a borrower on a note and there's a mortgage, there's a foreclosure." (R. 1445). According to EM, "if you're not a lender in this deficiency, it's a very different situation here. My client was not a lender. They were a subcontractor, got a judgment against the contractor, had a separate cause of action that yielded zero, as the testimony is." (R. 1446).

Therefore, there was no double recovery. (R. 1446). Although he did not "have the case law with me," counsel for EM assured the Court that "this is the same argument I made last time" which led the court to reject Mr. Frantz's argument "more than once." (R. 1445).

In his own closing, Mr. Frantz reminded the court that Section 713.28, Florida Statutes, specifically provided that subcontractors like EM had to follow the same procedures as lenders foreclosing on homes. (R. 1452). There was no need to collaterally attack the money judgment, because it became unenforceable when EM "took the property and became the owners." (R. 1453).

Whether EM's foreclosure resulted in any economic benefit to it did not concern Margherio or, by extension, Mr. Frantz as garnishee. EM's failure to retain the title it had sought and obtained was irrelevant, because it had elected to foreclose and actually obtained title at the foreclosure sale, instead of waiting in line with the other creditors defrauded by Mr. Benevides. "Whatever happened with them, whether they didn't pay their mortgage, they didn't pay their bills, they didn't pay their taxes and they got foreclosed on, that has nothing to do with what they received" when they foreclosed on the property. (R. 1453). If EM contended that it was still owed money, it had to first obtain a deficiency judgment to establish that foreclosing on the property had not satisfied the debt. (R. 1454). The rule against double recovery would not permit EM Paving to proceed on the

original money judgment against Margherio. Accordingly, "it's not our responsibility to seek a deficiency relief. It's the responsibility of EM Paving, the plaintiff, to through the deficiency process, and that wasn't done. And as such, they cannot enforce any writs of garnishment, and they cannot collect on this breach of contract against Margherio Construction." (R. 1455).

In rebuttal, counsel for EM Paving stated (incorrectly) that there had been no motion to dissolve the writ of garnishment, and that Mr. Frantz was "just plain wrong on the law." (R. 1455-56). He argued that the distinction was that here, EM's preceding money judgment was "against, not the property owner, but the contractor, Margherio," and therefore foreclosing on the property did not mean EM had to obtain a deficiency judgment. He also faulted Mr. Frantz for failing to "present any evidence here of market value of property." (R. 1456).

C. Final judgment of garnishment

On December 20, 2018, the court issued an order granting a final judgment of garnishment against Timothy Frantz. (R. 1227). The court rejected his argument that "the Plaintiff is limited to pursuing a deficiency judgment and is precluded from attempting to collect a separate judgment for the same debt." (R. 1230). The court reasoned that "Margherio was not a party to the foreclosure action, so it is doubtful that the Plaintiff could have recovered a deficiency judgment against it." (R. 1231).

The court agreed that "if the sale of the foreclosed property satisfied the judgment, then the Plaintiff would be precluded from attempting to collect the judgment against Margherio through this garnishment proceeding." (R. 1231). However, "where the Plaintiff lost title to the property shortly after acquiring it in the foreclosure action, it had nothing of value to offset the debt owed to the Plaintiff by the Defendants."

Also finding that "that the garnishee held funds belonging to Margherio between the time that the Writ of Garnishment was served and the filing of the Garnishee's Answer," the court granted final judgment of garnishment against Mr. Frantz for $30,000.

The Court reasoned that no deficiency judgment was necessary because "Margherio was not a party to the foreclosure action," casting doubt on Margherio's ability to recover on a deficiency judgment. The Court also stated that "the Plaintiff recovered nothing through the foreclosure proceeding" because of the subsequent foreclosure. Because "Plaintiff lost title to the properly [to a superior lienholder] shortly after acquiring it in the foreclosure action, it had nothing of value to offset the debt owed to the Plaintiff by the defendants."

Mr. Frantz filed a motion for rehearing, citing *Hammond v. Kingsley Asset Mgmt., Ltd. Liab. Co.*, 144 So. 3d 673 (Fla. 2d DCA 2014) in support of his continuing argument that EM Paving could not recover on the original money

judgment. (R. 1242). Mr. Frantz also argued that the amount of any deficiency could not lawfully be decided at the garnishment hearing, because the only issue properly before the court had been whether garnishment was proper. The amount of any deficiency was not noticed or framed in the pleadings, and the court had violated Mr. Frantz's due process rights by deciding the issue at the garnishment hearing. He explained that "at a properly noticed hearing he could put on evidence to disprove the Court's conclusion that 'the Plaintiff recovered nothing through the foreclosure proceeding,'" reasoning:

> A deficiency proceeding is an equitable proceeding at which the Court should consider all relevant facts. The record of the companion cases shows EM strategically sought a foreclosure order in this case before its interests had been adjudicated vis-à-vis the other claimants and appears to have actually obtained unencumbered ownership for more than two years. If EM failed to put the property to good use during its possession, it should have to answer in equity for its waste. Thus, even if the burden were properly placed on the garnishee to prove that an offset is warranted, it appears he could do so after appropriate time to prepare and conduct discovery.

