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NO. A11-1081

State of Minnesota
In Supreme Court

DORIS RUIZ,

Plaintiff-Respondent,

vs.

1st FIDELITY LOAN SERVICING, LLC,

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

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ARGUMENT

Throughout Minnesota, title examiners, bona fide purchasers and court participants need a clear framework for reviewing foreclosure documents found in county property records. The Court of Appeals in this case erred by failing to treat the foreclosure proceeding as presumptively valid, and overlooked the important public policy needs for reliability of county property records, and marketability of title to real estate following a non-judicial foreclosure proceeding conducted under Chapter 580 of the Minnesota statutes.

On a 'public records' level, Minnesota Statute section 580.19 already provides a bright-line rule by providing a rebuttable presumption that a foreclosure proceeding is valid and "that all requirements of law in that behalf have been complied with . . ." upon the recording of the sheriff's certificate. Minn. Stat. § 580.19 (2010). Additionally, the plain language of sections 580.20 and 580.21 presume a valid sale by stating that "[n]o such sale shall be held invalid or be set aside unless . . . ." (2010).

Minnesota's Curative Act, statute section 582.25, is a statute of repose that demonstrates a legislative intent for conclusively confirming the validity of a foreclosure proceeding for certain types of defects within a relatively short timeframe to support the integrity of Minnesota's recording systems and marketability of title.[1] In 1976, the

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[1] A statute of repose, as opposed to a statute of limitations, limits the time within which a party can acquire a cause of action, even if the claiming party lacks knowledge of his cause of action. *Weston v. McWilliams*, 716 N.W.2d 634, 642 (Minn. 2006) (quoting 51 Am. Jur.2d *Limitation of Actions* § 18 (2000) (footnotes omitted)). In other words, it demonstrates the legislature has concluded there is a point in time where a potential defendant should be immune from liability. *Id.* The *Weston* Court discussed and

Minnesota legislature enacted the Curative Act as a comprehensive set of circumstances aimed at eliminating judicial challenges to foreclosures. Contrary to Ruiz' suggestion that the Curative Act treats a foreclosure as invalid until the passing of time, (Resp. Br. at 17-18), the point of the Curative Act is clearly to support the validity of a foreclosure sale.[2] The overall framework of the Curative Act is to overlook most defects, not to doom a foreclosure to failure merely upon the raising of a timely objection.

Without question, the intent was to protect purchasers of foreclosed real estate from facing challenges based on defects in a foreclosure. The two defects at issue in this case fall squarely into the types of defects listed in the Curative Act, including the timing and content of recorded documents. The right to challenge a foreclosure is certainly not lost under the Curative Act, but the legislature has made a determination that clear and marketable title must pass to a purchaser despite many types of minor defects in a

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reasoned that a statute of repose may eliminate a right where such elimination is a "'rational means to achieve a legitimate legislative goal.'" *Id.* (quoting *McIntosh v. Melroe Co.,* 729 N.E.2d 972, 979 (Ind. 2000) (holding that the statute [of repose] served the public policy concerns of reliability and availability of evidence and the ability of interested parties to make future plans without the potential for unknown liability, and that such a statute was rationally related to meeting legitimate legislative goals)).

[2] The enactment of the Curative Act calls into question all prior "strict compliance" decisions that purport to apply an inflexible standard, since they are at odds with legislative intent. Even in a case relied upon by Ruiz for a strict compliance standard, *Finley v. Erickson*, 122 Minn. 235, 142 N.W. 198 (1913), this Court discussed the legislative intent of older curative statutes:

> Statutory foreclosure under the power given in the mortgage must necessarily conform strictly to the requirements. <u>But mistakes and irregularities creep into the proceedings, and the Legislature has from time to time passed curative acts in respect thereto. It was necessary to give stability to titles derived through such sales</u>."

