

IN THE CIRCUIT COURT OF THE  
NINETEENTH JUDICIAL CIRCUIT, IN AND  
FOR INDIAN RIVER COUNTY, FLORIDA

CASE NO: 312013-CA-001615


BANK OF AMERICA, N.A.

Plaintiff,

vs.

TIMOTHY D. WILLSON; KIMBERLY M. WILLSON  
A/K/A KIMBERLY MICHELLE WILLSON; ANY AND  
ALL UNKNOWN PARTIES CLAIMING BY,  
THROUGH, UNDER AND AGAINST THE HEREIN  
NAMED INDIVIDUAL DEFENDANT(S) WHO ARE  
NOT KNOWN TO BE DEAD OR ALIVE, WHETHER  
SAID UNKNOWN PARTIES MAY CLAIM AN  
INTEREST AS SPOUSES, HEIRS, DEVISEES,  
GRANTEES, OR OTHER CLAIMANTS; BANK OF  
AMERICA N.A.; UNKNOWN TENANT #1 IN  
POSSESSION OF THE PROPERTY; UNKNOWN  
TENANT #2 IN POSSESSION OF THE PROPERTY;

Defendants

FILED FOR RECORD  
PROTESTED BY SHIP  
COURT  
15 JAN 12 PM 1:06  
JEFFREY R. SMITH  
CLERK OF CIRCUIT COURT  
INDIAN RIVER COUNTY, FL  
BY  D.C.

**FINAL JUDGMENT OF FORECLOSURE**

THIS ACTION came before the court for trial on December 1, 2014 and after hearing sworn testimony, receiving evidence, hearing argument of counsel and being otherwise duly advised in the premises, the Court makes the following findings of fact and conclusions of law:

A. This foreclosure action was filed on December 2, 2013 based upon the Defendants' failure to make their December 1, 2008 mortgage payment. A notice of default was mailed to the Defendant on January 16, 2009. Defendants' filed their answer and affirmative defenses on June 19, 2014.

B. The Court had the opportunity to observe the demeanor and weigh the credibility of the witness and the Defendant. Briana May, who works for Bank of America as an operations team manager, was credible and qualified as a records custodian to authenticate the business records of Bank of America and to explain/interpret them based on the recordkeeping policies and procedures of Bank of America. She has had sufficient training and experience and personal knowledge with respect to the applicable policies and procedures of the Bank(s).

C. The Defendant/Borrowers borrowed \$295,000 and executed the subject Note and Mortgage on February 23, 2005. They agreed to pay principal and interest

payments of \$1,792.45 per month (with a fixed 6.125% interest rate), together with insurance and tax escrows. The property used as collateral for the Note is situated in Indian River County, Florida. The originating lender was Countrywide Home Loans, who assigned the loan to Bank of America on May 1, 2008.

D. The testimony demonstrated that Bank of America possessed and held the Note (which contains an open endorsement) prior to the filing of this action. Fannie Mae owns the note and authorized Bank of America to service the loan. Florida Statute Section 673.2011 makes it clear that entitlement to enforce a mortgage depends on possession, not ownership interest.

E. The undisputed testimony was that there have been no payments made since the November 6, 2008 or for 73 months @ \$1,792.45 owing at least \$130,848.85 in delinquent principal and interest payments alone. It is also undisputed that the Defendants have paid no taxes, insurance or escrow payments since 2008 and have an escrow balance of \$78,561.86. The loan documents, payment history and default letter were admitted into evidence without objection as Plaintiff's composite 1. The Defendant provided no clear explanation for his failure to pay the amounts due since December 2008. Although the payment history included a principal adjustment of \$21,585.04, there was no credible testimony or evidence to support the additional principal due.

F. The Court took judicial notice of three prior foreclosure cases pertaining to the Defendant and the subject property. It is undisputed that the loan was previously in default and that two foreclosure cases were filed before it was reinstated. The first foreclosure action was filed on August 8, 2007 based upon an April 1, 2007 default and was voluntarily dismissed on August 23, 2007 (Case No. 2007CA0986 by Countrywide). A second action was filed by Countrywide on March 27, 2008 based on the same April 1, 2007 default and voluntarily dismissed on January 21, 2011 (Case No. 2008CA0706).

