

James Ober v. Town of Lauderdale-By-The-Sea, Fourth District Court of Appeals, Case No. 4D14-4597 (Broward County Circuit Court, Case Number CACE 14-006782 (05)).

The Florida Supreme Court may soon provide guidance on whether municipal code enforcement liens filed against “zombie foreclosures” are enforceable. The time between foreclosure final judgment and foreclosure sale can stretch on for years in some cases, leading to distressed properties dubbed “zombie foreclosures” because neither the foreclosed property owner nor the foreclosing lender fulfills their duties to maintain the property in accordance with codes. Local governments and neighboring property owners suffer the impacts of this neglect, and local code enforcement is one of the only tools available to pressure the property owner and bank to properly maintain the property.

The Supreme Court is being asked to review this issue in relation to a single family residential home located at 3270 Spanish River Drive, Lauderdale-By-The-Sea, Florida. James Ober bought the house from a bank that foreclosed against the prior owner of the home and had filed a lis pendens. That foreclosure action had dragged on for many years. After receiving a final judgment of foreclosure, the bank sat on the property for another four years before finally selling the property to Ober. After the foreclosure judgment and after the foreclosure sale, the Town recorded a total of ten code enforcement liens against the property based on fines for failure to maintain the property in compliance with Town codes.

Ober was interested in buying the property from the bank as an investment property, and knew of the Town’s liens. He approached the Town and asked it to change its lien mitigation policy to allow him, as a prospective purchaser, to obtain a lien mitigation before the property was brought into compliance. The Town Commission changed its procedures to make Ober eligible to seek mitigation. Ober initially offered to pay \$5,000 (99.8% reduction) to resolve some \$338,000 in fines. The Commission approved a 75% reduction, which required a payment of \$71,237 conditioned on meeting a schedule for payment of the mitigated amount and bringing the property into compliance. Ober asked the Commission to accept \$49,000 and when they did not, Ober rejected the settlement and proceeded to purchase the property. He then brought the property into compliance and filed a lawsuit to quiet title in the property and wipe out the Town’s liens rather than paying \$22,237 more.

The trial court found that the Town’s liens were enforceable because they were filed after the foreclosure final judgment in 2014. Ober appealed this ruling to the Fourth District Court of Appeals, and the Town defended with the assistance of friend-of-the-court briefs from the City of Coral Gables and the City of St. Petersburg. Ober failed to provide friend-of-the-court briefs in support of his position on appeal. After oral argument in 2016, the Court unanimously upheld the trial court decision.

Ober asked the Fourth District to reconsider its decision, and certify it for Florida Supreme Court review. In a departure from normal appellate procedure, the Court authorized the filing of five friend-of-the-court briefs in support of Ober’s motion for rehearing, including the Business Law Section of The Florida Bar; the Real Property, Probate and Trust Section of The Florida Bar, the Florida Land Title Association, the Florida Bankers Association and the American Legal and

Financial Network. These groups all argued that liens filed between the time of the foreclosure judgment and the time of the foreclosure sale—in this case, a four-year period—were unenforceable. The Town again defended its liens against these new arguments and parties, with the additional support of the City of Tampa and the City, County and Local Government Section of The Florida Bar.

On January 25, 2017, the Court granted rehearing and unanimously reversed course by deciding that the Town’s liens filed after foreclosure judgment but before foreclosure sale were unenforceable. It acknowledged all of the caselaw supporting its prior decision, but indicated that the input from the five groups supporting Ober persuaded it that foreclosure suits “operate in the real world” differently, and that liens prior to judicial sale should not be enforceable. It also stated that the job of resolving the competing interests of towns and neighbors versus those of the lending and title insurance industries and buyers at foreclosure sales “is in the province of the Legislature.” The Court did continue to uphold the three Town liens that post-dated the final foreclosure sale.

The Town sought certification to the Florida Supreme Court of the decision on rehearing, as a matter of great public importance. The Fourth District granted the Town’s motion, and certified the following question:

“Whether, pursuant to Section 48.23(1)(d), Florida Statutes, the filing of a notice of lis pendens at the commencement of a bank’s foreclosure action prevents a local government from exercising authority granted to it by Chapter 162, Florida Statutes, to enforce code violations existing on the foreclosed property after final foreclosure judgment and before judicial sale, where the local government’s interest or lien on the property arises after final judgment and did not exist within thirty (30) days after the recording of the notice of lis pendens.”

The Town also filed a motion for discretionary review in the Florida Supreme Court, based on the existence of a conflict among the district courts of appeal on the enforceability of the post-judgment liens.

It is not yet known whether the Florida Supreme Court will exercise discretionary jurisdiction to review the case, or how it will rule. To date, the cities of Miami, Coral Gables and St. Petersburg; the Florida Association of County Attorneys; and the City, County and Local Government Law Section of the Florida Bar have all filed notices with the Florida Supreme Court indicating their intent to file briefs in support of the Town in the event that review is granted. Whether the Court grants review or not, the Fourth District decision clearly invites the Florida Legislature to address the hardships visited upon neighbors and local governments by lenders who fail to maintain foreclosed property or fail to timely proceed with foreclosure sales.