IN THE DISTRICT COURT OF APPEAL
OF THE FIRST DISTRICT, STATE OF FLORIDA
Case No.: 1D21-1940

ECHO RIVER SANCTUARY, LLC, F/K/A
TSE PLANTATION, LLC,

Appellant/Cross-Appellee,

vs. L.T. Case No.: 2017-CA-00188

21st MORTGAGE CORPORATION,

Appellee/Cross-Appellant
_____/

ON APPEAL FROM THE CIRCUIT COURT, THIRD JUDICIAL CIRCUIT, IN AND FOR SUWANNEE COUNTY, FLORIDA

APPELLANT/CROSS-APPELLEE, ECHO RIVER SANCTUARY, LLC, F/K/A TSE PLANTATION, LLC'S INITIAL BRIEF

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PREFACE

The parties are Appellant/Intervenor Defendant/Cross-Appellee, TSE Plantation, LLC N/K/A Echo River Sanctuary, LLC ("TSE"); Appellee/Plaintiff/Cross-Appellant, 21st Mortgage Corporation ("21st" or "21st Mortgage"); and Unserved Defendants, Meri and Curtis Harrell ("Harrells"). The Harrells never appeared in the case.

The mobile home at issue in the replevin is a 2009 Scotbilt 76' x 32' doublewide mobile home bearing VIN/Serial Numbers SBHGA1340803694A and SBHGA1340803694B ("the mobile home" or the "Scotbilt mobile home"). Each of the two halves is titled. Another mobile home will be referenced as the "old mobile home" or the "single wide."

The record will be referenced as "R__". There were multiple transcripts filed. The Trial Transcript of 12/8/20 will be referenced by "Tr__". Any other transcript will be referenced as "Tr{Date}___".

Within quotations, all emphasis is supplied, unless noted otherwise.

The trial was by agreement a zoom bench trial. R893. As the parties, the court and court reporter were in different locations, all exhibits were therefore filed with the Court in a unified filing days after the trial and numbered 1-60. Plaintiff 21st's and defendant TSE's exhibits are identified in the transcript at Tr. pp. 144-147;149, and 155. Plaintiff, 21st's Exhibits

were A1 (objected to), 1-18, 25-29, 35-39 and 47. Defendant TSE's Exhibits were 1-39, 42-54,56-60. Exhibit 55 was removed by agreement.

I. STATEMENT OF THE CASE AND OF THE FACTS

a. Statement of the Case

This action was filed by Plaintiff 21st against Meri and Curtis Harrell for replevin of a mobile home and for money damages for failure to pay a debt on the note that financed the mobile home. R24. 21st Mortgage claimed the right to replevin based upon a purported (void) lien. *Id.* However, on December 11, 2011, Curtis Harrell filed Bankruptcy. R359 Stipulation (b)(5). The lien was not filed with the state or county to be perfected until January 4, 2012. *Id.* Stipulation (b)(6). A bankruptcy automatic stay was in place when lien perfection was attempted. No steps were ever taken by 21st to seek another lien or to annul the stay through the Bankruptcy Court. Tr41L16-22.

The Harrells were never properly served in this case. R557/Ex11 Summonses. Nor did they ever voluntarily appear. The summonses for the Harrells were served only on the Scotbilt mobile home at 18358 24th Street, Live Oak, Florida. *Id.* The mobile home was affixed to this land when purchased by the Harrells. R520/Ex2; R529/Ex4. At the time of service of the suit papers by posting them on the door of the Scotbilt mobile home

(December 29, 2017), the Harrells no longer owned the property which was purchased at foreclosure sale by Centerbank (December 1, 2017). R725Ex36. The Certificate of Title was filed in the public records on December 20, 2017. *Id.* Counsel for 21st acknowledged at trial that the property had changed hands. Tr8L10-11. However, 21st's counsel represented to the court the Harrells were properly served before taking a default at trial. Tr9L9. That was not accurate when the exhibits and testimony are reviewed.

At the time of service of the summons on the mobile home (December 29, 2017), the property had been foreclosed and was owned by Centerbank. It was not owned by the Harrells, and the property was under a 2013 contract for imminent sale to TSE Plantation, LLC N/K/A Echo River Sanctuary, LLC ("TSE"). R733/Ex37. The Harrells did not reside at the property or possess the mobile home. The summonses showed they were not served personally and that the electric power meter was removed from the mobile home. R557/Ex11. The mobile home was secured and vacant on property owned by Centerbank and set for sale to TSE. Tr104L24-105L3; 106L25-107L3.

TSE intervened in this action. R104. 21st amended the complaint and added a claim for replevin against the new owner of the real estate where the mobile home was located and attached to the real estate. R144. The

claim against TSE only sought to take possession of the mobile home. R1. R146/147[1] TSE answered, raised defenses, including the invalidity of the lien, prior execution on the mobile home, and unclean hands. TSE counterclaimed against 21st seeking to declare the lien void or nullified and to gain title to the mobile home, which 21st holds as purported lienholder. R201.

No party served the Harrells personally, and they never appeared in the action. No claims were made by TSE against the Harrells except as they might be impacted by the determination that the res—the mobile home—had been executed upon and should be titled in the name of TSE. R201. If this was an in rem proceeding this was proper relief. If not, as possessor, TSE had the right to defend the possession of the mobile home affixed to its land. See argument below at pp.42-48.

Thereafter, the trial court granted summary judgment to TSE because 21st had unclean hands due to its misconduct. R319. The summary judgment was appealed to this Court and was reversed and remanded for further proceedings. R334. The case proceeded to final hearing/bench trial on December 8, 2020. R339. Trial Exhibits were filed December 11, 2020.

[1] Two other counts were claimed against TSE but were stricken and never re-pled or preserved in the pre-trial stipulation. R193 and 358.

R22, 23. The trial transcript was filed December 29, 2020. R23. The judgment was entered on May 20, 2021. R892. It was timely appealed to this Court. R898.

In its opening statement, 21st asked to default the Harrells and after being asked by the Court, 21st's counsel stated they were properly served before the court granted default. Tr9L2-9.

TSE raised these issues in a Bench Brief prior to trial R395, moved for directed verdict Tr51L13-60L13, renewed the motion Tr150L14-18 and asked for the relief sought in written closing/proposed order. R801.

At trial the issues in the Pre-Trial Stipulation for the Judge were R358:

1. Is Plaintiff (21st) entitled to replevin the mobile home?

    a. Did Plaintiff (21st) properly protect and establish its right to a lien on the mobile home?

    b. Has Plaintiff (21st) acted with unclean hands in this matter?

2. Is the mobile home real property or a fixture such that it passed with the land or is it personal property? Defendant TSE objects to this as an issue as Plaintiff did not raise it in the pleadings and if I(a) or (b) are found in Defendant TSE's favor, 21st has no standing to be heard on these issues.

3. Is Defendant, TSE, entitled to collect damages from Plaintiff for its

seeking to replevin the mobile home in question and, if so, the amount?

The following was reserved to post trial proceedings:

1. The parties agree that any amounts to compensate TSE, if entitled, for maintenance, repairs and taxes paid may be resolved post hearing if 21st prevails and has the right to replevin the mobile home.

2. Any properly pled and claimed right to fees, costs or interest may be addressed in post hearing proceedings.

At the conclusion of the trial, the Court ordered the parties to each submit a closing and proposed order. Tr151L12-154L2. For the first time in its closing 21st argued TSE had no standing to be heard due to no service on the Harrells. R890/892. This was not framed as an issue in the Pre-Trial Stipulation. R358. This was presented by 21st for the first time contemporaneous with TSE's closing and proposed order. Neither party had leave to present rebuttal argument. Tr151L12-154L2. Regardless, 21st sought Judgment from the Harrells without personal service on them. R892/893.

b. Error by the Trial Court

The Trial Court erred as follows:

1. The lien claimed by 21st is void and a nullity under Florida and federal law; thus, it is unenforceable. Therefore, the Court was

required to grant directed verdict and deny all relief to 21st regardless of whether the mobile home is owned by TSE or the Harrells.

