

# **Third District Court of Appeal**

**State of Florida, July Term, A.D. 2011**

Opinion filed October 19, 2011.  
Not final until disposition of timely filed motion for rehearing.

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No. 3D10-2910  
Lower Tribunal No. 09-397

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**Timothy Phillips,**  
Appellant,

vs.

**Centennial Bank f/k/a Marine Bank,**  
Appellee.

An Appeal from the Circuit Court for Monroe County, Sandra Taylor,  
Judge.

Christian J. Cruz (Sunrise), for appellant.

Feldman Koenig Highsmith & Van Loon and David Van Loon (Key West),  
for appellee.

Before WELLS, C.J., RAMIREZ, J., and SCHWARTZ, Senior Judge.

PER CURIAM.

Affirmed.

WELLS, C.J., and SCHWARTZ, Senior Judge, concur.

Phillips v. Centennial Bank,  
Case No. 3D10-2910

RAMIREZ, J. (dissenting)

I dissent because I cannot condone the unprofessional and unethical means used by the bank's counsel, with the trial court's complicity, to obtain an amended final judgment in this case. Counsel for Centennial Bank admitted at oral argument that the amended final judgment, which more than doubled the amount of the deficiency judgment, was obtained after an ex parte communication with the judge's chambers. Either the judge or her staff then advised counsel on how to proceed. Not only was it improper for the trial court to give legal advice, but the advice was wrong—directing counsel to send a letter with a proposed amended final judgment, rather than to file a motion seeking appropriate relief. This was then followed by another ex parte communication—a letter from the bank's counsel to the judge, that then resulted in a new final judgment two and half times larger than the previous final judgment. The bank did not even send a copy of the letter to the appellant. Incredibly, the majority of this panel is willing to condone and reward such behavior.

I.

The record shows that this case was initiated on September 2, 2009, by Centennial Bank f/k/a Marine Bank filing a complaint in foreclosure. Judge Ruth Becker, as Acting Circuit Judge, entered a final judgment of foreclosure on

January 28, 2010. On June 9, 2010, the bank filed a motion for deficiency judgment against Lance E. Stehman, John B. Phillips II, and Timothy Phillips, requesting a deficiency judgment in the amount of \$529,630.64. A hearing took place on August 19, 2010, before Senior Judge Sandra Taylor. There is no transcript of that hearing, but the court minutes show that Centennial Bank was seeking a deficiency judgment of \$529,630.64. Witness Maria Brandvold was sworn and questioned. Two exhibits were admitted and the witness was cross examined. The minutes show that: “Judge grants motion for deficiency judgment. Atty Orepeza [sic] to prepare order.” A Final Deficiency Judgment was signed by Judge Taylor on September 10, 2010, against only Lance Stehman and Timothy Phillips, in the amount of \$216,485.73, plus interest. Conformed copies were furnished to Centennial Bank’s attorney, as well as Patricia Snyder, Esq., as attorney for defendant Stehman, and to Timothy Phillips, pro se. The next record entry is an Amended Final Deficiency Judgment dated September 24, 2010. The judgment grew from \$216,485.73, to \$529,630.64. There is no intervening motion, affidavit, or hearing on the record.

The gaps in the history of the amended judgment, filled in by Centennial Bank, are without support in the record. Instead, in its brief, Centennial Bank claims that its own law firm mistakenly submitted a proposed final judgment that contained a deficiency amount inconsistent with any testimony or evidence. As

there is no transcript of the August 19 hearing, there is nothing on the record to support this allegation. Certainly the court minutes support that the bank was claiming that sum, but there is nothing showing that the testimony or evidence was uncontradicted or unchallenged as to that amount.

The brief then states that upon discovering the error, the firm immediately sent an ex parte letter to the court. At oral argument, counsel admitted that the letter was sent upon advice by the judge or the judge's chambers. At any rate, the letter was not made part of the record. Counsel admitted that the defendants were not sent copies of the letter.

Further, there is no record explanation as to why either the judgment or the amended judgment was entered only as to two of the defendants. In its brief, appellee states that defendant John B. Phillips II had filed for bankruptcy protection in Nevada on May 10, 2010. This assertion, again, contains no record cite and my independent review reveals no record support.

## II.

The appellee bank asks this Court to affirm a judgment obtained ex parte, off the record, and in a manner not contemplated by our Rules of Civil Procedure. I cannot accept the invitation, because these three defects are fatal to the amended judgment and demonstrate it was obtained without due process and must be reversed to permit such due process to occur.