(R. 1245).

On January 10, 2019, the court denied the motion for rehearing in an unexplained order. (R. 1304). Mr. Frantz appeals.

SUMMARY OF ARGUMENT

EM did nothing wrong by obtaining a money judgment first and a foreclosure judgment second. But when EM foreclosed, the debt was legally satisfied. If a portion of the debt was still owed, the burden fell on EM to prove it in separate deficiency proceedings. EM never did this, and therefore it had no judgment for which garnishment could issue.

To the extent that the original money judgment is enforceable, the due process rights of Margherio and Mr. Frantz were violated when the issue of deficiency was addressed at the garnishment proceedings. The amount remaining on the debt was not framed by the pleadings or properly noticed as an issue at the hearing, which was set to decide whether Mr. Frantz was subject to garnishment.

Finally, the court erred by ruling that the judgment against Margherio should not be reduced to account for EM Paving's successful foreclosure. The amount due EM Paving must be reduced by the higher of the market value of the property on the date of sale or the amount of the foreclosure sale. Equitable factors might warrant further adjustment. Here, where EM Paving foreclosed on the property immediately before claiming priority of interest against the other creditors, any final accounting should reflect the value of the property to EM Paving as a speculator moving to take advantage of a perceived insufficiency in the pleadings in the consolidated case.

STANDARD OF REVIEW

The Court reviews pure questions of law, such as whether a writ of garnishment could issue to enforce the original money judgment, *de novo.* *Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010). The granting or denial of a deficiency judgment is committed to "sound judicial discretion, which must be supported by established equitable principles as applied to the facts of the case, and the exercise of which is subject to review on appeal." *Vantium Cap., Inc. v. Hobson*, 137 So. 3d 497, 499 (Fla. 4th DCA 2014). Factual determinations underlying the exercise of discretion are reviewed for competent substantial evidence. Philip J. Padovano, *Florida Appellate Practice*, § 19.5, at 155 (2013 Ed. Vol. 2) (citing *Charlotte Cty. v. Vetter*, 863 So. 2d 465 (Fla. 3d DCA 2004)).

ARGUMENT

I. The district court erred by permitting EM Paving to enforce the original money judgment against Margherio, after EM Paving foreclosed on the subject property in satisfaction of the same debt and purchased the property at the foreclosure sale.

No one disputes that a lienholder like EM can obtain a monetary judgment on a breach of contract claim before or in addition to a judgment of foreclosure. *E.g.*, *Royal Palm Corp. Ctr. Ass'n v. PNC Bank, NA*, 89 So. 3d 923, 933 (Fla. 4th DCA 2012) (describing history and policy behind the "money judgments first, foreclosures second" procedure recognized in Florida and most jurisdictions); *see also* § 713.28(1), Fla. Stat. (allowing lienor to recover separate judgment on breach

of contract), § 713.30, Fla. Stat. When multiple defendants owe the same debt, a creditor can obtain a judgment "against each of the guarantors and the debtor. However, the indebtedness can be collected only once, and any payment on any of the judgments must be credited to the others." *Flagship Bank of Orlando v. Bryan*, 384 So. 2d 1323, 1324 n.3. (Fla. 5th DCA 1980); *see also Royal Palm*, 89 So. 3d at 929; § 713.28(3), Fla. Stat. (establishing that, for construction liens, "[a]ny payment made on account of any judgment or decree in favor of a party shall be credited on any other judgment or decree rendered in favor of that party in the same action.").

To prevent double recovery, when a party contends that it is still owed money after a foreclosure, "the trial court must conduct a deficiency hearing to determine the amount of set-off from the foreclosure sale." *Hammond v. Kingsley Asset Mgmt., Ltd. Liab. Co.*, 144 So. 3d 673 (Fla. 2d DCA 2014). Mr. Frantz contends that this principle covers the instant case, because EM Paving ultimately seeks to recover for the same debt upon which the judgment of foreclosure was premised.