2. 21st could proceed against the mobile home and the Harrells, as purported owners, only if this was a proceeding "in rem." Either this was a proper "in rem" proceeding and both parties (21st and TSE) could be heard on all issues regarding the Scotbilt, or it was an "in personam" proceeding and the Harrells should have been served by each of the parties. However, TSE was in possession of the mobile home, it is physically attached to land it owns and TSE has standing to defend the replevin regardless of resolution of any issues with the Harrells. "In rem" proceedings are addressed below at pp. 42-48.

c. Statement of the Facts

Preface

The evidence presented at trial will be provided to this Court in sections related to the issues on appeal.

Thus, the issues presented in the Statement of Facts will be facts relevant to the following issues:

1. Preliminary Facts to Orient the Court;
2. The 21st Mortgage lien was void and a nullity due to the bankruptcy stay;

3. 21st Mortgage had unclean hands; and

4. The property was executed upon and is properly owned by TSE.

1. Preliminary Facts to Orient the Court

Meri and Curtis Harrell were part of the Harrell Family which owned numerous pieces of acreage spanning two or three counties. The family was engaged in farm operations and certain members of the Harrell Family lived on some pieces of the property. The various Harrell properties were financed by First Guaranty Bank. R642/Ex30 and 670/Ex32.

The Harrells defaulted on their loans covering the numerous properties and went into foreclosure. The foreclosure litigation spanned many years and numerous appeals. First Guaranty Bank went into receivership with the FDIC and was ultimately spun off into Centerbank. *Id.* and R713/Ex35.

Meri and Curtis Harrell resided at 18359 24th Street, Live Oak, Florida 32060, on 160 acres. They were married. R642/Ex30. Prior to the Scotbilt, they lived in an old single-wide mobile home on the property. R520/Ex2.

Abutting that property was approximately 913 acres, also owned by the Harrells. Tr103L13-19. Centerbank obtained ownership through foreclosure of the 913 acres abutting the 160 acres at 18359 24th Street, Live Oak, Florida 32060. Centerbank sold the 913-acre neighboring property to TSE in 2013. Tr103/104. At the same time, Centerbank marketed other properties

that were in foreclosure and struck an option deal with TSE, if the foreclosure was successful, to sell everything at 18359 24th Street, Live Oak, Florida 32060, which abutted the 913 acres. Tr103-105.

The foreclosure of 18359 24th Street, Live Oak, Florida (160 acres) was successful. Centerbank obtained the property through foreclosure sale on December 1, 2017. The Certificate of Title was filed with the Clerk on December 20, 2017. R725Ex36.

TSE was informed of these events and performed under the option contract by sending a deposit to close on the 160 acres at 18359 24th Street. Tr104L21-25. The closing occurred on February 2, 2018. R739/Ex38, 742/Ex39.

TSE was not allowed on the property prior to the time Centerbank took possession of it. Tr105L6-13. When TSE was performing a walk through immediately prior to the closing, TSE discovered suit papers in a sealed plastic bag attached to the door of the vacant mobile home. Tr106L25-107L17. It was later determined the vacant mobile home on the property was the Scotbilt mobile home. It was not the original single-wide mobile home that had been on the property during the life of the foreclosure. The single-wide mobile home had been moved, and the Scotbilt mobile home replaced it. R520/Ex2.

2. Facts showing the 21st Mortgage lien was void and a nullity due to the bankruptcy stay

On Nov. 18, 2011, the purchase of the Scotbilt mobile home was consummated by Curtis and Meri Harrell, as joint owners, and the mobile home was installed as the primary residence of the Harrells on the real property they owned at 18359 24th Street, Live Oak, FL 32060. R359(b)(4), R529/Ex4, R775/Ex53 and R592/593Ex17 at p. 3 (see form instructions re "married" and "joint" and p. 4 Listed mobile home as joint). The title also listed Meri and Curtis Harrell with the word "and" as provided by statute for joint ownership. R541/Ex7, 542/Ex8 and §319.235, Fla. Stat.

With a foreclosure summary judgement and sale order hearing pending, Curtis Harrell then filed bankruptcy on December 11, 2011. R583/Ex16, less than a month after the purchase/installation of the mobile home and just days before the trial court's foreclosure summary judgment and sale order for the Harrell's property at 18359 24th Street, Live Oak, FL 32060 (December 21, 2011). R702Ex34.

At this point, 21st still had not perfected its lien rights related to the new Scotbilt mobile home affixed to the real estate in November 2011. R359 Stipulation. 21st Mortgage was listed as a bankruptcy creditor in the bankruptcy and the Scotbilt mobile home was listed as a bankruptcy estate asset. R593/ScheduleBEx17, 596/Schedule D/Ex17.

21st's Corporate Representative admitted prior to Curtis Harrell's bankruptcy, 21st did not timely file and perfect its lien on the new Scotbilt mobile home. R359Stipulation(b)(5 and 6),Tr37L3-9. It had the right under Florida law to file the lien before the transaction. It did not. It had the right under Florida law to file the lien within 15 days of the purchase/installation and have it relate back to the transaction date. It did not. Tr.37:3-9. The lien filings occurred after the bankruptcy was filed in December 2011 and an automatic bankruptcy stay was in place. *See* 11 USC §362.

According to the 21st Corporate Representative Warkins, 21st never sought leave of the bankruptcy Court to file the liens. Tr41L16-22. 21st has a section of its legal department devoted to bankruptcy matters and appears daily in bankruptcy court. Tr40L12-25. It is aware of the bankruptcy automatic stay that is effective immediately upon the filing of a bankruptcy. The stay prohibits any action that affects the debtor's ownership, possession, lien status, or anything else relating to their assets. Tr41L1-8. The Corporate Representative argued that the liens were properly filed against Meri Harrell only. Tr46L21-47L8. However, on cross by TSE, Corporate Representative Warkins admitted that the lien was filed against Curtis Harrell also and affected his interests. Tr47L13-17. This admission is consistent with law presented below.

Corporate Representative Warkins testified on direct that the only basis for the replevin was the lien reflected on the titles (showing issue date on January 4, 2012). R541/Ex7, 542/Ex8; Tr26L9-14. The lien was filed after bankruptcy, without leave of the bankruptcy court. Though 21st actively litigated in the bankruptcy court, it never addressed the lien matter with the bankruptcy court. Tr41L16-22.

There is a lien annulment procedure in bankruptcy court to restore a late filed lien. It is discussed below in the argument section at p. 31. 21st never sought this because it never revealed to the bankruptcy court that the improper lien existed. *Id.*

More than two years after bankruptcy, Harrell breached the terms of the bankruptcy settlement with the Court and in June of 2014 a judgment was entered against him by the bankruptcy court. His bankruptcy discharge was revoked. R639/Ex29. His bankruptcy case was dismissed. Below in the argument section TSE presents law that a dismissal does not affect the voiding of an improperly filed lien in violation of a stay. *See* pp. 32-33.

21st argued below that the lien was filed only against the wife Meri Harrell, who did not file bankruptcy. The Harrells were married and were tenants by the entireties. See:

1. Mortgage stating they were “husband and wife,” R642/Ex. 30p1;

2. 21st's Loan Application shows they are married and live together at the same address where this mobile home went, R777Ex56;

3. See also 21st's "Online application" showing "married" in multiple places, R709/Ex57;

4. Curtis Harrell's sworn bankruptcy schedules (see instructions re "husband, wife" and notating "joint" – property was listed as "joint" indicating a spouse, including the mobile home titled with Meri), R592, 593, 596/Ex. 17 at 3, 4, and 7; and

5. The title also showed joint ownership. R541/Ex7, 542/Ex8; See §319.235, Fla. Stat.

There was no evidence or argument presented by 21st that the Harrells were not married, nor evidence or argument that this was not a tenancy by the entireties under Florida law. Florida cases cited in the argument section at p. 34 et seq. show there is a presumption of a tenancy by the entireties which impairs any action against an asset of either party.

3. 21st Mortgage had unclean hands

TSE admitted all the documents (and more) that supplied the basis for the unclean hands defense in the Summary Judgment hearing previously. TSE also submitted all the testimony (and more) supporting the Summary Judgment from Corporate Representative Warkins. Tr13-96. In response to

the 1st DCA reversal, TSE submitted evidence showing the harm to both TSE and Centerbank, from whom TSE received an assignment of rights. Tr110L23-113L18. TSE also showed additional documents confirming the misrepresentation of the value of the mobile home asset and the impact on the bankruptcy. R593/Ex17p4; 596Ex17p.7 and R617-637/Ex21-27.