G. After the loan was reinstated or modified, a subsequent default occurred on December 1, 2008. This resulted in the third action being filed by Bank of America (f/k/a Countrywide) on July 21, 2009 (Case No. 2009CA011798). It was dismissed for lack of prosecution on August 24, 2012.

H. This fourth foreclosure action was filed on December 2, 2013 based on the same December 1, 2008 default.

I. The Defendant moved for a directed verdict and argued that this action is barred by res judicata since the 2009 case was dismissed for lack of prosecution. The doctrine of res judicata does not necessarily bar successive foreclosure suits, even when the prior action was adjudicated on the merits. *2010-3 SFR Venture v. Garcia*, 149 So. 3d 123 (Fla. 4<sup>th</sup> DCA 2014) quoting *Singleton v. Greymar*, 883 So. 2d 1004 (Fla. 2004); see also *Evergrene v. Citibank*, 143 So. 3d 954 (Fla. 4<sup>th</sup> DCA 2014). A dismissal for failure to prosecute does not involve an adjudication on the merits. *Gibbs v. Trudeau*, 283 So. 2d 889 (Fla. 1<sup>st</sup> DCA 1973); *Bair v. Palm Beach Newspapers*, 387 So. 2d 517 (Fla. 4<sup>th</sup> DCA 1980); *Murphy White Dairy v. Simmons*, 405 So. 2d 298 (Fla. 4<sup>th</sup> DCA 1981). Accordingly, the 2009 dismissal did not adjudicate any claims. For res judicata to apply, there must be a clear-cut former adjudication on the merits. *Weit v. Rhodes*, 691 So. 2d

1108 (Fla. 4<sup>th</sup> DCA 1997) quoting *Suniland v. Wilbenka*, 656 So. 2d 1356 (Fla. 3d DCA 1995). See also *deCancino v. Eastern Airlines*, 283 So. 2d 97 (Fla. 1973).

J. After receiving the notice of default and service of two foreclosure suits, the Defendant ignored and failed to make subsequent payments that were due. Valid defaults were proven and it was undisputed that Defendants have failed to make any payments since November 2008. Although the Defendant also raised the statute of limitations, the statute starts to run on the date each payment became due. While any payment defaults that were more than five years old are subject to the statute of limitations, each payment default less than five years old (payments due each month since 12/3/08) created a basis for a subsequent foreclosure and/or acceleration action. *Singleton*, 882 So. 2d at 1008.

K. The Court finds that the Plaintiff satisfied all conditions precedent to the filing of the foreclosure action. On January 16, 2009, Plaintiff sent Defendant a Notice of Intent to Accelerate at the Defendant's proper mailing address. The Notice advised the Defendant that the loan was in default, and identified the date of default as well as the amount past due. The Notice also provided cure instructions and an adequate deadline for compliance. The Defendant was subsequently sued and served two actions for foreclosure. The Defendant offered no credible testimony or evidence that he was not provided notice of the default.

L. Other than the principal adjustment, the Defendant has offered no evidence that the amounts due and owing were incorrect or inaccurate. The Defendants have remained on the property without a single payment since December 2008 while the Plaintiff has maintained their insurance and real estate taxes for more than 6 years. The loan is presently in default, and the Plaintiff is entitled to the immediate entry of a Final Judgment of Foreclosure.

M. The Plaintiff hired the law firm to represent it in this matter and pursuant to the Mortgage is entitled to recover its legal fees and costs for litigating this matter. The Court will retain jurisdiction to determine the amount of the reasonable attorney's fees and costs.

