

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-2203

JOHN BENNETT and
NANCY BENNETT, his wife

Petitioners,

vs.

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,
HOME LOAN ALLIANCE, LLC, f/k/a
LEVERAL FINANCIAL, LLC d/b/a LF
LOANS, JAMAL M. WILSON, and
GTE FEDERAL CREDIT UNION,

Respondents.

A PETITION FOR DISCRETIONARY REVIEW FROM AN OPINION OF THE
THIRD DISTRICT COURT OF APPEAL
LOWER TRIBUNAL NO. 3D17-0001

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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137 So.3d 1081 (Fla. 3rd DCA 2014) 3, 5

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STATUTES AND OTHER AUTHORITY

15 U.S.C. 1635 2

INTRODUCTION AND JURISDICTIONAL STATEMENT

Petitioners allege that the Third District Court of Appeal rendered an opinion that is in “express and direct conflict with this court’s decision in *Santa Rosa County vs. Administration Commission*, 661 So.2d 1190 (Fla. 1995). Petitioners claim the appellate court based its decision on there being a settlement in the instant case, as in *Santa Rosa*, but an examination of the opinion reveals this claim to be erroneous. The appellate opinion is not based on a settlement, rather it is based on there being no present dispute or controversy that would entitle Petitioners to declaratory relief. In its opinion, the appellate court was not relying on *Santa Rosa*, it was merely comparing the situation in that case to the one at bar in dicta. Accordingly, no conflict exists and this Court should decline this invitation to exercise discretionary jurisdiction.

STATEMENT OF THE CASE AND FACTS

Petitioners omit critical information from their statement of the case and facts. Additionally, though Petitioners claim jurisdiction based on alleged conflict with a sister decision cited with respect solely as to that portion of the opinion regarding the propriety of summary judgment on Petitioners’ request for declaratory relief, Petitioners provide facts, and argument, on Petitioners’ other

claims in the lawsuit¹. These allegations, facts and claims have no relevance to the issue at bar and should be disregarded.

In the instant case, Petitioners applied for a specialized federal loan (known as a Home Affordable Refinance Program loan (HARP II) which was created to assist borrowers whose mortgage loans were in excess of the value of the home. (AX 5)² In applying for this loan, Petitioners signed documents several times which acknowledged, under penalty of perjury, that mortgage insurance was required for this government backed loan. (AX 5) The amount of mortgage insurance along with taxes and insurance to be escrowed monthly was stated specifically in these disclosure documents. (AX 5) When the loan was closed, however, the final documents contained a clerical error which omitted the federally required mortgage insurance. (AX 5)

Petitioners discovered the error shortly after the closing. (AX 5-6) They then allegedly obtained the closing documents from GTE, the assignee of the loan, and claimed there was a forged disclosure document in the file regarding mortgage insurance. (AX 6) Petitioners immediately had their counsel send a letter giving Respondents sixty (60) days to correct this error. (AX 6)

¹ In addition to their claim for declaratory relief, Petitioners also sought damages and rescission for alleged Truth in Lending Act violations (15 U.S.C. 1635 et seq) and damages for alleged forgery.

² The appendix filed by Petitioners shall be referred to as “AX ”

Within twenty (20) days of the date of this letter, Respondents had notified Petitioners in two writings that Respondents: “acknowledged that the disputed documents were ‘falsified’ and “misrepresentation[s]”; confirmed that the private mortgage insurance would be taken off the loan; and, agreed to refund any payments Petitioners had made for mortgage insurance. (AX 6-7)

Three months later, Petitioners filed suit for fraud in the execution, declaratory relief and TILA violations. (AX 8) Petitioners claimed to be in doubt as to their rights regarding the mortgage insurance, wanted the alleged forged documents declared null and void, sought a refund of their three payments totaling \$302.96 for mortgage insurance and sought legal fees and costs. (AX 8)