While evaluating the financing of the mobile home, 21st Mortgage gained knowledge of collections actions and legal proceedings against the Harrells through Equifax. R751Ex43, 754/Ex44; Tr65L12-17. Despite this, 21st required Harrell to remove the existing singlewide mobile home on the real property in foreclosure before it would finance the new mobile home. R743/Ex42 and Tr48:3-7. 21st claimed that it had no responsibility to notify the foreclosure court or Centerbank (the foreclosing entity) of the requirement for removal of the mobile home from property subject to an imminent foreclosure sale. Tr66:3-8. Thus, no notice was given to the court or Centerbank of removal of an old mobile home and installation of the new Scotbilt mobile home, just days before a foreclosure summary judgment and sale hearing on the property.

After the bankruptcy filing less than a month after buying the Scotbilt for $81,000.00, Harrell filed sworn financial schedules stating the “value of the property” (i.e. the Scotbilt) was “$30,000.00”. R593Ex17p.4 Schedule B

and 596Ex17p7 Schedule D. He did not identify the type of mobile home, nor did he reveal that the mobile home he valued at $30,000 was bought new, just weeks earlier, for $81,000. The old single wide had been removed when the Scotbilt was installed.

The Trustee moved to secure all assets, including the mobile home R607Ex18, 610Ex19; the Trustee then proposed a bankruptcy compromise settlement R610Ex22; Centerbank objected to the compromise settlement because it impacted assets they had an interest in. R628Ex23.

On Aug. 14, 2012, 21st appeared and responded to the Trustee's motion to take control of the mobile home. R631Ex24. In 21st's Response to Trustee's Motion for Turnover of Property of the Estate, 21st argued that there was "no equity" in the mobile home. It adopted the $30,000 schedule value listed by Harrell. 21st specifically stated that "pursuant to the debtor's schedules the value of the mobile home is $30,000.00." 21st represented this to the bankruptcy court while knowing that just days before the bankruptcy filing this was a new mobile home sold and financed for $81,000. It then argued in its motion that there was no equity for the trustee as they were owed around $67,000. *Id*.

21st objected to any discovery from its attorneys regarding why or how these representations were made and the attorneys did not testify. R387-388 and Tr76L11-16. The objection was sustained on privilege.

At trial Corporate Representative Warkins testified:

1. That the Harrell financial schedule R590/Ex17 and 21st's Motion only dealt with Curtis Harrell's interest in the property; however the forms ask for the "value of the property" and 21st's motion states "…the value of the mobile home is $30,000". There was no reference to a ½ value. Further, TSE then impeached the Corporate Representative with his prior testimony that the filing with the bankruptcy court was "inconsistent with the value of the mobile home" and "inaccurate". Tr73L8-23;

2. Warkins admitted there was a duty to be truthful and honest with the court. Tr73L18-23, 77L18-78L7;

3. Under examination by TSE, Warkins further admitted that the mobile home lost less than 10% of its value in the first 6 months, Tr81L15-20, and the value was $70-72,000. Tr83L11-16. The debt was around $67,000.

4. Warkins admitted the purpose of the filing was to keep control of the asset and to keep control away from the bankruptcy court. Tr79L13-18.

After 21st Mortgage, a licensed finance company, filed documents with the bankruptcy court claiming the mobile home had no equity in it:

1. One-week later Centerbank withdrew its objection to the proposed compromise by the Trustee R633/Ex25;

2. A week later, with no objections pending, the Court entered an order accepting the compromise R635/Ex26 and the debtor was discharged. R636/Ex27;

21st argues that in July 2012 the Trustee abandoned a claim to the mobile home based upon. R796-798/ExA1. This was objected to as hearsay and not disclosed as required by the pre-trial order. Tr84-87, 148,149. This is addressed below at p.40. 21st did not admit any evidence to show the court or trustee were supplied accurate facts.

Two years later Harrell breached the terms of the bankruptcy settlement, and in June of 2014 a judgment was entered against him by the bankruptcy court and his bankruptcy discharge was revoked. R639/Ex29. His case was dismissed. In the argument section below TSE supplies cites to case law that shows that the dismissal does not affect the voidness of the lien. *See* pp. 32-33.

At no time does the docket reflect that 21st informed the bankruptcy court that it had filed liens after the bankruptcy automatic stay began nor was

an “annulment” of the stay sought. R574/Ex15. Corp. Rep. Warkins admitted he was not aware of this occurring. Tr41L16-22.

After the bankruptcy was dismissed, Centerbank resumed its foreclosure of the property on which the new Scotbilt mobile home had been installed. After more litigation and appeals, Center Bank obtained a foreclosure judgment in October of 2016 R713/Ex35 and a Certificate of Sale in December of 2017. R725/Ex36.

Edwards testified regarding the impact of 21st’s deceptive conduct in the bankruptcy court. Tr110:23-113:20. He explained that the failure of 21st to meet its obligation to advise the court of the filing of the lien and that there was a new mobile home on the property, with equity in it, created problems and litigation, including this litigation. If 21st had met its obligations in that regard, the bankruptcy court would have resolved the issue of who had what interest in the mobile home. Edwards pointed out that the bankruptcy court is where these issues should have been resolved had 21st been candid with the court and met its obligations. *Id.* If that had happened, Centerbank would not have lost $10,000.00 on the deal it negotiated, and TSE would not have been involved in more than two years of litigation, with far greater loss of time and money. Alternatively, Edwards explained that had the bankruptcy court resolved these issues in 2012 or 2013 favorably to 21st, the deal between

Centerbank and TSE would have been structured differently, without the value of the mobile home as a consideration. *Id*. This testimony was not contradicted by any contrary testimony.

4. The property was executed upon and is properly owned by TSE

The mobile home was permanently attached to the land at 18359 24th St., Live Oak, Fla. On November 18, 2011, the mobile home was installed, tied down, wheels removed, skirted, utilities and septic connected, stairs installed, and permits obtained. R520/Ex2, 529/Ex4. The Harrells declared it real property with no objection from 21st. R570/Ex13, 571Ex14 There are statutory presumptions addressed in the argument section p. 49 below.

21st required the Harrells to certify the Scotbilt as their "primary residence". R775/Ex53. In 2013 the Harrells filed a sworn declaration that the mobile home was real property and affixed a permanent "RP" (real property) sticker to it; R569/Ex12, 570/Ex13. The property was homesteaded. 21st managed the escrow and paid real property taxes on the mobile home thereafter. R571Ex14. 21st did not present the court with any evidence of giving objection to the declaration that the mobile home was real property.

21st defended by arguing that its contract declared the mobile home personalty. But Corporate Representative Warkins testified that no one ever

informed Centerbank of the terms of its contract with the Harrells, as it never communicated with them. Tr35:7-10. 21st never filed the contract terms in any public forum. Tr34L:5-22. The 10 page single spaced fine print contract with the Harrells states that 21st and the Harrells will treat the mobile home as personalty in a sentence on page 6. R535/Ex5 at 6, "Other Terms and Conditions."

Because the mobile home was permanently affixed to the land (septic, electric and tied down without wheels), lived in as a principal residence, declared real property, and there was no lien in existence (it was void and a nullity), TSE showed that the mobile home transferred to Centerbank (and then to TSE) with the land as real property or as a fixture/improvement/appurtenance at the time of the foreclosure sale in December 2017. *See* Argument pp. 48-54.

II. SUMMARY OF THE ARGUMENT

21st Mortgage failed to prove a prima facie case for replevin and therefore cannot prevail on replevin/possession. Its lien was void and a nullity. It had unclean hands. The Harrells were never served, contrary to representations of 21st's counsel. Regardless, TSE had the right to defend since it was in possession of the mobile which was permanently attached to its land. If this was a proper in rem action, TSE had the right to all relief

sought. In addition, the mobile home was executed upon as a part of the real estate in the foreclosure of the property.

The Void Lien

Regardless of any other issue in the case, 21st has no right to possession of the mobile home nor any proper interest in these proceedings. 21st Mortgage is not an owner but claimed the right to replevin based upon a purported lien. That lien was void and a nullity.