First, it is undisputed the outcome in the trial court was obtained ex parte, which is improper. Counsel for Centennial Bank candidly admitted to this Court that upon discovery of the error in the original deficiency judgment, he contacted the trial court and was directed by the trial court to forward an amended deficiency judgment with a letter. He did so, but did not copy opposing counsel or the pro se defendant. The entry of the forwarded document, which was the product of ex parte discussions, was error. See Hanson v. Hanson, 678 So. 2d 522, 524 (Fla. 5th DCA 1996) (reversing a judgment that came after a conversation with only one side's attorney).

Second, the ex parte communication requires us to reverse because not only did the appellee bank act without including the appellant, it did so off the record. See R. Regulating Fla. Bar 4-3.5(b)(2) (stating that “[i]n an adversary proceeding a lawyer shall not communicate . . . as to the merits of the cause with a judge... except . . . in writing if the lawyer promptly delivers a copy of the writing to the opposing counsel or to the adverse party if not represented by a lawyer”). We cannot affirm, and thus endorse the bank's explanation of its actions, because we have no evidence to support what the bank alleges happened in the trial court. See McCrea v. Deutsche Bank Nat'l Trust Co., 993 So. 2d 1057, 1058-59 (Fla. 2d. DCA 2008). Counsel's letter is not in the record on appeal. There was no motion to amend or correct, or even an “agreed” order in the record to demonstrate the

participation of the appellant. Communications with the court, ex parte, which result in judicial action are improper even if they are intended to correct mistake or inadvertence regarding the outcome of a proceeding. See, e.g., Bird Lakes Dev. Corp. v. Meruelo, 582 So. 2d 119, 120 n.1 (Fla. 3d DCA 1991) (“We trust that in the future ex parte communications of this nature will not be repeated, as in our view, they are clearly improper.”). In the two weeks between signature of the original judgment and of the amended judgment, a telephone hearing, properly-copied correspondence, or other two-sided communication should have occurred. The absence of any such effort alone should lead to a reversal.

This case is the quintessential denial of due process. Due process requires notice and an opportunity to be heard. Here appellant was granted neither. A final judgment was amended from \$216,485.73, to \$529,630.64, and the appellant was only informed after the fact when he received the conformed copy in the mail. Appellants were not heard.

The explanation by the bank that the final judgment contained a typographical error seems specious. A good example of a typographical error can be found in Tolin v. Doudov, 626 So. 2d 1054, 1055 n.1 (Fla. 4th DCA 1993) (\$ 138,001 vs. \$ 138,801), or Suncoast Insulation Manufacturing Company v. Growth Leasing, Ltd., 570 So. 2d 447 (Fla. 2d DCA 1990) (\$ 1,500 vs. \$ 1,400), not, as here, \$216,485.73 vs. \$529,630.64.

To affirm based upon the majority's "no harm, no foul" implicit rationale, we must, at the very least, require the bank to demonstrate the result of its ex parte communication would be the same had a proper, adversarial motion been filed. The bank has not done so, and thus we must reverse for consideration of an appropriate motion, preferably accompanied by an affidavit.

The majority's analysis ignores that appellant seeks reversal to correct an error of procedural due process. At oral argument, counsel for the appellant was asked regarding his client's presence at the hearing that led to the original deficiency judgment and whether they objected at that hearing to the judgment amount. Counsel was understandably confused by the question because the issue here is what happened to facilitate the amended deficiency judgment, not the first judgment. Moreover, I am unaware of any decision that requires transforming the presumption in favor of due process into a requirement that a party wronged by the lack of due process prove what it would have done had it been given notice required by due process. That is because the answer lies in the question: the wronged party would have presented its position when given the opportunity to be heard. The remedy must follow the wrong, which here is the lack of notice and an ex parte action by a court with jurisdiction over both sides. The outcome was ipso facto incorrect because it is tainted by a lack of procedural due process. The

remedy appellants seek is the opportunity to be heard. They have a right to that remedy. See McCrae, 993 So. 2d at 1058-59; Meruelo, 582 So. 2d at 120 n1.

Communications that occur ex parte are presumptively improper, because “[t]he essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered” and a court should “render[] judgment only after proper consideration of issues advanced by adversarial parties” after an opportunity to be heard. See Hanson 678 So. 2d at 524; accord Wilson v. Armstrong, 686 So. 2d 647, 648-49 (Fla. 1st DCA 1996) (reversing because the judgment arose from the judge’s ex parte communication with one side’s accountant).

