No. 18-338

IN THE

Supreme Court of the United States

LEONARDO SOCCOLICH AND MILA SOCCOLICH,

Petitioners,

v.

WILMINGTON SAVINGS FUND SOCIETY, FSB, NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE FOR THE BROUGHAM FUND I TRUST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SECOND DISTRICT COURT OF APPEAL

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Petitioner has shown that the Florida Courts have strayed from their core responsibility of determining and applying law in the administration of justice which creates any issues appropriate for this Court's review?

2. Whether the Petitioner has shown any disregard of "standing" as an essential element for initiating litigation is compliant with the "case and controversy" requirement set forth in Article III of the Constitution of the United States sufficiently to create any issues appropriate for this Court's review?

3. Whether the Florida Court's opinion in *Singleton v. Greymar Associates*, 882 So.2d 1004 (Fla. 2004) shows any "departure" from the application of the doctrine of *res judicata* in mortgage foreclosure actions, violates constitutional rights, or creates any issues appropriate for this Court's review?

4. Whether the Florida Court's opinion in *Bartram v. U.S. Bank National Association*, 211 So.2d 1009 (Fla. 2016), extending the *Singleton v. Greymar Associates*, 882 So.2d 1004 (Fla. 2004), opinion shows any "violation" of constitutional rights, or creates any issues appropriate for this Court's review?

5. Whether the conduct of the "officers of the court" in the "Starwood Case" violates any "due process" rights, "emasculates" the administration of justice or creates any issues appropriate for this Court's review?

RULE 24.1(b) AND 29.6 STATEMENT

Pursuant to Court Rule 24.1(b), Respondent, Wilmington Savings Fund Society, FSB, not in its individual capacity, but solely as trustee for the Brougham Fund I Trust, states that all parties to the proceeding below appear in the caption of the case on the cover page.

Pursuant to Court Rule 29.6, Respondent, Brougham Fund I Trust, is privately owned; no parent corporation or public entity owns 10% or more of the stock of Respondent.

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The Respondent, Brougham Fund I Trust, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Florida Second District Court of Appeals' opinion in this case. That opinion is at 241 So. 3d 119 (Fla. 2nd DCA 2017) (Table Decision).

OPINIONS BELOW

The 12th Judicial Circuit Court of Manatee County, Florida, the trial court, rendered its unpublished Final Judgment of Foreclosure on February 7, 2017, in Case No. 2014CA003569. The Second District Court of Appeal of Florida, in Case No. 2D17-916, affirmed the Final Judgment of Foreclosure without opinion on December 15, 2017.

JURISDICTION

The Respondent asserts that no basis for jurisdiction exists in this action. The Petitioner asserts that jurisdiction of this Court rests on 28 U.S.C. 1254(1), 28 U.S.C. 1257(a), and Article III, § 2 of the Constitution of the United States.

STATEMENT OF FACTS

The Respondent, Brougham Fund I Trust, ("Respondent") seeks to prevent the Petitioners, Leonardo and Mila Soccolich, ("Soccolichs" or "Petitioners"), from circumventing the law and escaping a foreclosure which was the result of the Soccolichs' failure to fulfill their obligations and responsibilities on their mortgage. In 2006, the Petitioners borrowed $537,600 from SunTrust Mortgage, Inc. ("SunTrust"). To secure payment, Petitioners executed a promissory note and granted

SunTrust a mortgage on real property owned by the Petitioners in Manatee County, Florida. The mortgage was recorded in the Official Records of Manatee County, Florida at Book 2113, Page 7096. Petitioners used the money to purchase a second home. In addition to being secured by the value of the real property, the mortgage granted SunTrust (and its successors-in-interest) a security interest in any rental monies collected by Petitioners.

SunTrust, as the construction lender, was responsible for disbursing seven construction draws directly to the B/W General Contractors, Inc., D/B/A Bruce Williams Homes, ("B/W"). B/W was the construction company designated to build the home, and to provide model templates, one of which the Soccolichs selected as the model for their home. During the construction of the house, the Soccolichs ceased making the agreed-upon payments, claiming that B/W failed to comply with the plans and specifications of the home. Without proper cause, the Soccolichs directed SunTrust to stop payments and to withhold the fifth draw to B/W. Had SunTrust done so, the Soccolichs would have been in breach. As obligated to do, SunTrust made the payment as required.