After four years of litigation, Respondents moved for summary judgment on all claims. (AX 8) As to the declaratory relief action, the trial court entered summary judgment for the Respondents on the basis that there was no present dispute or controversy as a result of Respondents written representations long before suit had been filed. (AX 8)

After de novo review, the appellate court, relying on the principles of law as to declaratory relief actions as stated in *Grove Isle Ass’n, Inc. v. Grove Isle Assocs., LLLP*, 137 So.3d 1081 (Fla. 3rd DCA 2014), held that the trial court’s granting of summary judgment on the declaratory relief action was correct, since

“there was no genuine dispute that there was no bona fide adverse interest”. (AX 4, 13-15) The court compared the situation in *Santa Rosa* and in dicta stated that there was “even less of a ‘present’ controversy in this case” when compared with the situation in *Santa Rosa*. (AX 14-15)

SUMMARY OF ARGUMENT

Petitioners’ claim of conflict is in error. No conflict exists between the Third District’s opinion and any sister court. The Third District applied the proper analysis of the facts and law in its de novo review of the trial court’s determination that no present dispute or controversy existed when the lawsuit was filed. The Third District’s affirmance of the trial court’s summary judgment against Petitioners on the claim for declaratory relief was based on the proper standard of review and the law as applied to the evidence in the case.

ARGUMENT

I. NO CONFLICT WITH ANY OTHER DISTRICT COURT DECISION

Petitioners claim that the appellate court’s opinion is in “express and direct conflict with this court’s decision in *Santa Rosa County v. Administration Commission*, 661 So.2d 1190 (Fla. 1995) but there is no statement anywhere in the lower court’s opinion that the decision is in conflict with their sister court’s opinion. Petitioners’ argument herein is undermined by the Third District’s own

statement in the opinion that the situation in *Santa Rosa* was being provided for comparison purposes only. As the court noted, *Santa Rosa* was simply an example of a case that was “similar”. In that case the Florida Supreme court determined there was “no present need for a declaratory judgment” because a settlement resolved the pending disputes. *Id.* At 1192.

The appellate court noted that in the case at bar, “[T]here is even less of a ‘present’ controversy”. The court did not, however, rely on *Santa Rosa* or utilize the decision as the basis for its opinion in the case at bar. The reference to *Santa Rosa* was merely dicta.

In the case at bar, the Third District correctly followed long standing law regarding declaratory relief actions, stating, “[T]he elements of an action seeking a declaratory judgment require the plaintiff to show there is [1] a bona fide adverse interest between the parties concerning a power, privilege, immunity or right of the plaintiff; [2] the plaintiff’s doubt about the existence or non-existence of his rights or privileges; [3] that he is entitled to have the doubt removed.” *Grove Isle Ass’n, Inc. v. Grove Isle Assocs., LLLP*, 137 So.3d 1081, 1093 (Fla. 3d DCA 2014).

As the court noted, there was no bona fide adverse interest since the Petitioners sixty day cure notice had been agreed to and there was no genuine material dispute about the documents or the mortgage insurance.

Petitioners argue that the appellate court is making new law regarding settlements. Nothing in the instant opinion supports this claim. The basis for the summary judgment on the declaratory relief action was that there was no present dispute or controversy, not that there was a complete settlement of all issues. In other words, Petitioners are attempting to create facts and claims that do not exist in an effort to create a conflict that does not exist.

There being no conflict with any judicial decision, let alone the type of “express and direct” conflict necessary to invoke the discretionary jurisdiction of this Court, this appeal should be denied for lack of jurisdiction.

CONCLUSION

For the reasons stated above, this Court should decline to exercise its discretionary jurisdiction in this matter.

Respectfully submitted,

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/s/ Scott Jay Feder_____

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirement of the Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

By: /s/ Scott Jay Feder
Scott Jay Feder

CERTIFICATE OF SERVICE

I certify that a copy of this motion was served by e-mail on January 3, 2018

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