The owner of the mobile home, Curtis Harrell, was in bankruptcy with an automatic stay in place when 21st attempted perfection of the lien. Under the law, the lien was void, due to the bankruptcy stay. 21st Mortgage litigated in the Bankruptcy Court but never informed the court of its improper lien. It never sought an "annulment" of the stay, which is the only process by which the lien could have been perfected after a bankruptcy.

21st's other claim, that the lien was valid against the wife, Meri Harrell, is legally foreclosed as the Harrells owned the mobile home as "tenants by the entireties". Multiple exhibits showed they were married, and the title to the Scotbilt showed it was jointly owned. 21st admitted the lien affected Curtis Harrell's interest in the Scotbilt while in bankruptcy.

Thus, each of the arguments presented by 21st Mortgage below is without merit. Therefore, 21st Mortgage stands before this court as nothing

more than an unsecured general creditor of the Harrells, with no interest in the mobile home. It has no right to impair or hold the title to the Scotbilt mobile home. It should be ordered to clear and return the title.

The Unclean Hands Defense

21st acted with unclean hands and may not seek the equitable remedy of replevin. TSE presented the same evidence that supported summary judgment and then supplemented the evidence to cover the issues raised by this Court in its reversal. 21st acted deceptively in the bankruptcy court by misrepresenting the value of the mobile home for the admitted purpose of keeping the control of the asset away from the bankruptcy court and the trustee. It also concealed its lien. This deceptive court conduct by a sophisticated user of the bankruptcy courts prevented the bankruptcy court from dealing with these matters years ago and foisted this litigation on everyone involved. It injured Centerbank and TSE and adversely affected the court system through misconduct associated with the centerpiece of this litigation – the Scotbilt.

In Rem Proceeding or In Personam?

21st told the trial court that the Harrells were served process by 21st. They were not personally served. The Court erroneously entered a default against the Harrells with no personal service. 21st must maintain that this

action was an “in rem” action where it could proceed against TSE as the possessor of the property, without service on the owners documented on the title of record, the Harrells. This is an “in rem” proceeding, and TSE has the right to all relief it sought, including the right to clear title to the mobile home. The court erroneously ruled that TSE could have no relief without its own service on the Harrells. That is wrong. TSE as possessor of a mobile home affixed to its land had the right to defend. If this is an “in rem” proceeding, TSE has the right to all relief sought. If this is an in personam proceeding, then 21st had no right to any relief, including replevin without service on the Harrells.

Thus, this court should order the relief sought by TSE to deny replevin, find there is no lien, and require return of the title. If this is an “in rem” proceeding, the trial court must also turn title over to TSE. If in personem, 21st must be denied all relief, but the trial court should be instructed on the void lien.

The Mobile Home was executed upon with the Real Property in the Foreclosure

TSE was and is the possessor of the mobile home. It is physically attached to TSE’s real estate. TSE has the right to defend the Scotbilt and this action. TSE also presented evidence of execution of the mobile home,

a defense to replevin. This also provides TSE's right to title if this is a proper "in rem" proceeding.

The mobile home became a part of the real estate and a fixture, improvement or appurtenance to the land when attached to the land as there was no lien on it. The title lists Meri and Curtis Harrell as joint owners. Because there was no lien when the mobile home was attached to the land, the mobile home became real estate or a fixture/improvement/appurtenance when it was affixed to the land. Florida law allowed filing of the lien before the transaction was closed. It also allows it to relate back to closing if filed within 15 days. §319.27(3)(b), Fla. Stat. 21st did neither.

Before the Scotbilt was installed, 21st required the Harrells to certify it was their primary residence. Shortly after the mobile home was installed, the Harrell family declared the mobile home, under oath, real property, attached a real property sticker to it and declared it homesteaded. 21st Mortgage knew of these activities. 21st Mortgage paid the real property taxes on the mobile home and never objected to it being declared real property. Thus, the mobile home became at least a fixture/improvement/appurtenance and was declared permanent homesteaded "real property" by the owners, with no objection by 21st.

When the property foreclosure order was entered and the property was sold, the mobile home went with it. There was no lien impairing the ability of the property to transfer, it was void. After the judicial sale of the property, the mobile home transferred with it pursuant to state statute. The statute does not require "magic words" as argued by 21st below. Thus, the replevin fails for a third reason because the property was executed upon.

21st Mortgage raises arguments to the contrary, which are not availing under Florida law. 21st's claim that its contract with the Harrells and a statute allow it to keep the mobile home designated as personalty are not correct. The statute requires a valid security interest – this one was void. The contract terms with the Harrells were not revealed to other parties and therefore are not binding on them.

Accordingly, this matter should be remanded to the trial judge with instructions to deny 21st Mortgage its replevin claim and to enter judgment in favor of TSE. This Court should also order entry of clean title in the name of TSE. Alternatively, the matter should be remanded to the trial court to deny 21st relief and for further proceedings to determine ownership between TSE and the Harrells. Regardless, as possessor of the mobile home, TSE has the right to recover against 21st for defeating 21st's improper lien claim and clearing the title.

III. STANDARD OF REVIEW

Normally a decision of a lower tribunal is accorded a presumption of correctness by the Appellate Court. *See, Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1979). However, when the decision is based upon written reports and documents as opposed to live testimony, the presumption of correctness is weaker because the trial judge in the lower tribunal is in no better position than the Appellate Court on matters decided upon written evidence. *See, Beckman/Tillman v. Bennett*, 118 So. 3d 896 (Fla. 1st DCA 2013).

In this case, a review of the adjudication by the trial judge was based upon conclusions of law based upon written documents and pleadings. There were no findings of any facts recited. Only legal rulings apparently based upon erroneous review of pleadings.

A discretionary decision may be reversed if it is not properly explained. *In re E.B.L.*, 544 So. 2d 333 (Fla. 2d DCA 1989). Judge Altenbernd explained "It is our obligation to review the actions of trial courts to assure their compliance with the requirements of the law." The appellate courts need fact findings to perform a proper review.

The standard governing review of decisions of law is de novo. *See, Travelers Commercial Ins. Co. v. Harrington*, 154 So. 3d 1106 (Fla. 2014).

The Judgment decided TSE did not have the right to proceed on certain matters, but that 21st did have the right to proceed on related matters. A decision on whether a party may proceed with an action is reviewed de novo. As is the right to proceed against a particular defendant. See §19.4, Standards of Review, *Florida Appellate Practice*, 2021 Ed. Vol. 2, pp. 393 and 394.

IV. ARGUMENT

In Florida, the right to replevin only arises pursuant to statute. *See, National Leasing Corp. v. Bombay Hotel, Inc.*, 159 So. 2d 111 (Fla. 3rd DCA 1963). There is no right to replevin outside of complying with and proving the statutory requirements. *See, State Ex Rel. Heavelow v. Frederick,* 163 So. 885 (Fla. 1935).

Florida Statutes provide the elements for a replevin. *See, §78.055,* Florida Statutes. The statutory elements are:

> (1) A description of the claimed property that is sufficient to make possible its identification and a statement, to the best knowledge, information, and belief of the plaintiff of the value of such property and its location.
>
> (2) A statement that the plaintiff is the **owner of the claimed property or is entitled to possession of it, describing the source of such title or right**. If the plaintiff's interest in such property is **based on a written instrument, a copy of said written instrument must be attached to the complaint**.

> (3) A statement that the property is wrongfully detained by the defendant, **the means by which the defendant came in the possession thereof**, and the cause of such detention according to the best knowledge, information and belief of the plaintiff.
>
> (4) A statement that the claimed property has not been taken for a tax, assessment or fine pursuant to law.
>
> (5) **A statement that the property has not been taken under an execution**, or attachment against the property of the plaintiff or, if so taken, that it is by law exempt from such taking, setting forth a reference to the exemption law relied upon.

Plaintiff, 21st Mortgage, had a duty to plead and prove the elements contained in §78.055, or it has no right to replevin the property from TSE, the Harrells, or anyone else. *See, Al-Hakim v. Holder*, 787 So. 2d 939 (Fla. 2nd DCA 2001). The omission of any element is fatal to the claim of replevin. *See, Doyle v. Flex*, 210 So. 2d 493, 493-95 (Fla. 4th DCA 1968).