Id. at 238, 199 (underline added). The Curative Act enacted in 1976 presumably aims to accomplish similar goals.

foreclosure. Together, Minnesota's statutory scheme comprehensively presumes the validity of non-judicial foreclosures.[3]

Minnesota common law provides further support for the presumption of validity. A court order is needed before a lender can abandon a defective foreclosure proceeding and re-foreclose, which necessarily presumes that a foreclosure is valid unless or until invalidated. *Pole v. Trudeau,* 516 N.W.2d 217 (Minn. Ct. App. 1994). Holding that *any* error automatically voids a foreclosure sale creates uncertainty for those in the real estate community, including attorneys, title companies, title examiners, and lenders. This inflexibility is in conflict with Minnesota's Race-Notice statute, section 507.34, which protects against this uncertainty by allowing interested parties to rely upon information found on the face of publicly recorded documents. *Miller v. Hennen*, 438 N.W.2d 366, 368 (Minn. 1989) (citing *Strong v. Lynn*, 38 Minn. 315, 317, 37 N.W. 448, 449 (1888) (holding that the goal of Minn. Stat. § 507.34 is to protect persons who buy real estate in reliance upon the record)). Without the ability to have predictable foreclosures by advertisement, mortgagees will prefer the increased certainty of foreclosures by action, and desire to obtain an objective determination at the outset.

The rebuttable presumption of validity necessarily requires a ruling that defective foreclosures are voidable, not void. In fact, this Court previously determined that such

[3] Nothing in the Curative Act automatically voids a foreclosure sale based solely on the raising of a timely objection within one year after the end of the redemption period. Presumably, the challenging party, Ruiz in the present case, must have to make a showing of entitlement to relief before she would be entitled to any equitable relief. This court's past decisions do provide direction under the circumstances of this case, which ultimately requires Ruiz to make a showing of prejudice under the "substantial compliance" standard described in several past decisions.

foreclosure sales are merely voidable. *Willard v. Finnegan*, 42 Minn. 476, 478-79, 9 L.R.A. 50 (1890) ("Viewed from a practical standpoint . . . a sale contrary to the statute is merely voidable when fraud, prejudice, or other good cause for vacating is shown."). Without the presumption of validity, and ability for purchasers to rely upon the property records, the titles to foreclosed properties become unmarketable for at least one, five or ten years. *See, e.g.*, Minn. Stat. §§582.25, 580.20 and 580.21 (2010).

In this case, the Court of Appeals erred by overlooking the presumption of the validity of foreclosure proceedings in combination with the Race-Notice statute, and by holding that the foreclosure was automatically void. If its decision stands, uncertainty and chaos will interfere with marketability of real property in Minnesota. Thus, this Court must reverse the decision of the Court of Appeals, affirm the trial court decision, and rule that foreclosure proceedings are presumptively valid, and voidable (i.e. not automatically void).

I. THE BRIGHT-LINE TEST FOR CHALLENGES TO A PRESUMPTIVELY VALID FORECLOSURE IS SUBSTANTIAL COMPLIANCE, WITH A FOCUS ON A SHOWING OF PREJUDICE.

An interested party must timely commence a judicial challenge asserting non-compliance with the foreclosure statutes.[4] In the event of a timely challenge, a substantial compliance standard is necessary to best resolve competing needs of interested parties. The "strict compliance" standard – erroneously employed by the Court

[4] Because a statute of repose limits the time in which a party can acquire a cause of action, it is necessary that a challenge to a presumptively valid foreclosure must be brought by judicial action, or perhaps at a minimum, presented in defense in a related action. *Weston,* 716 N.W.2d at 642; *Gallaher v. Titler,* 812 N.W2d 897, 903-04 (Minn. Ct. App. 2012).

of Appeals - creates an unworkable system where foreclosures are automatically void based upon *any* perceived defect without regard to the equities.[5] Ruiz continues to request that this Court change its past precedent by imposing an inflexible standard that invalidates a foreclosure for the slightest of defects, without any regard to doing justice or meeting the equitable needs of the parties.