Although the Petitioners continue to argue that B/W's efforts to build per the agreed-upon specifications of the home were insufficient, rising to noncompliance, this issue was already resolved against the Petitioners in Arbitration. The Soccolichs were found to have breached the agreement, and were required to pay attorneys' fees. Following the arbitration, SunTrust was obligated to pay the fifth draw on the property.

After SunTrust completed the payments, the Soccolichs breached their loan agreement by failing to make any payments to SunTrust after January, 2009. As a result of this breach, the Soccolichs defaulted shortly after in February 1, 2009, and to date the default has not been cured. Due to the failure to comply and subsequent default, SunTrust liened the property, and was forced to recoup the loan through a foreclosure sale. The Florida 12th Circuit Court dismissed the matter on August 3, 2009, (Case No. 2009CA007908) due to SunTrust's failure to file an amended complaint within the 45 days ordered by the court. Standing was not a factor in that court's decision to dismiss.

During the proceedings for the foreclosure and subsequent disposition, the loan and note were sold to Primestar Trust in March, 2013. The loan originated in 2009, and has a current delinquent balance of $537,600. The Mortgage Loan Purchase and Interim Servicing Agreement shows a proper transfer of the note and outstanding debt. Due to continued failure of the Soccolichs to comply with their obligation, Primestar Trust was forced into a foreclosure proceeding as well, (Circuit Court Case No. 2014CA003569) and the court held for the lender, granting final judgment for Respondent.

From the outset, the Soccolichs have received regular and substantial rental income from the property at issue, the mortgage upon which they have not made any payment for nine years. In the Circuit Court case from which this action ultimately arises, the court granted Respondent's Motion for Sequestration of Rents into the Court Registry. (Order of August 3, 2016.) Upon the issuance of this order, Ms. Soccolich immediately sought to circumvent the court's authority by hoarding, but not cashing or

depositing, her tenants' rent checks on the absurd grounds that if she was not depositing the checks, she had not "received" the money and therefore did not have to turn it over to the court registry. During, the proceedings the loan was purchased and transferred to Brougham Fund I Trust, as successors in interest and as a result they were subsequently substituted as the Appellee. (Order of October 10, 2016).

Subsequently, the Petitioners appealed the final judgment of the court in the 2nd District Court of Appeals, which once again affirmed the Florida 12th Circuit opinion. The Florida Supreme Court declined the Petitioner's request to hear the case. Now, after years of flouting the court-ordered judgment, the Petitioners have put forth one final effort to circumvent their obligations. After twelve years of inaction and nine years of nonpayment, the Petitioners now seek a Writ of Certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

This argument is divided into two sets of issues. Firstly, Respondent will address the factors that determine whether or not this case is appropriate for Court review, and show that none of the factors applies to the facts of this case. Secondly, Respondent will briefly address the claims raised in Petitioners' unsuccessful appeal.

1. This Case Meets None Of The Criteria That Would Merit A Writ Of Certiorari.

The Court is the ultimate U.S. judicial authority, and the court of last resort. The granting of a writ of certiorari entails the review of many factors to assess which cases are appropriate. The instant case does not present the type of question that is usually deemed fit for Court review. This petition for a writ of certiorari is entirely without merit, it raises no unique federal question, and amounts to no more than a last-ditch effort by the Petitioners to avoid the consequences of defaulting upon their mortgage.

Under the rules of the Court, Rule 10, the Court has jurisdiction to decide and certify issues to be heard. The first question considered concerns the type of court from which the appeal arises. The instant case is being appealed from the Florida Second District Court of Appeals. (The Florida Supreme Court declined to hear the case.) There is no split in opinion between the Florida state courts and the federal courts. The case does not invoke a federal question. It is a simple foreclosure action which has made its way through all courts available to Petitioners, as they pursue the same litigation, repeatedly and without merit, in hopes of a new and favorable outcome.