In *Hammond*, the creditor Kingsley brought a three-count action to foreclose a commercial mortgage, and to obtain damages on a promissory note and damages on guaranty agreements. The court issued a final judgment of foreclosure and a separate final monetary judgment for the same amount. 144 So. 3d at 674. At the

subsequent foreclosure sale, Kingsley obtained Ms. Hammond's 15.75% interest in the mortgaged property. The issue on appeal was "whether, now that Kingsley has sought and obtained a foreclosure sale of the property, it can collect purely on the money judgment without first obtaining a deficiency judgment." *Id.* at 675. On appeal, the court explained that "To avoid the possibility of a double recovery, before Kingsley can execute on the promissory note, the trial court must conduct a deficiency hearing to determine the amount of set-off from the foreclosure sale." *Id.* at 676. Moreover, "because Hammond is jointly and severally liable here, a deficiency hearing will allow the court to determine if Kingsley has collected on the debt from any of the other defendants." *Id.* fn.2. The *Hammond* court therefore reversed with instructions to grant the motion to dissolve the writ of garnishment.

The same considerations apply here. Admittedly, Margherio's liability arises from contract, not from the construction lien that allowed EM Paving to foreclose on the subject property. But Margherio's debt was the same debt for which foreclosure had issued, and it was jointly and severally liable. Here, as in *Hammond*, "complications arise" because EM alleges that "the proceeds resulting from the initial collection method . . . do not satisfy the entire debt." 144 So. 3d at 675 (quoting *Century Group, Inc. v. Premier Financial Services East, L.P.*, 724 So. 2d 661, 662 (Fla. 2d DCA 1999)). Those complications create the same risk of

double recovery described in *Hammond*. If the foreclosure and sale of the property in this case did not satisfy Margherio's debt, EM should have timely proceeded "in the same manner and under the same conditions as deficiency decrees in mortgage foreclosures." § 713.28, Fla. Stat.

Many cases feature mortgagees who failed to obtain a deficiency judgment and sought to instead proceed on the note. *E.g.*, *Schneider v. First Am. Bank*, 252 So. 3d 264, 266 (Fla. 4th DCA 2018); *Farah v. Iberia Bank*, 47 So. 3d 850, 851 (Fla. 3d DCA 2010). But the deficiency judgment procedure extends to guarantors as well. *Levine v. United Cos. Life Ins. Co.*, 638 So. 2d 183, 184 (Fla. 3d DCA 1994) (guarantors "may not be held liable for the full amount of the judgment prior to a determination of a deficiency). As the Second DCA has observed, "the fact that the appellee subsequently lost title to the property to a superior lienholder has no effect" on whether the remaining amount due should be reduced. *Hatton v. Barnett Bank of Palm Beach Cty.*, 550 So. 2d 65, 67 (Fla. 2d DCA 1989). Here, no recovery should occur until a deficiency judgment issues that reduces the original money judgment by "the higher of either the successful bid at the judicial sale or the fair market value at the time of the judicial sale." *Id.* at 68.

II. The district court erred by deciding whether a deficiency existed at the garnishment hearing rather than a properly noticed deficiency hearing.

Florida law requires that matters to be decided adversarially be set for hearing and properly noticed in time for a fair hearing. Fla. R. Civ. P. 1.090(d); *see Gaspar's Passage, Ltd. Liab. Co. v. RaceTrac Petroleum, Inc.*, 243 So. 3d 492, 500 (Fla. 2d DCA 2018) (discussing due process guarantee protected by Rule 1.090(d)). This rule extends to deficiency proceedings. *Dabas v. Bos. Inv'r Grp., Inc.*, 231 So. 3d 542, 546 & n.4 (Fla. 3d DCA 2017) (deficiency proceedings should be set as an evidentiary hearing to fix unliquidated sum, and burden is on party seeking deficiency order); *Boynton-Whitworth Farms, Ltd. Liab. Co. v. Cadence Bank*, 163 So. 3d 615 (Fla. 4th DCA 2015) (due process denied where deficiency judgment issued without notice and opportunity to be heard).

The subject of the evidentiary hearing on garnishment, as noticed and framed by the pleadings, was whether the $30,000 payment obtained in the settlement of Margherio's claims in Case 5d14-3863 was wrongfully disbursed to its president Michael Nemec directly, and whether Mr. Frantz was personally liable on the release of those funds. From the motion to dissolve the writ of garnishment to the pre-hearing request for judicial notice, Mr. Frantz had argued that as a matter of law garnishment was not available because the money judgment was a legal nullity. The issue was whether Mr. Frantz was liable on Margherio's debt.

More importantly, the unfairness extends beyond Mr. Frantz, who was a party to the garnishment proceedings, to Margherio, who was not. Ultimately it is Margherio whose legal obligation is embodied in the judgment, and whose corresponding interest in the existence and amount of any debt must be respected. If Florida law permits the deficiency issue to be litigated in garnishment proceedings, the Court should nevertheless stop short of allowing the issue to be decided without the party against whom the original money judgment was issued.

III. The circuit court erred by finding that EM Paving received no value from its two-year ownership of the subject property.

Finally, EM Paving has failed to carry its burden to show that it was not made whole when it purchased the property at the foreclosure sale.