Instead, a bright-line test for judicial challenges must take a practical approach to rebutting the statutory presumption of validity by focusing on the purpose of the statute, scope of persons to be protected by the statute, nature and extent of any defect, and the existence of any prejudice from the statutory non-compliance. This Court has issued several decisions dating back to the 1800s that establish standards for reviewing a judicial challenge to a foreclosure proceeding. The use of labels such as "strict" or "substantial" are admittedly both found in these past decisions, but labels alone do not lead to a clear or predictable measure of outcomes in a particular case.[6] Even though some decisions appear inconsistent in their labels employed to describe the court's analysis or outcome, most decisions can be harmonized by common threads, primarily the importance of

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[5] Reasonable certainty and predictability of the outcome of a potential lawsuit may in many cases obviate the need to ever commence the action. However, the draconian certainty described in *Jackson v. Mortgage Elec. Registration Sys., Inc.*, 770 N.W.2d 487 (Minn. 2009), which purports to automatically void all foreclosure proceedings for minor, non-prejudicial defects is not good public policy due to its interference with an efficient market place for real estate and risk of inequitable rulings.

[6] In fact, strict adherence to black and white labels is improvident, because substantial compliance and strict compliance are complementary rather than contradictory. *Sieve v. Rosar,* 613 N.W.2d 789, 793 (Minn. Ct. App. 2000). While the essential elements of the statute must be adhered to, failure to comply with more formal requirements may be overlooked. *Id.*

determining if the statute protects the interests of the person challenging the proceeding and whether prejudice can be shown from such non-compliance.[7]

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[7] A survey of other jurisdictions also finds that an irregularity will not justify setting aside a foreclosure sale absent a showing of prejudice by the party seeking relief. *See, e.g., Perry v. Federal Nat'l Mortg. Ass'n*, No. 2100235, 2012 WL 2477916, slip copy at *1, (Ala. Civ. App. June 29, 2012) (errors that do not prejudice the mortgagor will not invalidate a foreclosure); *McHugh v. Church*, 583 P.2d 210, 216 (Alaska 1978) ("[w]hile noncompliance with the statutory provisions regarding foreclosure by the power under a mortgage or trust deed is not to be favored, the remedy of setting aside the sale will be applied only in cases which reach unjust extremes."); *Lona v. Citibank, N.A.*, 134 Cal. Rptr. 3d 622, 633 (2011) (California law requires the party attacking the foreclosure sale to prove prejudice or harm); *Amos v. Aspen Alps 123, LLC*, 280 P.3d 1256 (Colo. 2012) (when an irregularity does not injure or harm the complaining party, a foreclosure sale will not be set aside); *First Nat. Bank of Chicago v. Maynard*, 815 A.2d 1244, 1248 (Conn. App. Ct. 2003) (a plaintiff must show "injury to [itself] resulting from the irregularity complained of" regarding the foreclosure sale); *Fagnani v. Fisher*, 15 A.3d 282, 290 (Md. 2011) (the party seeking to set aside the foreclosure sale bears the burden of showing that any claimed errors caused prejudice); *Sweet Air Inv., Inc. v. Kenney*, 739 N.W.2d 656, 662 (Mich. Ct. App. 2007) ("a defect in notice renders a foreclosure sale voidable," not void.); *Manard v. Williams*, 952 S.W.2d 387, 392 (Mo. Ct. App. 1997) (an irregularity in the execution of a foreclosure sale must be substantial or result in a probable unfairness to suffice as a reason for setting aside a voidable trustee's deed); *Gilroy v. Ryberg*, 667 N.W.2d 544, 554 (Neb. 2003) (for "an inconsequential defect, equity will not set aside the sale."); *Mortgage Elec. Registration Sys., Inc. v. Schotter*, 857 N.Y.S.2d 592, 595 (N.Y. App. Div. 2008) ("[a]bsent a showing that a substantial right of a party was prejudiced," this defect does not require that a New York sale be vacated); *GMAC Mortg. Corp. of PA v. Buchanan*, 929 A.2d 1164, 1167 (Pa. Super. Ct. 2007) (party seeking to set aside sale must show inadequate notice resulting in prejudice); *Eastern Sav. Bank, FSB v. Sanders*, 644 S.E.2d 802, 805 (S.C. Ct. App. 2007) ("a judicial sale should not be set aside except for cogent reasons."); *Charter Nat. Bank-Houston v. Stevens*, 781 S.W.2d 368, 371 (Tex. App. 1989)("mere irregularities in the conduct of the foreclosure sale will not vitiate the sale unless the irregularities result in injury to the mortgagor."); *RM Lifestyles, LLC v. Ellison*, 263 P.3d 1152, 1156 (Utah Ct. App. 2011) (setting aside the sale will be applied only in cases which reach unjust extremes); *Amresco Independence Funding, Inc. v. SPS Props., LLC*, 119 P.3d 884, 886-87 (Wash. Ct. App. 2005) (despite a strict compliance requirement, a plaintiff must show prejudice before a court will set aside a trustee sale); *McNeill Family Trust v. Centura Bank*, 60 P.3d 1277, 1284 (Wyo. 2003) (explaining court's "continued reticence to set aside or vacate a foreclosure sale absent clear prejudice and irregularity of the proceedings.").