IT IS ADJUDGED that the final judgment is entered against all Defendants and further orders:

1. The following amounts are due from Defendants to Plaintiff, **BANK OF AMERICA, NA**:

Principal as of 12/3/08	\$ 286,002.59
Interest from 12/3/08 to 1/12/15 (Per diem at \$47.99 x 2231 days)	\$ 107,073.69
Property Inspection	\$ 645.00
Taxes	\$ 23,777.38

2014 - \$3,093.70	
2013 - \$3,042.69	
2012 - \$2,942.38	
2011 - \$3,076.26	
2010 - \$3,974.32	
2009 - \$7,648.03	
Hazard Insurance	\$ 54,945.25
2014 - \$6,622.97	
2013 - \$8,291.28	
2012 - \$10,007.96	
2011 - \$11,402.72	
2010 - \$9,310.16	
2009 - \$9,310.16	
Escrow Credit	(\$ 160.77)
Court Costs:	
Complaint Filing Fee	\$ 1,995.50
Service of Process	\$ 300.00
E-Filing Fee	\$ 59.87
Attorneys' fees	RESERVED
<b>TOTAL</b>	<b>\$ 474,638.51</b>

2. **Interest.** The total amount in paragraph 2 shall bear statutory interest, currently 4.75%, from this date forward until paid.

3. **Lien on Property.** Plaintiff holds a lien for the total sum superior to all claims or estates of defendant(s), TIMOTHY D. WILLSON; KIMBERLY M. WILLSON A/K/A KIMBERLY MICHELLE WILLSON; BANK OF AMERICA N.A., on the following described property in Indian River County, Florida:

**LOT 18 AND 19, BLOCK 10, VERO BEACH ESTATES, ACCORDING TO THE PLAT THEREOF AS RECORDED IN PLAT BOOK 5, PAGE 8, PUBLIC RECORDS OF ST. LUCIE COUNTY, FLORIDA; SAID LAND NOW LYING AND BEING IN INDIAN RIVER COUNTY, FLORIDA. Property Address: 645 CYPRESS ROAD, VERO BEACH, FL 32963, Indian River**

4. **Sale of Property.** If the total sum with interest at the rate described in paragraph 2 and all costs accrued subsequent to this judgment are not paid, the clerk of this court shall sell the property at public sale on **FEBRUARY 17, 2015**, to the highest bidder for cash, except as prescribed in paragraph 6, by electronic sale at www.indian-river.realeforeclose.com beginning at 10:00 a.m. in accordance with section 45.031, Florida Statutes **The public sale shall not be postponed or canceled without a court order, and shall proceed regardless of whether plaintiff, a plaintiff's representative, or plaintiff's counsel is present. All orders postponing or canceling the sale must be filed with the clerk of court no later than 5:00 p.m. two business days before the sale**

**date. Counsel for plaintiff must be certain that the clerk has the original proof of publication of the notice of sale on file no less than three business days before the sale date. Failure to file the original proof of publication of the notice of sale will not stop the sale, however the certificate of sale will not issue until the original proof of publication of notice of sale is filed. The failure of plaintiff's counsel to properly and timely publish the notice of sale may result in sanctions against the plaintiff, plaintiff's counsel individually, and the law firm representing the plaintiff.** If the original proof of publication of the notice of sale is not filed with the clerk within ten calendar days after the sale, an order will be entered directing the plaintiff to show cause why the sale should not be vacated and the case dismissed with or without prejudice. The fact that an attorney has a high volume practice will not be a showing of good cause. Any electronic sale by the clerk shall be in accordance with the written administrative policy for electronic sales published by the clerk at the official website for the clerk and posted in the public areas of the clerk's offices.

5. **Costs.** Plaintiff shall advance all subsequent costs of this action and shall be reimbursed for them by the clerk if plaintiff is not the purchaser of the property for sale, provided, however, that the purchaser of the property for sale shall be responsible for the documentary stamps payable on the certificate of title. If plaintiff is the purchaser, the clerk shall credit plaintiff's bid with the total sum with interest and costs accruing subsequent to this judgment, or such part of it, as is necessary to pay the bid in full. The clerk shall receive the service charge imposed in Section 45.031, Florida Statutes.