21st claims the right to replevin property based upon a lien against the Scotbilt mobile home, which it never attached to the complaint. TSE will show:

1. 21st did not try to perfect its lien until after Curtis Harrell filed bankruptcy and an automatic bankruptcy stay was in place. This rendered the lien void and a nullity under the law. Moreover, 21st's claim that the lien was valid against the wife is baseless under Florida law;

2. TSE presented clear evidence of unclean hands involving the mobile home at issue and the harm Centerbank and TSE suffered as a result;

3. The trial court erred in defaulting the Harrells because they were not served in this case and did not appear. Further, TSE has the right to the relief sought, or at least rulings on all the issues in defense of the claims brought by 21st; and

4. The mobile home was executed upon as a part of the real estate in the foreclosure case, defeating 21st's replevin action and providing TSE's basis for title to the mobile home.

This Court should reverse the trial court and dismiss 21st's replevin claim.

A. 21st Mortgage Has No Right to Replevin Because It Failed to Prove Its Prima Facia Case.

1. 21st Mortgage's Purported Lien Was Void Because It Was Filed After a Bankruptcy Automatic Stay.

Both Florida and federal law declare the lien claimed by 21st Mortgage void. The law prohibits any adverse action against a debtor in bankruptcy and declares any adverse action committed by a creditor to be void.

This Court has clearly spoken to this issue. In *Citibank, N.A. v. Unknown Heirs*, 197 So.3d 1214 (Fla. 1st DCA 2016), this court ruled that

any action taken against a debtor during the pendency of the bankruptcy automatic stay is **void**. *Id.* at 1214.

In reversing the trial court in *Citibank*, this Court stated that a violation of the automatic stay is void and the trial court has "no discretion to deny the motion to vacate." *Id.* This was so even though appellee and the trial court did not have notice of the automatic stay until after the judgment was entered. *Personalized Air Conditioning, Inc. v. CM Systems of Pinellas County, Inc.*, 522 So. 2d 465, 466 (Fla. 4th DCA 1988); *Woods v. Lloyd's Asset Management LLC*, 191 So. 3d 918 (Fla. 4th DCA 2016). The trial court had no discretion to deny a motion to vacate a void judgment. *Segalis v. Roof Depot USA, LLC*, 178 So. 3d 83, 85 (Fla. 4th DCA 2015).

Further, this Court cited *McMahon v. Ryan,* 964 So. 2d 198 (Fla. 5th DCA 2007), with approval. In *McMahon*, the Fifth District explained that any action taken in violation of the automatic stay is void and without effect. *McMahon* stated, "A void judgment may be attacked at any time because the judgment creates no binding obligation on the parties, is legally ineffective and is a nullity." *Id. at 200.*

Based on these precedents, the Trial Court erred by not granting TSE's motion for directed verdict and TSE's request for relief in its closing. 21st Mortgage's lien was void and a nullity from the date it was filed.

21st financed the mobile home in November 2011. 21st did not file its lien papers with the county or state in a timely manner to relate back to the day of the purchase as provided by statute. R359Stipulations(b)(4,5,6); *see* §319.27(3)(b), Fla. Stat.

On December 11, 2011, Curtis Harrell filed bankruptcy. R583Ex16. 21st Mortgage thereafter first filed its lien on January 4, 2012. R359Sipulations(b)(6). At the time the lien papers were filed, Curtis Harrell remained in bankruptcy. R574/Ex15. An automatic bankruptcy stay was in effect. *See* 11 USC §362.

21st Mortgage never sought leave of the bankruptcy court to file its liens before or after the filings. Tr41L16-22. There is a process to seek an annulment of the stay from the bankruptcy court to permit a late filed lien. *Williford v. Williford*, 294 Fed. Appx. 518 (11th Cir. 2008) ("Any lien secured or filed after a bankruptcy filing **is void absent an annulment by the bankruptcy court**") (unpublished decision). 21st Mortgage never sought any annulment because it never informed the bankruptcy court it filed a lien against the Harrell property. Tr41L16-22.

As shown in the facts, 21st Mortgage's legal department appears daily in bankruptcy court. It knows its obligations under the bankruptcy stay. The corporate representative admitted that it is improper to take any action that

affects the debtor's ownership, possession, lien status, or anything else related to their assets. Tr40L12-25, 41L1-8.

Applying the law to these facts, the lien is void and a nullity. It never existed. Further, 21st acted improperly in failing to clear the lien and the title and in failing to inform the bankruptcy court of these events.

2. Additional Federal Precedent Shows the Lien Was Void and a Nullity.

Florida law follows federal law in holding any adverse action against a debtor after a bankruptcy is automatically void, not voidable. As the discussion in the previous section demonstrates, this Court's precedents align with federal law on this issue.

Federal law is clear and rebuts the arguments raised by 21st Mortgage below. 21st argued that the bankruptcy by Harrell was dismissed years later. That is irrelevant to the fact that the lien was void when filed and never resurrected by presenting the issue to the bankruptcy judge for an annulment. In *Oldham v. Heights Finance Corp.*, Case No. 04-41692, (U.S. Bankruptcy Court, S. Ill, March 23, 2006)[2], the court was presented with similar title and lien issues. A debtor filed bankruptcy, the lien holder filed its lien after the stay was in place and then the debtor was dismissed from

[2] Available at: https://casetext.com/case/in-re-oldham-4

bankruptcy. The bankruptcy court held that filing the lien after bankruptcy did not perfect the lien. It was void despite the bankruptcy having been dismissed. The lender was in violation of the bankruptcy stay, and it would violate public policy for the court to sustain the improper conduct. *Id.* pp. 5-8 See also, *In Re Servico, Inc.*, 144 B.R. 933 (USBC, S.D. Fla. 1992) – Any acts violating the stay are void, and the case explains the public policy behind voiding these acts.

Additional federal support includes *Borg-Warner Acceptance Corp. v. Hall*, 685 F2d 1306 (11th Cir. 1982) – Any security interest filed or served after entry of a bankruptcy stay is void and without any effect; *In Re Continental Country Club, Inc.,* 64 B.R. 177 (USBC, N.D. Fla. 1986) – Lien filed against bankrupt entity after the filing of the bankruptcy is void unless it relates back to a date prior to the filing of the bankruptcy[3]; *In the Matter of Keidel*, 613 F.2d 172 (7th Cir. 1980) – Lien created on a mobile home after the filing of a bankruptcy is void and creditor has an unperfected security interest **rendering the creditor nothing more than a general creditor**.

Because the lien was void, there was no right to replevin, and this Court should reverse and remand.

[3] Florida has a relate back statute for this type of loan, but 21st missed its filing deadline for the security interest to relate back. §319.27(3)(b), Fla. Stat.

3. Because this was a Tenancy by the Entireties 21st Mortgage's Lien Was Void Under Bankruptcy Law regardless of the wife.

21st Mortgage argued to the trial court that they had the right to file a lien against Meri Harrell, the wife, after the husband's bankruptcy. Under Florida law, that is incorrect.

Florida law presumes "tenancy by the entireties" for married couples. There was no evidence to the contrary. Property, either real or personal, jointly owned by married persons in Florida is *presumptively* held in a tenancy by the entirety. *Beal Bank, SSB v. Almand & Assocs.*, 780 So. 2d 45, 57–59 (Fla. 2001). Property held in a tenancy by the entirety "belongs to neither spouse individually, but each spouse is seized of the whole." *Id.* at 53. The Supreme Court of Florida explained that "with tenancy by the entireties property; the property is not divisible on behalf of one spouse alone, and therefore it cannot be reached to satisfy the obligation of only one spouse." *Beal Bank SSB*, 780 So. 2d at 53.

Based upon tenancy by the entireties law, this Court recently held that properties owned by a judgment debtor and her husband as tenants by the entireties were not subject to a writ of execution on spouse's individual indebtedness. *Williams v. M & R Constr. of N. Fla., Inc.*, 305 So. 3d 353 (Fla. 1st DCA 2020). *See also*, *Sharp v. Hamilton,* 495 So. 2d 235 (Fla. 5th

DCA 1986) (Property held in tenancy by entireties is not subject to lien or judgment against one tenant alone).