In particular, this court issued the *Hudson* decision in 1925, which best describes the framework for a court to review a foreclosure proceeding challenged by an interested party. *Hudson v. Upper Michigan Land Co.*, 165 Minn. 172, 176-77, 206 N.W. 44, 46 (1925). This Court's approach in *Hudson* harmonizes most of the cases addressing the standards for reviewing a challenged foreclosure sale. The *Hudson* Court admittedly states that "all essential requisites of the statute must be complied with," but placed far greater emphasis on the existence of prejudice, and reasoned that a foreclosure is valid when: 1) all statutory requirements are satisfied that are calculated to protect the interests of the party whose rights are affected; and, 2) any omission does not prejudice the rights of an interested party. *Id.*; *see also, Holmes v. Crummett,* 30 Minn. 23, 25, 13 N.W. 924, 924 (1882); *Bottineau v. Aetna Life Ins. Co.*, 31 Minn. 125, 128, 16 N.W. 849, 850 (1883). In *Hudson*, the importance of prejudice was paramount, with the court reasoning that the trial court's decision might have been sustained if other third party interests wouldn't have been impacted by the failure to timely record the sheriff's certificate. 165 Minn. at 176-77, 206 N.W. at 46. In the present case, there were no additional third parties prejudiced by any of the irregularities. Ruiz certainly can show no prejudice.

Moreover, the *Hudson* Court, pointing to the relationship between the directory nature of the foreclosure statutes and the application of substantial compliance, and correctly stated that "although mere irregularities do not avoid the sale unless the statute so provides, nevertheless it may be avoided if the irregularities operate to prejudice the rights of a party in interest." *Id.; see also, Manco of Fairmont, Inc. v. Town Bd. of Rock Dell Township*, 583 N.W.2d 293, 295 (Minn. Ct. App. 1998). The *Hudson* Court

reasoned that whether a sale is void or voidable [without discussing the difference] by reason of an irregularity in the proceeding depends upon the nature of the irregularity." 165 Minn. at 174, 206 N.W. at 45. Without question, the *Hudson* court's approach was to review foreclosure proceedings on a case-by-case basis.

The *Hudson* Court also stated that "a clear departure [from foreclosure requisites] vitiates the proceeding." *Id.* By implication, any irregularity that is not a clear departure should not invalidate the foreclosure proceeding. In the present case, neither the one day delay in recording of the Notice of Pendency, the missing words from the 1st Fidelity's name, nor the use of "JP Mortgage Chase Bank, N.A." can be deemed a "clear departure" under the particular factual circumstances of this case. Specifically, Ruiz was not prejudiced from any irregularity, and there is an absence of any other third parties impacted by the irregularities. In the absence of any need for a title examiner or purchaser to rely upon extraneous evidence to determine the holder of title to the mortgage with reasonable certainty, the *Hudson* decision supports a ruling in favor of validating 1st Fidelity's foreclosure sale.