6. **Distribution of Proceeds.** On filing the certificate of title, the clerk shall distribute the proceeds of the sale, so far as they are sufficient, by paying: first, all of plaintiff's costs; second, documentary stamps affixed to the certificate; third, plaintiff's attorneys' fees; fourth, the total sum due to plaintiff, less the items paid, plus interest at the rate prescribed in paragraph 2 from this date to the date of the sale; and by retaining any remaining amount pending the further order of this court.

7. **Right of Redemption.** 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 chapter 720, Florida Statutes, if any.

8. **Right of Possession.** Upon the filing of the certificate of title, the person named on the certificate of title shall be let into possession of the property, subject to the provisions of the "Protecting Tenant At Foreclosure Act of 2009" without further hearing.

9. **Jurisdiction Retained.** Jurisdiction of this action is retained to enter further orders that are proper including, without limitation, writs of possession and a deficiency judgment.

**IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THE FINAL JUDGMENT. IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO**

**LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS.**

**IF YOU ARE THE PROPERTY OWNER, YOU MAY CLAIM THESE FUNDS YOURSELF. YOU ARE NOT REQUIRED TO HAVE A LAWYER OR ANY OTHER REPRESENTATION AND YOU DO NOT HAVE TO ASSIGN YOUR RIGHTS TO ANYONE ELSE IN ORDER FOR YOU TO CLAIM ANY MONEY TO WHICH YOU ARE ENTITLED. PLEASE CHECK WITH THE CLERK OF THE COURT, (INSERT INFORMATION FOR APPLICABLE COURT) WITHIN 10 DAYS AFTER THE SALE TO SEE IF THERE IS ADDITIONAL MONEY FROM THE FORECLOSURE SALE THAT THE CLERK HAS IN THE REGISTRY OF THE COURT.**

**IF YOU DECIDE TO SELL YOUR HOME OR HIRE SOMEONE TO HELP YOU CLAIM THE ADDITIONAL MONEY, YOU SHOULD READ VERY CAREFULLY ALL PAPERS YOU ARE REQUIRED TO SIGN, ASK SOMEONE ELSE, PREFERABLY AN ATTORNEY WHO IS NOT RELATED TO THE PERSON OFFERING TO HELP YOU, TO MAKE SURE THAT YOU UNDERSTAND WHAT YOU ARE SIGNING AND THAT YOU ARE NOT TRANSFERRING YOUR PROPERTY OR THE EQUITY IN YOUR PROPERTY WITHOUT THE PROPER INFORMATION. IF YOU CANNOT AFFORD TO PAY AN ATTORNEY, YOU MAY CONTACT (INSERT LOCAL OR NEAREST LEGAL AID OFFICE AND TELEPHONE NUMBER) TO SEE IF YOU QUALIFY FINANCIALLY FOR THEIR SERVICES. IF THEY CANNOT ASSIST YOU, THEY MAY BE ABLE TO REFER YOU TO A LOCAL BAR REFERRAL AGENCY OR SUGGEST OTHER OPTIONS. IF YOU CHOOSE TO CONTACT (NAME OF LOCAL OR NEAREST LEGAL AID OFFICE AND TELEPHONE NUMBER) FOR ASSISTANCE, YOU SHOULD DO SO AS SOON AS POSSIBLE AFTER RECEIPT OF THIS NOTICE.**

DONE AND ORDERED on January 12, 2014 at Vero Beach, Florida.

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CYNTHIA L. COX, Circuit Judge

**Copies to:**

MARINOSCI LAW GROUP, P.C. 100 WEST CYPRESS ROAD, SUITE 1045 FORT LAUDERDALE, FL 33309 [serviceFL@mlg-defaultlaw.com](mailto:serviceFL@mlg-defaultlaw.com); [servicefl2@mlg-defaultlaw.com](mailto:servicefl2@mlg-defaultlaw.com)  
LEO DESMOND, ESQ @ [lwd@verobeachlegal.com](mailto:lwd@verobeachlegal.com)  
BANK OF AMERICA, NA 1425 NW 62<sup>ND</sup> AVENUE FORT LAUDERDALE, FL 33309  
UNKNOWN TENANTS 645 CYPRESS ROAD VERO BEACH, FL 32963