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DECEMBER 6, 2019 | PUBLICATION

Client Alert: Fourth DCA Reverses Itself in Ober, Restores Certainty with Foreclosures

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Back in October, Shumaker published a Client Alert which described the judicial uncertainty generated by the decision in *Ober v. Town of Lauderdale-by-the-Sea*, 41 Fla. L. Weekly 1978, Case No. 4D14–4597 (Fla. 4th DCA, August 24, 2016). In *Ober,* the Fourth District Court of Appeal (the "Court") held that the lis pendens statute (section 48.23, Florida Statutes—the "Lis Pendens Statute") would *not* serve to extinguish liens which attach to foreclosed property after the entry of a final judgment for foreclosure, but *before* the judicial foreclosure sale. Following a motion for rehearing, however, the Court reversed itself, and in its new opinion entered on January 25, 2017, held that liens placed on real property subsequent to a final judgment of foreclosure, but before a judicial sale, were discharged under the Lis Pendens Statute.

In support of the reversal, the Court cited the broad language of the Lis Pendens Statute, which applies to "all interest and liens" and "expressly contemplates that its preclusive operation continues through a 'judicial sale.'" The Court received a total of eight amicus briefs (from the Florida Land Title Association, the Business Law Section of the Florida Bar, the Florida Bankers Association, the Real Property, Probate and Trust Law Section of the Florida Bar, the American Legal and Financial Network, the City of St. Petersburg, the City of Tampa and the City, County and Local Government section of the Florida Bar) in connection with the motion for rehearing, and quoted several of them in its opinion. In particular, the Court referenced the

amicus brief filed by the Florida Bankers Association, which noted that foreclosure lawsuits are unlike typical civil lawsuits, as "much remains to be accomplished after entry of final judgment, including the foreclosure sale, the issuance of certificates of sale and title, and, in many instances, the prosecution of a deficiency claim, all under court supervision." The fact that such liens arise between judgment and sale is part of the "practical problem" of the "long lag time between the foreclosure judgment and the foreclosure sale." While there are some circumstances in which such delays are unavoidable (i.e., the debtor files bankruptcy), more frequently the trial courts themselves have invited this issue by routinely granting extended foreclosure sale dates or cancelling foreclosure sales based on some compassion for the borrower.

Indeed, as noted in Shumaker's Client Alert following the prior *Ober* decision, the foreclosure sale statute (section 45.031(1)(a), Florida Statutes) expressly requires the court to enter an order or final judgment directing the clerk to sell the property "on a specified day that shall be not less than 20 days or more than 35 days after the date thereof," and only allows for a sale to be scheduled "more than 35 days after the date of final judgment or order if the plaintiff or plaintiff's attorney consents to such time." Moreover, the appellate courts have universally held that postponing a foreclosure sale over the plaintiff's objection is an abuse of discretion. *See, e.g., Firstbank Puerto Rico v. Othon*, 190 So. 3d 110, 111 (Fla. 4th DCA 2015) ("neither the fact that the respondents in this case listed their property in hopes of obtaining a short sale nor the fact that the wife had medical problems is a ground to cancel the sale. The trial court contravened the statutory direction."), citing *Republic Federal Bank, N.A. v. Doyle*, 19 So.3d 1053 (Fla. 3d DCA 2009). Nonetheless, delayed sales are routine in practice.

While this decision may have temporarily restored some certainty with respect to lis pendens in foreclosures, the Town of Lauderdale-by-the-Sea has sought review by the Supreme Court. Shumaker, Loop & Kendrick, LLP's Financial Institutions practice group will continue to monitor the *Ober* decision. If you have questions, please contact Meghan Serrano at mserrano@shumaker.com.