II. 'STRICT COMPLIANCE' IS NOT AND MUST NOT BE THE STANDARD.

The cases cited by Ruiz for the proposition that "strict compliance" is the standard are either inapposite or otherwise inapplicable. In several cases, Ruiz posits that a decision stands for "strict compliance" simply based upon the label, but she takes the statement out of context or ignores court's underlying rationale.

Ruiz' assertion that the analysis starts with dicta set forth in *Jackson v. Mortgage Electronic Registration Systems, Inc.*, 770 N.W.2d 487 (Minn. 2009) is flawed and

elevates form over substance. (Resp. Br. at 7-8.) Contrary to Ruiz' argument, the label used in *Jackson* was irrelevant to the ruling in the case, and its reference to *Moore v. Carlson*, 112 Minn. 433, 128 N.W. 578 (1910), was a solitary citation. The *Jackson* court neither discussed the history of compliance cases nor compared the standards for reviewing a foreclosure. *Jackson* was not a foreclosure defect case, and it did not determine whether a foreclosure was voidable or void. Giving *Jackson* the weight Ruiz asserts improperly ignores over one hundred years of equity driven, practical decisions and legislative enactments. Moreover, it would serve bad public policy not intended by this Court in its *Jackson* decision.

In addition, Ruiz's argument that *Spencer*, *Dana*, and *Clifford* support her position is erroneous because these cases, although using a "strict compliance" label, consider elements of substantial compliance and derive their support from substantial compliance cases. *Spencer v. Annon,* 4 Minn. 542, 4 Gil. 426 (1860); *Dana v. Farrington,* 4 Minn. 433, 4 Gil. 335 (1860); *Clifford v. Tomlinson*, 62 Minn. 195, 64 N.W. 381 (1895).[8] In *Spencer,* for instance, this Court stated that "if the other party is not shown to be prejudiced [by the defect], the sale should not be disturbed." 4 Minn. at 544. This Court's analysis centered on whether there was prejudice to the mortgagor by a failure of the notice of sale to accurately state the claimed amount due, and only invalidated the sale once that finding of prejudice was made. *Id.* Similarly, in *Dana*, this Court

[8] Ruiz also makes the argument in a string citation of cases that *Klotz v. Jeddeloh*, 201 Minn. 355, 276 N.W. 244 (1937), supports the application of strict compliance, but reliance on this case is also misplaced for the same reason - that *Klotz* relies on support from substantial compliance cases for its rule.

determined whether a defect in a notice of sale invalidated a foreclosure when the sheriff's sale date had been changed. 4 Minn. at 433. Even though the *Dana* Court used a "strict" compliance phrasing, the Court specifically focused on the showing of prejudice in its analysis. *Id.* at 437. In fact, the Court stated that "the case shows that the Defendants were misled by the change in the notice to their prejudice." *Id.* at 436.

Furthermore, in direct conflict with Ruiz' argument, (Resp. Br. at 8), the *Dana* Court stated:

> We do not mean to hold that the correction of every immaterial typographical error that may occur in a notice would vitiate a sale; nor do we mean to hold than an alteration of a notice made in good faith to correct an error in a material particular would *per se* be fatal in all cases to a sale. In applications for relief in such cases, prejudice resulting from the mistake or alteration is always considered an essential feature by courts, and whether there was prejudice in fact, or the error is such that the courts are bound to presume it, must in each case be determined by the facts proven.

Id. at 437 (emphasis added). Therefore, this Court made it clear that "strict compliance" does not invariably invalidate a foreclosure and that prejudice is a required showing before invalidating a sale. Finally, even in *Clifford*, this Court discussed Minnesota's prior authority for substantial compliance and then considered the issue of prejudice in its decision. 62 Minn. at 197-98, 64 N.W. at 382. Therefore, Ruiz' cursory review of these cases fails to support an inflexible standard with no regard for balancing the equities.