"Where it is clear that the total debt secured by a lien on property is more than the fair market value of that property at the date of the foreclosure sale, the granting of a deficiency decree is the rule rather than the exception." *Vantium Cap., Inc. v. Hobson*, 137 So. 3d 497, 499 (Fla. 4th DCA 2014). But the party seeking to recover still has the initial "burden to prove that the fair market value of the collateral was less than the total debt." *Coral Gables Fed. Sav. & Loan Ass'n v. Whitewater Enters.*, 614 So. 2d 682, 682-83 (Fla. 5th DCA 1993). Equitable considerations such as unclean hands may inform the amount of a deficiency awarded after a foreclosure. *McCollem v. Chidnese*, 832 So. 2d 194, 196 (Fla. 4th DCA 2002).

When a foreclosure action is combined with an action on the guaranty, courts have held that the ultimate liability of the guarantor will be for the deficiency, which is calculated as the "higher of either the successful bid at the judicial sale or the fair market value at the time of the judicial sale." *Hatton v. Barnett Bank of Palm Beach County*, 550 So. 2d 65, 68 (Fla. 2d DCA 1989) (applying same rule to deficiency sought by second mortgagee who was subsequently foreclosed and extinguished by first mortgagee's foreclosure sale).

Only $100 was bid for subject property. However, the record indicates that the fair market value of the subject property was much higher, and should be used here because the nominal bid does not reflect the value of the property to EM Paving. A $100 bid might normally indicate a hopelessly clouded title, but that was clearly not how the situation appeared to EM. Immediately after EM Paving obtained its certificate of title, it argued – successfully – that its claims had priority over the mortgageholder and the other creditors. It was only after the mortgagee alleged equitable subrogation (which EM Paving contested vigorously) that EM Paving lost title to the subject property. Therefore, the record does not support a finding that EM Paving received nothing of value. It sought, and received, its opportunity to establish priority of interest based on the pleadings in the consolidated case. Obviously, the market value of EM's interest plummeted after the mortgagee's right to equitable subrogation was established – but that occurred

after the relevant date, which is the date of the foreclosure sale. *First Union Nat'l Bank v. Goodwin Beach P'ship*, 644 So. 2d 1361, 1364 (Fla. 5th DCA 1994).

Mr. Munoz's flat denial that he received anything of value did not carry his burden to show that EM Paving received no value from a foreclosure. Cf. *Weiner v. Am. Petrofina Mktg., Inc.*, 482 So. 2d 1362, 1364 (Fla. 1986) (explaining, in context of deficiency judgment in UCC cases, that party seeking deficiency judgment must show that it disposed of collateral in commercially reasonable or else face presumption that collateral was equal in value to debt owed).

Putting the burden on EM Paving is consistent with reason and reality, as well. Mr. Frantz would obviously be prejudiced by his appraiser's inability to inspect and compare properties as they existed on February 9, 2011. A party who executes a judgment should not be permitted, must less encouraged, to remain silent as to whether any outstanding obligation remains. *Frohman v. Bar-Or*, 660 So. 2d 633, 635 (Fla. 1995) (holding that motion to dismiss for failure to prosecute is available when party takes no further action after foreclosure sale).[2]

[2] No action occurred in this case for two years, from the February 23, 2011 issuance of title to EM's February 22, 2013 motion for contempt.

CONCLUSION

EM Paving fought hard to foreclose its construction lien and obtain title to the subject property. Immediately afterwards, in the consolidated case that the other creditors all proceeded in, EM obtained an order establishing superior title to the other creditors in the consolidated case. EM now claims that, although it held title to the property for about a year, it obtained nothing of value from the foreclosure proceedings. Its president's flat assertion is not competent, substantial evidence to support the trial court's ruling. But the issue should not even have been decided, because EM Paving did not notice a hearing on whether any deficiency remained after the foreclosure. It should have noticed an appropriate hearing and obtained a deficiency judgment before seeking garnishment. The final judgment of garnishment should be reversed, and the case remanded.

Respectfully Submitted,

/s/ Gray Proctor
GRAY R. PROCTOR
Florida Bar No. 48192
LAW OFFICE OF GRAY PROCTOR
1108 E. Main Street, Suite 803
Richmond, VA 23219
Ph: (888) 788-4280
Email: gray@appealsandhabeas.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served via email through the Florida e-filing portal this 16th day of July 2019 to:

Barry Kalmanson, Esquire
BARRY KALMANSON, P.A.
500 North Maitland Avenue
Suite 305
Maitland, Florida 32751,

at bk@barrykalmanson.com and pjsugg@barrykalmanson.com

Respectfully Submitted,
/s/ Gray Proctor

CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this brief is typed in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/Gray R. Proctor
Attorney