Second, the issues in this case are not only state issues, but they have been decided entirely on state law and precedent. Here, there is no constitutional conflict, no conflict between two states' highest courts, and no conflict between a federal court and the state courts. Further, there is no challenge to the interpretation or implementation of federal legislation, statutes, or case law. The issues raised by the Petitioners are not the

kind of issues which affect the public at large, nor would they be considered of great public importance, which is a traditional requisite of this Court's jurisdiction. Much to the contrary, the case is specific and individualized, and would render a resolution only for the Soccolichs. Based on the history and precedent of the Court, it is evident that this case is not appropriate for discretionary certiorari jurisdiction.

The Florida courts have decided this case on two occasions, based on *Singleton,* which is, and has been, reaffirmed as the controlling precedent for Florida, twice having supported decisions against the Soccolichs. The highest state court, the Florida Supreme Court, has declined to hear the case. The state court decisions do not conflict with any federal law. State issues have been traditionally left to the state where the cause of action arises in the state, and a decision has been rendered by state courts. In conclusion, no aspect of this case or the underlying law makes it appropriate for this Court's review. The Petitioners defaulted on their mortgage, spent years trying to circumvent appropriate legal proceedings, and now hope that this Court will absolve them of their financial obligations. This is simply another effort to exploit (and abuse) judicial proceedings to avoid the fair and just payment due from the Petitioners that the Respondent has deserved for years.

2. The Appellate Court Rightly Held That Petitioners' Claims Were Without Merit.

On Appeal, the Petitioners raised five primary issues -- none of which were found to have merit. Their first argument was that the Respondent lacked standing,

but the evidence establishing standing was clear and substantial. During the October, 2016, trial, Respondent established standing as the holder of the instrument. The copy of the note carrying a blank endorsement from the original lender was attached to the Complaint and matched identically the original note that was subsequently filed with the Clerk. The assignment of the mortgage and the transfer of ownership were well documented. The trial court rejected the Petitioner's standing argument.

Next, the Petitioners argued the claim was barred by the statute of limitations. They misconstrued the law. The claim was timely filed within five years of the original acceleration date – *i.e.* the date the 2009 Foreclosure case was filed. Regardless, the *Bartram* and *Bollettieri* decisions hold that the underlying Complaint alleges a "new cause of action" based on new defaults within the limitations period.

Petitioners argued that *res judicata* barred the appellate action because the Complaint contained the same default language that was used in the 2009 foreclosure case, which they claim was dismissed with prejudice. However, the 2009 foreclosure case was not adjudicated on its merits, and therefore res judicata is inapplicable. Regardless, recent case law like *Bollettieri* suggests that the 2009 and 2014 foreclosure cases are not the same because the 2014 Complaint alleges a "continuing state of default," which necessarily includes defaults that have occurred since the 2009 case was dismissed. *See Forero v. Green Tree Servicing, Inc.*, 42 Fla. L. Weekly D1577, 2017 WL 2989493, *3 (Fla. 1st DCA July 14, 2017).

Petitioners argued that the trial court failed to preserve the administration of justice and protect the Petitioners' constitutional rights. Petitioners' arguments are not supported by the law or the facts. The dismissal of the Soccolichs' counterclaims was appropriate where the claims were directed at a non-party, failed to adequately state claims against the Respondent, and, in any event, were not compulsory counterclaims. Any error in dismissing the counterclaims without leave to amend was waived where that relief was never sought by the Soccolichs. Once the Soccolichs' counterclaims were dismissed, there was no basis for a jury trial because a mortgage foreclosure proceeding is equitable in nature and does not afford the parties a right to trial by jury.

The trial court also did not err in failing to convene a pretrial conference upon the Soccolichs' motion, where the motion was not timely – served a mere seven days before trial – and the court had already conducted a case management conference. The remainder of the Petitioners' argument under this issue lack the specificity needed to be considered on appeal and the record refutes the general assertions that the Soccolichs were deprived of their due process rights. If anything, these *pro se* litigants have been afforded due process *ad nauseam*. The proverbial apple is down to its core.

ARGUMENT

1. This Case Is Not Appropriate For A Writ Of Certiorari.

The Petitioners believe that the highest court in the land should absolve them of paying their mortgage. The

Petitioners are grossly misusing the court system in order to circumvent paying the debts and responsibilities which the Petitioners have incurred through their own actions. The instant case is a simple foreclosure action and not appropriate for this Court's review.