Ruiz also erroneously asserts that cases like *Peaslee*, *Moore*, and *Hamel* stand for a "strict compliance" standard, even though these cases expressly rely on prior substantial compliance decisions in support of their rulings. *Peaslee v. Ridgway,* 82 Minn. 288, 289-90, 84 N.W. 1024, 1025 (1901); *Moore v. Carlson,* 112 Minn. 433, 128 N.W. 578 (1910);

Hamel v. Corbin, 69 Minn. 223, 72 N.W. 106 (1897). In *Peaslee*, this Court perhaps announced a "strict compliance" label, but then relied upon prior cases invoking the consideration of prejudice. *Id.* at 290, 1025 (citing *Mason v. Goodnow*, 41 Minn. 9, 42 N.W. 482 (1889)*; Richards v. Finnegan*, 45 Minn. 208, 47 N.W. 788 (1891)*; Backus v. Burke*, 48 Minn. 260, 51 N.W. 284 (1892); and *Clifford*, 62 Minn. 195, 64 N.W. 381). In addition, the *Peaslee* Court analyzed the defects in the context of: 1) who the statute is designed to protect; and, 2) whether the claiming party was prejudiced by the defect. *Id.* at 289-90, 1025. Despite the "strict" phrasing of the rule, this Court found that a defect in the power of attorney - which is required by the foreclosure statutes - was not fatal to the sale. *Id.* In fact, contrary to Ruiz' reading, the purpose of the statute and to whom the protections are aimed was a dispositive factor considered by the *Peaslee* Court. *Id.*

In the relatively brief decision in *Moore,* this Court considered a foreclosure defect in the notice of sale that failed to list mortgage assignees. *Moore v. Carlson,* 112 Minn. 433, 128 N.W. 578. Despite its ruling to invalidate the sale, *Moore* relied upon the prejudice-based decision in *Hathorn v. Butler,* 73 Minn. 15, 75 N.W. 743, an 1898 decision involving similar issues, about which the *Moore* court considered "sound law." The Court in *Hathorn*, however, did not rely on a "strict" standard for compliance, but expressly discussed the consideration of prejudice:

> It will be kept in mind . . . that such a foreclosure might not be held invalid in case an innocent party purchased at a sale, or where the owner, or a creditor, or a junior mortgagee redeems without knowledge of an unrecorded as assignment. We can readily see that under some circumstances a foreclosure made as this was might be upheld as to one who, holding an unrecorded assignment, has caused a mortgage to be

> foreclosed in the name of another, who, of record, appeared to be fully authorized so to foreclose.

Id. at 20, 744. Further, the defect in *Moore* was narrowly focused on the absence of information in the notice of sale, a document published and served upon the occupants, as opposed to the Notice of Pendency and Assignment of Mortgage at issue in the present case. Neither of the documents at issue in this case were required to be served upon Ruiz.

Even though the *Moore* court discussed a "strict" standard, it also discussed the purpose of the statute and considered why the listing of all assignees in the notice of sale was important, how the particular statute should be construed, and what value is served to the mortgagor. 112 Minn. at 434, 128 N.W. at 579. These considerations reflect the approach later taken in *Hudson*, but are ignored by Ruiz in her reliance on *Moore*.