Meri Harrell was Curtis Harrell's wife. Evidence was presented at trial that Curtis and Meri Harrell were married. See:

1. Mortgage stating, they were "husband and wife," R642/Ex. 30p1;

2. 21st's Loan Application shows they are married and live together at the same address where this Scotbilt went, R777Ex56;

3. See also "Online application" showing "married" in multiple places, R7709/Ex57;

4. Curtis Harrell's sworn bankruptcy schedules (see instructions re "husband, wife" and notating "joint"—property was listed as "joint" indicating a spouse, including the mobile home titled with Meri), R592, 593, 596/Ex. 17 at 3, 4, and 7; and

5. The title also showed joint ownership. R541/Ex7, 542/Ex8; See §319.235, Fla. Stat.

21st Mortgage never attempted to challenge or question the marriage of the Harrells at any time during these proceedings. Thus, contrary to 21st Mortgage's arguments below, no lien could be filed against Meri Harrell alone under Florida law. By filing bankruptcy, Curtis Harrell put his assets, including the Scotbilt, out of reach of creditors, without permission of the

bankruptcy court. 21st Mortgage did not seek or obtain permission to file a lien against the mobile home.

Though 21st advanced the argument that Meri Harrell's interest could still be subject to lien, Warkins, the Corporate Representative, admitted that the lien was filed against Curtis Harrell also and affected his interests. Tr47L13-17. 21st is a sophisticated user of the bankruptcy court. Tr40L12-25. It is aware of the bankruptcy automatic stay obligations. By 21st's Corporate Representative's admission, the stay prohibited any action that affects the debtor's ownership, possession, lien status, or anything else relating to their assets. Tr41L1-8. Because filing the lien did that and was in violation of the automatic stay, the lien was void. Failing to withdraw the lien or to address it with the bankruptcy court was highly improper conduct and arguably a fraud on the court.

Since the only basis for 21st Mortgage to have an interest in the mobile home was a void lien, 21st Mortgage is nothing more than a general unsecured creditor of the Harrells. It has no right or interest in the Scotbilt mobile home. The trial court order of replevin should be reversed and remanded.

B. The Unclean Hands Defense

Florida recognizes the equitable defense of "unclean hands." In the appeal from the summary judgment in this case this court found that unclean hands occurs when plaintiff (21st below) engages in some type of "unscrupulous conduct, overreaching, or trickery that would be condemned by "honest and reasonable men." *21st Mortg. Corp. v. TSE Plantation, LLC*, 301 So. 3d 1120, 1122 (Fla. 1st DCA 2020); *Shahar v. Green Tree Servicing, LLC*, 125 So. 3d 251, 253 (Fla. 4th DCA 2013); *Ocean View Towers, Inc. v. First Fid. Sav. & Loan Ass'n*, 521 So. 2d 325, 326 (Fla. 4th DCA 1988)); *Congress Park Office Condos II, LLC v. First-Citizens Bank & Trust Co.*, 105 So. 3d 602 609 (Fla. 4th DCA 2013). "Unclean hands may be asserted by a defendant (TSE below) who claims that the plaintiff (21st below) acted toward a third party (the bankruptcy court, trustee, the Harrells, and Centerbank) with unclean hands with respect to the matter in litigation." *Id.*; *Quality Roof Servs., Inc. v. Intervest Nat'l Bank*, 883 So.3d 883, 885 (Fla. 4th DCA 2009). "To prevail on this defense, the adverse party (TSE) must show that it was injured as a result of the alleged misconduct." *21st*, 301 So. 3d at 1122; *MTGLQ Inv'rs., L.P. v. Moore*, 293 So. 3d 610, 617 (Fla. 1st DCA 2020).

The trial court entered summary judgment for defendant, TSE, finding that plaintiff, 21st, came to the trial court with unclean hands based on

conduct in the bankruptcy court involving the Scotbilt. R319. This court reversed because it found that there was a fact question regarding the injury suffered by either Centerbank, or TSE. *21st Mortg. Corp. v. TSE Plantation, LLC*, 301 So.3d 1120, 1122 (Fla. 1st DCA 2020). TSE received an assignment of Centerbank's rights with transfer of its property interest in the real estate and the Scotbilt. R742.

At trial, TSE admitted all the documents (and more) that provided the basis for the unclean hands defense that previously prevailed on Summary Judgment in the trial court. TSE also admitted all the supporting testimony (and more) from the Corporate Representative from the Summary Judgment. Tr13-96.

In addressing the 1st DCA reversal, TSE admitted evidence showing the harm to both TSE and Centerbank, from whom TSE received an assignment of rights. Tr110L23-113L18. TSE offered additional documents confirming the misrepresentation of the value of the mobile home asset and the impact on the bankruptcy. R593/Ex17p4; 596Ex17p.7 and R617-637/Ex21-27, and see other documents at Statement of Facts pp.13-19 above. An unclean hands defense requires determination of fact disputes. *Dery v. Occhiuzzo and Occhiuzzo Enters, Inc.*, 771 So. 2d 1276, 1279 (Fla. 4th DCA 2000). The facts presented, and previously found adequate by the

trial court for a summary judgment, show 21st engaged in deceptive conduct involving the Scotbilt in dispute before the trial court. 21st violated responsibilities of candor to the courts involving the Scotbilt.

The Corporate Representative, Warkins, admitted under cross examination that the filing with the bankruptcy court showing a value of $30,000, when the Scotbilt was sold and financed for $81,000, just a few months earlier, was “inconsistent with the value of the mobile home” and “inaccurate”. Tr73L8-23. He also admitted the purpose of the filing was to keep control of the asset and to keep control away from the bankruptcy court. Tr79L13-18. He also admitted there was equity in the Scotbilt, Tr81L15-20 and the value was $70-72,000. Tr83L11-16.

Deposition statements by a corporate representative bind the corporate party as admissions. *See Carriage Hills Condo., Inc. v. JBH Roofing & Constructors, Tnc.,* 109 So.3d 329, 335 (Fla. 4th DCA 2013) ("When a Rule 1.310(b)(6) deposition is properly noticed and conducted, the testimony of the designee 'is deemed to be the testimony of the corporation itself.'" *Sybac Solar, GMBH v. 6th St. Solar Energy Park of Gainesville,* LLC, 217 So.3d 1068, 1070 (Fla. 2nd DCA 2017)). Corporate Representative Warkin’s attempts to change his testimony were impeached with his prior deposition statements as cited above.

TSE also presented testimony that explained the harm to Centerbank, who transferred the property to TSE, and assigned its rights to TSE. The harm to TSE was also explained and there is harm to the courts because of this deceptive conduct. Tr110L23-113L18. There was no rebuttal or contrary evidence to this testimony. Thus, a proper basis for unclean hands was presented. 21st's conduct in the bankruptcy court was deceptive and harmed all involved. It created a domino effect with pleadings filed thereafter.

21st's responded by claiming that the trustee abandoned the Scotbilt. This claim is misplaced and was trial by ambush. 21st withheld the relevant document (A1) from any pre-trial disclosure. The document was objected to but allowed anyway. *See Northup v. Acken*, 865 So. 2d 1267, 1272 (Fla., 2004)—all documents must be revealed for use at trial, including rebuttal documents.

The document was a notation from the trustee filed while a proposed compromise was pending with an objection from a creditor (Centerbank). It was filed in July. R796ExA1. If there was an enforceable abandonment of the Scotbilt, 21st's deceptive "Response," filed in August was not necessary and should not have been filed. R631/Ex24. More importantly, under bankruptcy law, everything remains an asset of the Bankruptcy Court unless

ordered released by the Bankruptcy Judge. The Judge never ordered the mobile home dropped from the bankrupt estate. R574/Ex15 It was only after the deceptive response was filed that the bankruptcy case was disposed of by discharge of Mr. Harrell's debts. R617-637/Ex21-27.

21st did not admit any evidence to show the Court or the Trustee were ever supplied accurate facts. Its Corporate Representative admitted it was not honest with the Bankruptcy Court (the filing with the bankruptcy court was "inconsistent with the value of the mobile home" and "inaccurate"). Tr73L8-23. In so doing, that created the litigation that is now before this Court and caused harm to all involved.