The Court's discretionary certiorari jurisdiction is based on several factors which the Court will consider in determining whether to grant the petition for certiorari. The first of these is whether or not there is a federal question at issue. As Justice Brennan stated, "Crucial to the exercise of our certiorari jurisdiction is whether the controlling issue in the state court case is a federal issue, that is, an issue arising under the United States Constitution or under federal law or treaties." Robert L. Stern, Stephen M. Shapiro, Eugene Gressman & Kenneth S. Geller, *Supreme Court Practice*, 207 (7th ed. 1993) citing Justice Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar. Assn. Q. 393, 399-400 (1960). Here there is no federal question or issue arising from the state court. This case is and remains a foreclosure action.

The Court has held that matters of great public concern are appropriate for review, even if they do not turn on a federal question. See *Janus v. American Federation of State*, 138 S. Ct. 2448 (2018), see also *Florida v. Powell*, 559 US 50, 130 S. Ct. 1195 (2010). The issue presented is a simple issue which has been resolved by multiple courts. Additionally, the questions of law set forth for review by the Petitioners will not alleviate other Plaintiffs and Petitioners but rather will only serve to help this specific matter. There are no matters of public concern at issue.

When there is no federal question, and no matters of public concern, there is no need for this Court's involvement. "It is fundamental . . . that state courts be left free and unfettered by us in interpreting their state constitutions." *Florida v. Powell*, 130 S. Ct. 1195, 1201 citing *Minnesota v. National Tea Co.*, 309 U.S. 551, 557, 60 S.Ct. 676, 84 L.Ed. 920 (1940). The nature of this issue emanates solely from state law and the disposition at issue is reliant solely on state precedent, as a result, the state court's decisions and interpretation of their state laws should be given finality.

Further, "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* citing Michigan v. Long, 463 U.S. 1032, 1041. Here, the state law on which the case was decided is beyond reproach. The Florida Second District of Appeals upheld the decision of the trial courts, based on well-established legal precedent of Florida, primarily *Singleton v. Greymar Associates*, 882 so.2d 1004 (Fla. 2004) (holding that a dismissal of a mortgage foreclosure action even with prejudice, does not necessarily bar a subsequent foreclosure action on the same mortgage, because each alleged default creates a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action) and *Bartram v. U.S. Bank Nat. Ass'n*, 211 so. 3d 1009, 1019 (Fla. 2016), reh'g denied sub nom. *Bartram v. U.S. Bank Nat'l Ass'n*, No. SC14-1265, 2017 WL 1020467 (Fla. Mar. 16, 2017) (which upheld *Singleton* and held that "[w] ith each subsequent default, the statute of limitations runs from the date of each new default providing the mortgagee the right, but not the obligation, to accelerate all sums

then due under the note and mortgage.). The above cases are well supported, and the trial court and Florida Second District Court of Appeals provide ample due process for any legitimate claim.

The Court has, in eleven circumstances, found state court issues to be appropriate for discretionary certiorari jurisdiction when federal question jurisdiction is not present. They are as follows.

The first consideration is, "[w]here the state court has held a federal statute or treaty unconstitutional or has sustained the validity of a state statute as against the claim of repugnance to the federal constitution;" Robert L. Stern, Stephen M. Shapiro, Eugene Gressman & Kenneth S. Geller, *Supreme Court Practice*, 208 (7th ed. 1993). This is not applicable as the instant case does not address any federal statutes, treaties or the constitution. Instead, this case deals with Florida case law dealing with foreclosures and the judgment levied by the Florida courts against the Petitioners.

The next factor for consideration is, "[w]here the state court holds a state statute to be repugnant to the federal Constitution;" Robert L. Stern, Stephen M. Shapiro, Eugene Gressman & Kenneth S. Geller, *Supreme Court Practice*, 208 (7th ed. 1993). This factor is also inapplicable, as the there was no conflict or interpretation made regarding the federal Constitution or any other federal doctrines in the underlying actions.

The Court will also consider, "[w]here the state court sustains the validity of a federal statute … if the constitutionality of the statute is really doubtful or where

an untenable construction is given to the statute to save its constitutionality." *Id.* See also *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240 (1935); *Hopkins Federal Savings & Loan Ass'n v. Cleary*, 296 U.S. 315, 332 (1935). This factor would be inapplicable and inappropriate for granting certiorari due to the fact that there is no interpretation being made by the Florida courts that is related to a federal statute.