Ruiz' reliance on additional cases is misplaced because they are factually distinguishable. For example, in *Sheasgreen Holding Co. v. Dworsky*, 181 Minn. 79, 231 N.W. 395 (1930), the facts evidenced the complete failure to record a power of attorney to foreclose; whereas, the issue in this case is the *timing* of recording the Notice of Pendency and assignment of mortgage. Regardless of the standard applied in *Dworsky*, there was no doubt that a complete failure to record a required document would invalidate the sale. *Id.* Further, unlike the definite requirement to record the assignment in *Dworsky*, the statute in this case has no specific or definite timing requirement.[9]

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[9] Ruiz also relies upon *Dunning v. McDonald*, 54 Minn. 1, 55 N.W. 864 (1893), for support. However, *Dunning* is inapplicable because there is no mention of a "strict

III. 1ST FIDELITY'S FORECLOSURE IS VALID.

The one day delay in recording the Notice of Pendency and irregularities in the assignments of mortgage do not invalidate 1st Fidelity's foreclosure, and no common law precedent exists that requires this Court to do so. In the absence of any authority directly on point, the Court must instead rely upon its past standards for analyzing legal challenges to foreclosure proceedings. The discussion must begin with the presumption of validity of the foreclosure proceeding, and end with the undisputed fact that Ruiz cannot establish any prejudice from non-compliance with Minnesota's foreclosure statutes.

A. Ruiz Was Not Intended to be Protected by Section 580.032 and Cannot Show any Prejudice from a Recording Delay of One Day.

The recording of the Notice of Pendency on the same morning as first publication did not invalidate the foreclosure. Ruiz was not a party intended to be protected by Section 580.032, which is designed to provide notice to junior lienholders with a redeemable interest. Ruiz argues that she cannot be precluded from challenging the foreclosure, (see Resp. Br. at 24), but the requirement of recording the Notice of Pendency is not about protecting Ruiz' rights as a mortgagor. The statute doesn't provide for serving the Notice of Pendency on Ruiz because it's not recorded for her protection.

Moreover, Ruiz cannot show that she suffered *any* prejudice as a result of the timing of recording. Ruiz, who did not record a request for notice, received direct personal notice of the foreclosure through personal service of the notice of sale as an

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compliance" standard; the case instead focused on available powers under a power of attorney. *Id.*

occupant of the property. Ruiz was in possession of all information required to protect her rights as a mortgagor; therefore, she cannot show prejudice. *See Rambeck v. Labree*, 156 Minn. 310, 315, 194 N.W. 643, 645 (1923). With absolutely no prejudice to Ruiz, the validity of the foreclosure must be upheld.

B. Ruiz Already Knew the Identity of Her Lender and Cannot Show Any Prejudice Relating to the Assignment of Mortgage.

Neither the timing of recording the corrective assignment nor the irregularities in either assignment invalidate the foreclosure because Ruiz cannot show prejudice. Ruiz already knew the identity of her mortgagee because she was personally served with the notice of sale, which correctly listed 1st Fidelity Loan Servicing, LLC, and had all information she needed to identify the mortgagee of record. The Second Assignment only listed "1st Fidelity" as the name of the assignee, but the absence of the remaining part of its name was not significant as to constitute a "clear departure" that would vitiate the proceeding. *See, e.g., Hudson,* 165 Minn. at 174, 206 N.W. at 45. Again, the Notice of Sale included the full name of 1st Fidelity and Ruiz had actual knowledge of the identity of her lender.

The manifest purpose of the recording requirement is to make the contents of the mortgage, and the title to the mortgage a matter of record:

> It is the plain intent of that statute that ... the title of an assignee of a mortgage appear of record, and of record in such manner that <u>evidence extraneous to the record will not be needed to put [the title of the assignee of the mortgage] beyond reasonable question</u>.

Soufal v. Griffith, 159 Minn. 252, 255, 198 N.W. 807, 808 (1924) (underline added). Based on the Second Assignment, Corrective Assignment and the Notice of Sale in the

sheriff's certificate that accurately described the full name of 1st Fidelity Loan Servicing, LLC as the corrected name, it was unnecessary for any title examiner to seek extraneous evidence about the true identity of the mortgagee of record.