If the Scotbilt had been properly handled by 21st in the bankruptcy court, there is a possibility the lien might have been reinstated and the Scotbilt determined to be out of reach of all involved. Centerbank and TSE would then not have dealt with it. Or the bankruptcy court could have denied the lien and none of the parties would now be dealing with this matter, nor would the Florida courts.

Because this lien was void and the appropriate value of the Scotbilt was concealed from the Bankruptcy Court, that created harm to all involved, including the court system. Tr110L23-113L18. That is a basis for a finding

of unclean hands, as well as a fraud on the Court, which should preclude 21st from any equitable recovery.

Because replevin is an equitable action, unclean hands is a complete defense. *See* §68.04, Fla. Stat.—"All liens of any kind, whether created by statute or the common law, and whether heretofore regarded as merely possessory or not, may be enforced in chancery."

C. The Court erred in defaulting the Harrells and failed to grant TSE relief it was entitled to whether "in rem" or "in personam" jurisdiction applied

Contrary to the representations of 21st's counsel, the Harrells were never served and never made any appearance in the case. Thus, it was error to "default" them.

TSE was in possession of the property 21st seeks replevin of. TSE owns the land the mobile home is physically attached to. There is no evidence of any challenge to TSE's possession by the Harrells.

A replevin action must proceed against the possessor of the property to be replevined. *Lyle v. Semmes*, 88 So. 301 (Fla. 1921), and *see* §78.055(3), Fla. Stat. TSE was sued for replevin and may defend that claim. If TSE is correct on its defenses, the trial court must grant the relief sought by TSE, at least as to 21st.

The trial court's judgment states that "pursuant to Rule 1.170 of the Florida Rules of Civil Procedure Defendant TSE had to serve [the Harrells] with the cross-claim by service of process." R892. However, TSE sought no affirmative relief "in personam" against the Harrells, only the title to the "res" of the action—the Scotbilt. The mobile home was already in TSE's possession and attached to the land TSE owned. That relief is "in rem" and is proper if the disposition of the Scotbilt was rightfully before the court. Under the statutory scheme and caselaw, the Scotbilt was the "res" in this "In Rem" proceeding, and TSE's relief should have been granted.

This case presents some unique questions. TSE must be a party as possessor of the property sought. But what happens to the rights of the Harrells, who are listed as title owners on the documents 21st relies upon? May they be defaulted and lose their right to defend because they are not in possession of the property when the property and the possessor are before the court? If so, this is an "in rem" action, and TSE has the right to all relief sought. Cases discussed below explain that this case proceeded in rem.

If not, 21st did not have the right to proceed in this action without personal service on the Harrells. However, if this court remands on that issue, it should do so with instructions, as 21st has no right to any relief as

explained herein because its lien was void. Therefore, the trial court should be instructed to deny 21st all relief and order them to return the title.

In *Fuentes v. Shevin*, 407 US 67, 92 S. Ct. 1983 (1972), the US Supreme Court found Florida's replevin statute unconstitutional for the failure to provide due process. The case addresses due process for the person in possession of property. In this case that was TSE. However, the Harrells are listed as owners on the title attached to the complaint and the lien documents. They were sued by 21st but were not served and did not appear.

The replevin statute permits proceeding without service but not for the final hearing and judgment. *See* §§78.065(c) and (d); §78.067 and §78.075. However, the "possessor" of the property was before the court "In personam" and satisfied the "In personam" requirement as discussed below.

If it was proper to proceed then, this case proceeds "in rem" as to the mobile home and TSE has the right to the relief requested. If not, then TSE still had the right to defend as the possessor of the property attached to its land and has a right to show 21st cannot prove the necessary elements for a replevin of the mobile home.

Under "in rem" jurisdiction, the trial court would be authorized to determine "all controversies between the parties as to legal title and right of possession" to a piece of property which is before the court "in rem". *See*,

Miller v. Griffin, 128 So. 416 (Fla. 1930). *Miller* explains that when the court takes "in rem" jurisdiction it will decide all controversies as to legal title and right of possession. *Miller* at p. 419.

This is consistent with holdings of multiple other cases dealing with in rem jurisdiction. In the case of *Matz v. O'Connell*, et al., 155 So. 2d 705 (Fla. 2nd DCA 1963), the court distinguished between in rem proceedings and in personam jurisdiction. The court explained that when there is in rem jurisdiction because personal service was not obtained on certain parties, but the property was properly brought before the court, the court's jurisdiction is treated "as effectual and binding merely as a proceeding in rem and having no operation beyond the disposition of property or some interest therein." *Id.* at 708. The court went on to cite numerous other Florida cases.

In the case of *Newton v. Bryan*, 194 So. 282 (Fla. 1940), the Florida Supreme Court determined that when a piece of property was brought before the court under in rem jurisdiction with no service or appearance by an out-of-state citizen, the court "had jurisdiction of the said land so owned and the power to adjudicate any issue connected therewith is conferred under the laws of Florida. [Citation omitted.] *Id.* at 20.

In the case of *Harrison Company Advertising, Inc. v. Republic of Cuba*, 127 So. 2d 687 (Fla. 3rd DCA 1961), the court addressed "goods, money,

chattels or effects of the defendant in the hands, possession or control of a third person." *Id.* at 693. The court analyzed the U.S. Supreme Court case of *Pennoyer v. Neff*, 95 U.S. 714, 723-24 (1878), where the court stated that under in rem jurisdiction the court's "inquiry can then be carried only to the extent necessary to control the disposition of the property." *Id*. The U.S. Supreme Court further explained that jurisdiction can be obtained by personal service or it can be obtained "by a procedure against the property". When the property is before the court, the unserved defendant is not bound by the judgment except as to disposition of the property. *Id*. at 724.

Florida law presumes that the Legislature knows Florida common law. *Courtney Enterprises, Inc. v. Publix Super Markets, Inc.*, 788 So. 2d 1045 (Fla. 2d DCA 2001). As cited earlier, Florida common law provides that a possessor is a proper party to the replevin action. Therefore, when the Legislature amended the statute following *Fuentes*, this Court must presume that they knew that the possessor may be the proper party defending the action. The statute does not address an "owner." As noted in the statute above, the plaintiff must show how the defendant came into "possession" of the property. *See, §78.055(3),* Florida Statutes. Thus, this was an "in rem" action under which TSE appeared after the mobile home had been brought into control of the Court.

Florida follows the law of in rem jurisdiction when a piece of property is properly brought before the court. When the court "takes jurisdiction, it will proceed to determine all controversies between the parties as to legal title and right of possession." *See*, *Miller*, 128 So. at 984.

The Florida replevin statute and *Fuentes* permit the disposition of the property if the possessor appears in the litigation. The Harrells did not appear. *Pennoyer* explains that substituted service may bring property before the court. Then, "[t]he law assumes that property is always in the possession of its owner, in person or by agent; it proceeds upon the theory that a seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is reached and dispose of property in the state, or of some interest therein . . . " *See*, *Pennoyer,* 95 U.S. at 727.

The property was properly brought before the court *in rem*. As the owner of the real estate to which it was attached, and the possessor of the Scotbilt, TSE properly defended the action against 21st Mortgage's improper claim of a lien. The lien was void. The Harrells never appeared and defended their property against claims that 21st Mortgage or TSE had the right to the property.

If the property was rightfully before the court, the court should have entered an order providing clear title to TSE, because the lien was void and because of the other grounds raised. Based upon the *in rem* jurisdiction, and the status of the case, the court was obligated to enter judgment in favor of TSE.

The Judge erroneously ruled that TSE has no rights herein due to lack of service on the Harrells, but allowed 21st to proceed. The court also ruled the Harrells were defaulted, without personal service. If the Harrells remain the proper titled owners and there was no *in rem* jurisdiction, then 21st does not have the right to obtain the relief it seeks (replevin) unless it has *in personam* jurisdiction over the Harrells through personal service. Regardless, TSE had standing to defend on these issues as the possessor.

D. The mobile home was executed upon and transferred to TSE.

1. 21st may not replevin the mobile home due to execution

If this is an "in rem" action, TSE has the right to all relief sought. If not, then the court may only consider this argument as a defense in denying 21st the relief it seeks—replevin. Prior execution of the property is a defense to a replevin action. *See* §78.055(5), Fla. Stat. - requiring plaintiff (21st) to plead and prove that the property to be replevined "has not been taken under execution."