If "a conflict between decisions of a highest court and a federal court of appeals on a question of federal law," the court may grant certiorari. Robert L. Stern, Stephen M. Shapiro, Eugene Gressman & Kenneth S. Geller, *Supreme Court Practice*, 208 (7th ed. 1993). See also *Katzinger v. Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947); *MacGregor v. Westinghouse Co.*, 329 U.S. 402 (1947). The instant case is based solely on state law, and the interpretation of state law, which render the instant case outside of the federal question necessary for this factor as well.

If "a conflict between a decision of the highest state court and that of this Court on a matter of federal law" arises certiorari may also be considered. Robert L. Stern, Stephen M. Shapiro, Eugene Gressman & Kenneth S. Geller, *Supreme Court Practice*, 208 (7th ed. 1993). See also *Hudson v. Louisiana,* 450 U.S. 40, 42 (1981); *William E. Arnold Co v. Carpenters District Council*, 417 U.S. 12, 14 (1974*); Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 371-72 (1974). However, this case does not qualify simply considering the fact that there is no conflict between the courts. The case is also one of state law, specifically foreclosure, and it deals solely with Florida law, no federal laws. Finally, there are no cases, laws, or precedent in conflict with any other court's decision, particularly this Court.

Another factor the Court will consider is whether, "a conflict between decisions of the highest courts of two or more states on a federal question." Robert L. Stern, Stephen M. Shapiro, Eugene Gressman & Kenneth S. Geller, *Supreme Court Practice*, 208 (7th ed. 1993). Such a conflict most frequently occurs in connection with the construction of a federal statute. See *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772, 780 n.10 (1981); see also *United States v. Oregon*, 366 U.S. 643, 645 (1961); *Citizens & Southern National Bank v. Bougas*, 434 U.S. 35 (1977). The instant case does not deal with a conflict between any applicable courts, does not involve a federal question, thus consideration under this criteria would be inappropriate.

Additionally, the Court may grant certiorari when, the "state court decisions involve[s] the construction and application of federal statutes or treaties." Robert L. Stern, Stephen M. Shapiro, Eugene Gressman & Kenneth S. Geller, *Supreme Court Practice*, 209 (7th ed. 1993); see also *Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961). As stated above the instant case does not deal with a federal statute nor a treaty and, therefore, there are no decisions encompassing the construction or application of a federal statute, treaty, or question.

The next factor for consideration is "[w]here a state court has decided a substantial and unsettled federal question arising under the Constitution or where it has rendered an erroneous or at least a doubtful decision on such a question." Robert L. Stern, Stephen M. Shapiro, Eugene Gressman & Kenneth S. Geller, *Supreme Court Practice*, 209 (7th ed. 1993); see also *Oregon v. Kennedy*, 456 U.S. 667, 668-669 (1982); *Tibbs v. Florida*, 457 U.S. 31, 39 (1982). This is not applicable due to the fact that

the issue involves state foreclosure action and at no point did the court make a decision on any federal questions or issues arising under the Constitution.

Additionally, the Court may consider "[w]here a state court has relied upon a prior Court decision, or a constitutional principle previously established by the Court, that is now considered ripe for reconsideration and possible overruling or change." Robert L. Stern, Stephen M. Shapiro, Eugene Gressman & Kenneth S. Geller, *Supreme Court Practice*, 209 (7th ed. 1993); see also *Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963). This issue is not present in the instant case, as the case was strictly a state issue, there was no federal decisions related to this matter and as such there was no Court precedent or case law used by the lower court in reaching its finding.

The Court has also granted certiorari, "to determine whether the state court has properly interpreted, applied, or extended a prior Court decision in a given situation." Robert L. Stern, Stephen M. Shapiro, Eugene Gressman & Kenneth S. Geller, *Supreme Court Practice*, 209 (7th ed. 1993); see also *Bullington v. Missouri*, 451 U.S. 430, 432 (1981). As stated above, the instant case at no point interprets, applies, or extends a prior Court decision. As stated above, the instant case arises from strictly state foreclosure laws.