Ruiz cites various cases in favor of invalidating the proceeding based on the Assignment of Mortgage, but these cases are not on point. In *Aldinger v. Close*, for instance, the focus was on whether a separate proceeding to collect the debt – pending during publication and canceled two weeks prior to sale – invalidated the foreclosure process. 161 Minn. 404, 201 N.W. 625 (1925). The case does not address or rule on any timing requirement for recording an assignment of mortgage. The *Aldinger* Court admittedly stated that the "first publication of the notice is as necessary as the last to the validity of the foreclosure, and hence the right to proceed must exist from the first publication up to the sale," (*id.* at 405, 625), but Ruiz can make no showing that publication in this case was in error, and there is no dispute that 1st Fidelity was the sole mortgagee with a right to foreclose.[10] Ruiz also cannot show prejudice from the timing of recording.

In addition, Ruiz' reliance on *Soufal* is misplaced. The *Soufal* Court admittedly stated that title of an assignee of a mortgage must appear of record and be sufficiently

[10] In addition, *Aldinger* certainly illustrates that the Minnesota legislature knew how to distinguish between the foreclosure sale and pre-sale steps by removing language from what is now Section 580.02. In 1894, the general statutes included the specific language: "To entitle any party to give notice . . . and to make such foreclosure . . . ;" whereas, the legislature removed the first clause so the statute currently (and since 1905) reads: "To entitle any party to make such foreclosure . . . ." Regardless, the Curative Act has repaired this issue and validates publication of the notice for at least three weeks. *Minn. Stat.* § 582.25(3)(a) (2010). Therefore, the legislature has demonstrated that such a defect is of less concern, and would require Ruiz to show prejudice.

clear to put it beyond reasonable question, but contrary to Ruiz' argument that such recording must be prior to commencing the foreclosure, (Resp. Br. at 25), there is no such mention in *Soufal*. *Id.* Adopting Ruiz' expanded reading of *Soufal* is inconsistent with the plain language of section 580.02, which expresses no specific timing requirement. There is also no question that, despite the irregularities in the names of 1st Fidelity and "JP Mortgage Chase Bank, N.A.", 1st Fidelity's title was sufficiently and reasonably clear, and Ruiz undisputedly knew the identity of the foreclosing lender.

Finally, the timing of the recording of the corrective assignment, the missing words in 1st Fidelity's name, and the use of "JP Mortgage Chase Bank, N.A." were not a "clear departure" from essential foreclosure requirements that "vitiates the proceeding."[11] *Hudson,* 165 Minn. at 174, 206 N.W. at 45. The property records of the foreclosure proceeding, taken as a whole, combine to clearly and unmistakably show that 1st Fidelity Loan Servicing, LLC, and no other interested party of record, was the only party with authority to foreclose. Therefore, the validity of 1st Fidelity's foreclosure must be upheld.

[11] Although the name of the grantor in the corrective assignment of mortgage was "JP Mortgage Chase Bank, N.A.," the notice of sale and the remaining documents in the public record show that 1st Fidelity was indisputably the only entity entitled to foreclose. Moreover, it is undisputed that no other mortgagee or entity has claimed an interest in or the right to foreclosure Ruiz' mortgage. Finally, Ruiz suffers no prejudice as a result of the inadvertent name of the grantor, and the power of the officer executing the corrective assignment was, notwithstanding the irregularity, valid.

CONCLUSION

Based upon the foregoing arguments, and those contained in its initial brief, 1st Fidelity Loan Servicing, LLC respectfully requests that this Court reverse the decision of the Court of Appeals and affirm the decision of the District Court that upheld the validity of the foreclosure proceeding and dismissed Ruiz' complaint in its entirety and with prejudice.

Respectfully submitted,

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Dated: August 9, 2012

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CERTIFICATION OF BRIEF LENGTH

I, Eric D. Cook, hereby certify that this Reply Brief, served on August 9, 2012, conforms to the requirements of Minn. R. Civ. App. P. 132. 01, subds.1 and 3. This Brief was typeset with Times New Roman font at 13 point type. Including footnotes, this Brief contains 5,352 words and 432 lines of text, and was drafted using Microsoft Word 2010.

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