

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

BANK OF NEW YORK AS TRUSTEE
FOR THE CERTIFICATES HOLDERS CWABS,
INC., ASSET-BACKED CERTIFICATES
SERIES 2005-14,

Plaintiff,

v.

OLIVIA HANNIBLE, et al.,

Defendants.

CASE NUMBER: 01-2007-CA-5354

DIVISION: J

**ORDER GRANTING MOTION FOR RELIEF AND VACATING FINAL JUDGMENT
AND JUDICIAL SALE**

THIS CAUSE came before the Court on Defendant Olivia Parler's (formerly Olivia Hannible) motion and amended motion to stay writ of possession, motion for relief from final judgment, and motion to set aside judicial sale. All parties were properly noticed. Attorney Glorimil Walker appeared on behalf of Defendant Olivia Parler, and Attorneys Bruce Brashear and Peter Focks appeared on behalf of Jonphe Guilamo, the movant for writ of possession (as assignee of the subject property from Plaintiff following judicial sale). By separate Order, the Court has granted the Defendant's motion to stay writ of possession.

Defendant's present motion for relief from final judgment is essentially the renewal of a motion made by Defendant much earlier in this litigation that has never been ruled upon. The complaint in this mortgage foreclosure action was filed on December 28, 2007. The Defendants, Olivia Hannible and James Hannible, did not answer the complaint after it was served upon them, and a default was entered as to both of them on March 27, 2008. Thereafter, the Plaintiff moved for summary final judgment. Despite having included in its complaint a count for re-establishment of a lost note, Plaintiff filed what it purported to be the original adjustable rate note and original mortgage. Plaintiff is not the original payee and mortgagee, but claimed to be the owner and holder thereof.

Plaintiff's motion for summary judgment was set for hearing, canceled and rescheduled several times. Eventually the case was referred to a general magistrate. At a conference with the general magistrate, the Plaintiff appeared¹ and a date was set for a non-jury trial before the general magistrate. It appears that the notice setting this non-jury trial which was sent to Defendant Olivia Parler was returned due to an insufficient address. Thereafter, Plaintiff set and served notice of a hearing on its motion for summary judgment, setting it for the same date and time as the non-jury trial, but indicating that its motion would be heard by a circuit judge, not the general magistrate. This notice was sent to Defendant at an address which appears to be the same address at which Defendant was originally served with process. Then, approximately ten days before the scheduled hearing and non-jury trial, Plaintiff's counsel served a notice of cancellation of the hearing which it had scheduled before the judge. The non-jury trial before the magistrate, however, was held, and the transcript indicates that the Defendant, who did not receive proper notice, did not appear. Thereafter the magistrate filed a report and recommendation and a final judgment of foreclosure, which included items of unliquidated damages, was entered by the Court. Approximately three weeks after service of the final judgment of foreclosure, the Defendant filed a "Motion to Cancel Sale",² pro se. In this motion, the Defendant claimed that she was not afforded the opportunity to be present at the non-jury trial because she had received a notice from Plaintiff's counsel that the only hearing she knew about had been canceled. Shortly thereafter, Plaintiff also filed a motion to cancel the sale because it needed additional time to assure compliance with a consent order entered in a matter involving the U.S. Department of Justice and the Florida Attorney General's office. Although both parties were at that time requesting the cancellation of the foreclosure sale, the Plaintiff's motion was denied. There is no indication, however, of any ruling with respect to the Defendant's motion to cancel sale (or for relief from judgment entered without notice). Perceiving that the Court's

1 The order setting this conference was sent to Defendant at an address that does not appear to be her address of record.

2 In substance, this was a timely motion for relief from judgment for failure to afford Defendant due process.

denial of the Plaintiff's motion to cancel sale was an indication that the sale would not be canceled, the pro se Defendant then filed an appeal on the day before the scheduled sale. It was described as an appeal of the denial of the motion to cancel sale. Nonetheless, the sale took place on the following day, and the schedule of bids indicates that Plaintiff was the successful bidder. This first appeal by the pro se Defendant was eventually dismissed because the Defendant could not comply with the requirement that she file a conformed copy of the order being appealed. There never having been an order entered on her motion to cancel sale, this would have been impossible to do. Regardless, Defendant tried in various inartful ways to request that the sale and the certificate of sale be "revoked", repeating her claim that she had never had an opportunity to be present at the non-jury trial which resulted in entry of the final judgment of foreclosure.

A second appeal was filed with respect to denial of another post-judgment motion by Defendant. This appeal was initially dismissed and then reinstated. As part of that pending appeal, an order requiring Defendant to post a \$5,000 bond to avoid a writ of possession was reviewed and approved. Both parties agree that the matters under present consideration by this court would not interfere with the issues pending in the appellate court, although that appeal would certainly be impacted and rendered moot if the final judgment (which is not on appeal) was vacated.

Although defaulted, and precluded from contesting liability, the Defendant is still entitled to be heard on the issue of unliquidated damages. *Donohue v. Brightman*, 939 So. 2d 1162 (Fla. 4th DCA 2006). No motion has ever been made which seeks to challenge or set aside the entry of default against the Defendant, and the time to do so based on excusable neglect has expired.

Accordingly, it is hereby ORDERED AND ADJUDGED:

1. The final judgment of foreclosure is vacated and set aside. The judicial sale is likewise set aside.
2. This matter will be set for a case management conference for the purpose of establishing a new non-jury trial date on the issue of damages and any other

issues not otherwise precluded by entry of default.

3. Until further order of the Court, all remaining issues herein will be set before and resolved by the undersigned judge unless and until reassigned.

DONE AND ORDERED in Chambers, at Gainesville, Alachua County, Florida on this 21 day of March 2014.



TOBY S. MONACO, CIRCUIT JUDGE

I HEREBY CERTIFY that copies have been furnished by e-mail delivery and/or U.S. Mail on March 21, 2014, to the following:

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