Finally, the Court may issue certiorari "where state court decision seems to 'present important questions touching the accommodation of state and federal interests under the Constitution.'" Robert L. Stern, Stephen M. Shapiro, Eugene Gressman & Kenneth S. Geller, *Supreme*

Court Practice, 210 (7th ed. 1993) citing *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974); see also *Smith v. United States*, 431 U.S. 291, 293 (1977), *Arizona v. Manypenny*, 451 U.S. 232, 239 (1981). This case does not deal with the fundamentals or principles of the Constitution. This case is a foreclosure action which entails the upholding of precedent which has been in existence for nearly 14 years. The *Singleton* case allowed for the foreclosure proceedings based independently and solely on Florida law. Therefore, the instant case is inappropriate for discretionary certiorari jurisdiction.

2. Should The Court Grant A Writ Of Certiorari, Petitioners' Case Must Still Fail On The Merits

A. The Trial Court Was Correct In Finding That Standing Had Been Established.

Whether a party has standing to bring an action is reviewed by a mixed standard of review. In concluding that the predecessor party, Primestar Trust, had standing at the inception of the case and that Brougham had standing at trial, the trial court necessarily made a finding of fact that Primestar Trust possessed the note endorsed in blank when the action was commenced and that Brougham possessed the same note endorsed in blank at trial.

Florida law is clear that the transfer of the Note and Mortgage during the pending litigation did not negate the original plaintiff's standing to initiate this action. *See, e.g., Smith v. Spitale,* 675 So. 2d 207, 209 & n. 1 (Fla. 2d DCA 1996); *Sun States Utilities, Inc. v. Destin Water User, Inc.*, 696 So. 2d 944 (Fla. 1st DCA 1997). The transfer of the Note and Mortgage was only grounds for the substitution

of the new owner/holder, not dismissal of this case. *Sun States Utilities,* 696 So. 2d at 945. The fact that Brougham obtained a transfer of this interest from Primestar during the pendency of this lawsuit did not negate Primestar's standing at inception or otherwise destroy the right of Brougham to foreclose the Mortgage.

B. Respondent's Claims Are Not Barred By the Statute Of Limitations.

Petitioners argued that the trial court erred by not applying the statute of limitations to dismiss the instant case. Petitioners asserted that the cause of action accrued in the original case 30 days after the Notice of Default was mailed to the Soccolichs. The Notice of Default was mailed in that case on March 18, 2009, so Petitioners argued the statute of limitations commenced April 18, 2009. The Petitioners then argued that since the current case was not filed until July 10, 2014, the five-year statute of limitations has run and the court was required to dismiss it.

The Petitioners' statute of limitations analysis is flawed for two reasons. First, the cause of action did not "accrue" until the original case was filed on August 3, 2009, so the instant case, filed July 10, 2014, was filed within the limitations period. Second, the argument is flawed because the *Bartram* decision establishes that the dismissal of the prior action serves to decelerate the balance due and allows the plaintiff to bring a new foreclosure action based on a subsequent default, which in this case was pled using continuing state of default language. *See Bollettieri Resort Villas Condo. Ass'n, Inc. v. Bank of New York Mellon*, 198 So. 3d 1140, 1142 (Fla. 2d DCA 2016), *review granted*, No. SC16-1680, 2016 WL 9454216 (Fla. Nov. 2, 2016).

C. The Action Is Not Barred By The Doctrine Of *Res Judicata*.

First, it is axiomatic that a dismissal without prejudice will not support a plea of res judicata. *Tilton v. Horton,* 137 So. 801, 103 Fla. 497 (1931); *Deutsche Bank Tr. Co. Americas v. Beauvais,* 188 So. 3d 938, 964 (Fla. 3d DCA 2016). Thus, to support a res judicata argument, the Soccolichs must identify a prior adjudication on the merits. For the reasons that follow, they cannot meet that burden.

The Petitioners incorrectly asserted on appeal that the original foreclosure action from 2009 was dismissed with prejudice. The initial order granting the Soccolichs' first motion to dismiss for failure to state a cause of action was dated October 4, 2010, and granted SunTrust 45 days to amend the complaint. The second order of dismissal was rendered on March 11, 2013, when the Court determined that SunTrust failed to amend the complaint. Citing Florida Rule of Civil Procedure 1.420(b), the Soccolichs argued that because the court did not specify in the second order of dismissal that it was a dismissal without prejudice, then the "order operates as an adjudication on the merits."