When the foreclosure sale of the real estate took place in 2017, the only lien claimed by 21st Mortgage was void. It never existed under Florida law. Thus, 21st was and is an unsecured general creditor of the Harrells as it stands before this Court. *See, In the Matter of Keidel*, 613 F.2d 172 (7th Cir. 1980)—with a void lien, creditor has an unperfected security interest **rendering the creditor nothing more than a general creditor**.

Under Florida law, "[a] mobile home shall be considered permanently affixed if it is tied down and connected to the normal and usual utilities." *See,* §193.075(1), Florida Statutes. 21st never presented any evidence to overcome this presumption. On November 18, 2011, the mobile home was delivered, installed, secured to the land, wheels removed, permitted, septic and utilities hooked up, and was made a part of the real estate. R520/Ex2, 529/Ex4. The real estate will be harmed by the removal of this property. This was certified as the primary residence of the Harrells. R775/Ex53.

Thereafter, the Harrells declared the mobile home "real estate" under oath and had a permanent real property sticker attached to it. *See*, R569/Ex12, 570/Ex13. The property was homesteaded. 21st Mortgage acquiesced in that by paying the property taxes on it as real property at a homestead rate, without objection. R571/Ex14. Thus, when the foreclosure sale occurred, there was no valid lien because the only lien was void. The

mobile home was not personalty, it was a fixture sworn to as permanent real estate by the owners. It transferred with the land.

When the foreclosure sale took place, the mobile home was a fixture/improvement/appurtenance making it real property, not personalty. *See, Strickland's Mayport, Inc. v. Kingsley Bank*, 449 So. 2d 928 (Fla. 1st DCA 1984)—existence of security agreement in a mobile home does not preclude characterization of an object as a fixture if other facts indicate that annexer's intent to make permanent accession to reality; and *Solomon v. Gentry*, 388 So.2d 52, 54 (Fla. 4th DCA 1980)—in light of the facts that: (1) the mobile home was not readily transportable—it was on blocks with wheels removed; (2) the intent of the parties was to rent the mobile home and slab for use as a residence for a period of indefinite duration, as opposed to its use as a chattel involved in a daily rental situation; and (3) the mobile home was sufficiently affixed to the ground with proper sewer and plumbing connections, **we find that the mobile home in this context must be treated as real property and not as chattel.**

The evidence is that the mobile home was permanently affixed, used as a permanent primary residence, and the owners swore it was real property. 21st paid the real property taxes on it without protest. It was at

least a fixture and an improvement, making it real estate. The only liens existent in this case were void based upon the bankruptcy stay.

Thus, this mobile home was the subject of a judicial sale and execution consistent with §319.28(1)(a), Florida Statutes. The real estate was foreclosed on by Centerbank. R713/Ex35, 725/Ex36. Centerbank obtained ownership of the property and transferred its interests in the property to TSE. R739/Ex38, 742/Ex39.

21st argues that the title or serial number must be referenced in any court ordered transfer by execution or attachment. That may apply to transfers relating to a perfected security interest under §319.27, Fla. Stat. However, nothing in the language of §319.28, Fla. Stat. creates any such requirement. Further, the purported security interest (lien) was void.

This case is controlled by §319.28(1)(a), Fla. Stat. (Transfer of Ownership by Operation of Law). This relates to the judicial sale of mobile homes. The statute provides:

> In the event of the transfer of ownership of a …mobile home by operation of law as upon … attachment, **execution, or other judicial sale** …

The property was sold at judicial sale as a part of the real estate with the 160 acres to which it was attached. *See*, §319.28(1)(a), Fla. Stat. This statute expressly relates to mobile homes and provides that they may be

transferred at "judicial sale". A process is provided for how a purchaser, like TSE may have the title placed in the new owner's name. *Id.* at (2)(a)[4]. That section of the statute would not be necessary if 21st's argument is correct that the court's "judicial sale" order must identify the mobile home specifically. The court cannot treat section (2)(a) as unnecessary surplusage.

TSE attempted to obtain the title from the Clerk but was told the title is held by 21st Mortgage due to their lien and a court order will be required. Tr115L15-25. TSE sought such an order as part of its relief below and as provided in the cited statute. R209Counterclaim for Declaratory Relief.

2. 21st incorrectly argues the mobile home was personalty and could not be executed upon

21st Mortgage argued below that their ten-page Consumer Note Agreement contains a sentence that says that the mobile home will remain personalty during the term of the note. R535/Ex5p.6 They also argue that a statute permits this agreement. §320.015, Fla. Stat. permits a mobile home

[4] "Except as provided in paragraph (b), only an affidavit by the person, or agent of the person, to whom possession of such motor vehicle or mobile home has so passed, setting forth facts entitling him or her to such possession and ownership, together with a copy of the journal entry, **court order**, or instrument upon which such claim of possession and ownership is founded, shall be considered satisfactory proof of ownership and right of possession." §319.28(2)(a), Fla. Stat.

lender to declare the mobile home personalty for the life of its loan, but only with a valid security interest. *Id.* ("any mobile home classified by a seller or a lender as personal property **at the time a security interest was granted therein to secure an obligation** shall continue to be so classified for all purposes"). The only security interest in this case was void and a nullity as discussed above, and 21st is an unsecured creditor of the Harrells.

In addition, the contract and the statute relate to the obligations between 21st and the Harrells, not others. Florida common law is clear that when such an agreement exists, it is not binding or effective against parties who have not been put on notice of it. See *Community Bank of Homestead v. Barnett Bank of the Keys*, 518 So. 2d 928 (Fla. 3rd DCA 1987); *Burbridge v. Therrell*, 148 So. 2d 204 (Fla. 1933).

The legislature is presumed to know the common law when it writes the statutes. For a statute to change the common law, it must do so expressly. *Courtney Enterprises, Inc. v. Publix Super Markets, Inc.*, 788 So. 2d 1045 (Fla. 2d DCA 2001)—Unless a statute unequivocally states that it changes the common law or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law. This statute is silent on the issue of notice to other parties and whether the agreement binds others. It only addresses the rights of the parties to the

contract. Thus, it does not affect the rights of non-parties to the agreement unless there is proof that the non-party to the agreement was put on notice of the terms of the agreement as required by the common law. 21st Mortgage Corporate Representative Warkins admitted no proof of notice to others exists. Tr35:7-10,34:15-22. Thus, 21st cannot enforce these provisions.

The mobile home transferred with the land in the foreclosure sale as explained above. This execution is an additional defense to the replevin. If this is a proper in rem action, these facts also provide the basis for the court to award title to TSE. Regardless, the 21st lien should be declared void, 21st's replevin denied, and the title returned.

V. CONCLUSION

Based upon Florida law and the facts herein, 21st may not replevin the property. A directed verdict was appropriate because 1) 21st is not the owner and the lien 21st asserts is void. Thus, 21st is nothing more than an unsecured general creditor of the Harrells; 2) 21st had unclean hands; 3) the mobile home was executed upon and no longer belongs to the Harrells; and 4) TSE has the right to damages and fees for proving the invalidity of the lien and requiring return of the title.

This court should reverse the judgment granting possession by replevin and 21st Mortgage should be denied any relief and ordered to clear and return the title.

In addition, the trial court should be directed to grant TSE's relief as follows:

1. Order that a clear title to the mobile home issue to TSE or, alternatively, conduct any necessary further proceeding to determine ownership between the Harrells and TSE; and

2. Conduct further proceedings as preserved in the pre-trial stipulation regarding the damages/fees/costs suffered by TSE, as the possessor and/or owner of the property which were incurred in clearing the lien/title of 21st Mortgage's claims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the eDCA system this 17th day of September, 2021, and an electronic copy has been furnished by email to all parties with an email address and to all other parties by 1st Class U.S. Mail.

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CERTIFICATE OF COMPLIANCE FOR COMPUTER GENERATED BRIEF
Fla. R. App. P. 9.045

I HEREBY CERTIFY that the foregoing brief was prepared using Ariel 14-point font and that it complies with the word count requirements in the Florida Rules of Appellate Procedure.

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Attorney