Third, the amended deficiency judgment cannot stand because it arose without a motion that was served on all parties, which is the basic requirement for any “application to the court for an order.” See Fla. R. Civ. P. 1.100(b); 1.080(a). We have previously stated that “A trial court does not retain the authority to amend or modify a final judgment, absent a rule or statute providing otherwise.” Harbor Bay Condos., Inc. v. Basabe, 856 So. 2d 1067, 1069 (Fla. 3d DCA 2003). I am not aware of any rule or statute that allows the court to amend or modify a final judgment pursuant to a letter sent ex parte to the court.

The bank has ignored the requirement for notice and a motion more than once in this case. Without any record activity reflecting the reasons for its actions,

the bank removed a defendant before obtaining the deficiency judgment at issue in this case. John B. Phillips, named in the complaint as a defendant, and who was named in the initial final summary judgment of foreclosure, was not named in either of the orders granting a deficiency judgment that at issue in this appeal. I see no record activity suggesting the reasons for this defendant's absence, although the bank's counsel has contended as part of its defense of the amended deficiency judgment that the missing defendant sought and received Federal bankruptcy protection. Neither we nor the trial court should take judicial notice of this fact without appropriate process. See § 90.205(6) Fla. Stat. (2010) (providing a court "may take notice" of records of a court of the United States). Moreover, the record does show that the absent defendant signed the note, which is in the record, and that he was subject to a final judgment of foreclosure. Thus, we do not know what this absent defendant contributed toward the debt at issue, if anything. This is yet another issue that might have been explored at the hearing that did not happen.

Even the bank's record activity paints an incomplete picture of the actions it has taken, which taints the results of such action because we cannot be sure due process occurred. The text of the amended deficiency judgment includes a reference to the "plaintiff's motion," but there was no motion to facilitate the amended deficiency judgment. The amended deficiency judgment also does not

indicate whether the defendant was advised in advance, or if the outcome is the result of default, agreement, or non-opposition. There is no transcript of the original hearing in the record. While the minutes of the hearing note the amount of the judgment, they also do not indicate whether the trial court intended to award the full amount. Thus, a reversal for a determination of the basis for amending the judgment is required. See, e.g., Peters v. Peters, 479 So. 2d 840, 841 (Fla. 1st DCA 1985) (reversing for a determination whether an alleged clerical error was instead a change in substance).

The bank relies heavily on Betts v. Fowelin, 203 So. 2d 630 (Fla. 4th DCA 1967), where a jury verdict was entered in favor of plaintiff in the amount of \$63,660, yet the final judgment entered was for \$63,600. On appeal the defendant did not appeal the \$60 difference but was instead trying to use the date of the corrected final judgment as the operative date for the timing of its notice of appeal. I fail to see how that case supports what happened here, as the change in judgment occurred after a motion and the issue was the effect of that judgment on the timing of the defendant's appeal, not whether the trial court properly amended the judgment amount.

In contrast, our case is eerily similar to McCrea, where the McCreas appealed an order vacating the order that dismissed Deutsche Bank National Trust Company's mortgage foreclosure action with prejudice. See McCrea, 993 So. 2d

at 1057. The McCreas argued that the trial court lacked jurisdiction to vacate the order because Deutsche Bank failed to serve a motion for rehearing within ten days and the court did not have a proper basis to vacate its order pursuant to Florida Rule of Civil Procedure 1.540(b). Id. at 1058. The Second District reversed and remanded for a hearing on the matter because the trial court had rendered the order after ex parte communications with Deutsche Bank and without providing the McCreas an opportunity to be heard. The court stated:

It may well be that the earlier order was the product of mistake, as opposed to judicial error, and was properly corrected by the trial court under rule 1.540(b). However, the McCreas were precluded from establishing the misapplication of rule 1.540(b) by the ex parte procedure that led to entry of the order.

Id. at 1058-59. The Second District did not require the McCreas to show how they were prejudiced by the ex parte procedure. It was enough that appellant showed that an ex parte procedure was used.

In my view, to affirm what happened here requires that we turn a blind eye to the Florida Rules of Civil Procedure, the Florida Bar Rules of Professional Conduct, and the Code of Judicial Conduct, to say nothing of the Constitutions of the United States and the State of Florida.

For these reasons, I would reverse the trial court's entry of the amended final judgment.