After substantial time had lapsed and the Bank failed to amend, the Soccolichs filed their second motion to dismiss seeking a dismissal with prejudice. They further requested a hearing on their motion. The motion was set for March 7, 2013. However, the hearing was "court canceled" according to the Soccolichs. Thereafter, the Court ruled on the Soccolichs' motion without a hearing. The Order Granting Defendant's Motion for Dismissal, reads, in relevant part: "ORDERED AND ADJUDGED that the Defendant's Motion for Dismissal is hereby

GRANTED and the hearing previously scheduled for March 7, 2013 at 2:00 PM is CANCELED."

Because SunTrust was not given the opportunity to be heard on the Soccolichs' motion for dismissal with prejudice, the case law mandates that the final order of dismissal must be without prejudice.

Moreover, even if the hearing requirement had been met, this was not a proper case for dismissal with prejudice. "Where a court has permitted an amendment, the failure to amend timely is most nearly analogous to a failure to prosecute the action, which is the classic case for a dismissal without prejudice. Under the logic of *Neu*, such a dismissal is presumptively a dismissal without prejudice." *Sekot Labs., Inc. v. Gleason,* 585 So. 2d 286, 288 (Fla. 3d DCA 1990)(citing *Neu v. Turgel*, 480 So. 2d 216, 217 (Fla. 3d DCA 1985)).

D. Petitioners Received The Fair And Impartial Administration Of Justice.

Petitioners asserted that they were denied "essential elements" of the "administration of justice." Their argument can be distilled down to four points:

The Soccolichs asserted that their "compulsory counterclaims" were dismissed without leave to amend

The Soccolichs never raised this issue before the trial court. Thus, it is waived. *See Davis v. Sun First Nat. Bank of Orlando*, 408 So. 2d 608, 610 (Fla. 5th DCA 1981).

The Soccolichs asserted that the Respondent failed to respond to discovery or that its responses were inadequate.

The Petitioners summarily stated that "eighty-two percent" of its "seventeen (17) requests for discovery" were objected to, but Petitioners fail to identify a single request that was objected to *wrongfully*. This argument suffers from a lack of specificity. "In order to obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely, and separately as points on appeal." *Florida Emergency Physicians-Kang and Associates, M.D., P.A. v. Parker,* 800 So. 2d 631 (Fla. 5th DCA 2001). Moreover, the trial court asked the parties to submit copies of all the Soccolichs' discovery requests and all of the Respondent's responses so the court could compare them. The court subsequently determined that "Plaintiff's Responses to all of the Defendants' Discovery are deemed sufficient." The Petitioners have not demonstrated how the order is erroneous.

The Soccolichs asserted that the Court failed to administer justice by failing to set a case management conference, not setting a pretrial conference, and failing to issue a pretrial order.

First, the Court did conduct a case management conference prior to the trial.

Secondly, while the Soccolichs filed a Motion for Pretrial Conference, their motion was untimely. Generally, if either party moves for a pretrial conference, it is mandatory. *See Beasley v. Girten*, 61 So. 2d 179, 180 (Fla. 1952). However, Rule 1.200(b) requires that the motion for a pretrial conference be "timely." Fla. R. Civ. P. 1.200(b). In the instant case, the Soccolichs filed their Motion for Pretrial Conference on October 20, 2016 – one week before the trial began. Rule 1.200(c) requires "20 days' notice" for a pretrial conference. Fla. R. Civ. P. 1.200(b). Accordingly, the Soccolichs' motion was untimely and the trial court did not err in proceeding to trial without conducting a pretrial conference.

Finally, the Petitioners asserted that the trial court's "administration of postjudgment protocol" illustrates unprofessional and unprincipled conduct. Again, the Petitioners' argument is stated in the broadest of terms, and the only example given is an "Order to Show Cause" directed at Ms. Soccolich, which she claims was difficult to understand. None of the above supports certiorari review.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted this 15th day of October, 2018

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