

## **ERROR IN LEGAL DESCRIPTION RENDERS JUDGMENT VOIDABLE, AND CAN'T BE CORRECTED MORE YEAR AFTER**

*Epstein v. Bank of America* (4D13-4066), released today, involves a borrower's challenge to a trial court's order vacating a judgment that had been entered in favor of the plaintiff/lender. Three years after the judgment was entered in its favor, the plaintiff/lender sought to vacate the judgment due to an error in the legal description of the property on the mortgage, complaint, and ultimately the judgment. Ultimately, the court reversed the trial court's order vacating the judgment. As is shown below, the error relating to the property description was a voidable error, meaning the trial court lost jurisdiction to correct the error one year after the judgment was entered.

The court outlined the facts at issue as follows:

The problem began when the mortgage was signed using an incorrect legal description for the real property. Subsequently, the bank filed a foreclosure complaint. In December 2009, a final summary judgment of foreclosure was entered using the incorrect legal description. The foreclosure sale was conducted the following August with the bank as the highest bidder. Shortly thereafter, a certificate of title containing the incorrect legal description was issued to the bank.

Two years later, in September 2012, the bank filed its first motion to vacate the final summary judgment, sale, and certificate of title. The motion was filed pursuant to Florida Rule of Civil Procedure 1.540(b)(1), alleging that, "due to an inadvertent mistake," the legal description of the property in the mortgage was incorrect, and therefore, the bank needed to amend the complaint to add a reformation count. It also alleged that the incorrect legal description in the foreclosure judgment prevented the bank from obtaining clear title to the property. In October 2012, the trial court entered an order denying the bank's motion, "without prejudice."

In January 2013, the bank filed its second motion to vacate. This second motion was also filed pursuant to Florida Rule of Civil Procedure 1.540(b)(1), but, additionally, pursuant to rule 1.540(b)(4), on the added grounds that the final judgment was void. In this motion, the bank admitted that it was made aware of the error in the legal description in the mortgage and final judgment in October 2010, ten months after the judgment was entered. The motion alleged that the

error in the legal description in the final judgment was clouding the title to property owned by a third party.

A hearing was held on the bank's second motion. At the hearing, the homeowner objected to the bank's second motion, arguing that the trial court did not have jurisdiction to hear the motion because rule 1.540(b)(1) has a one-year time limit for vacating a judgment, and the bank's motion was filed more than a year after the judgment was entered. The bank renewed its argument that the incorrect legal description rendered the judgment void, making the one-year time limitation inapplicable. The trial court granted the bank's second motion.

On appeal, the issue was whether the three-year old judgment was void or merely voidable. The court noted that “[i]f a judgment is ‘void’ then under rule 1.540(b) it can be attacked at any time, but if it is only ‘voidable’ then it must be attacked within a year of entry of the judgment.” Condo. Ass’n of La Mer Estates, Inc. v. Bank of New York Mellon Corp., 137 So. 3d 396, 398 (Fla. 4th DCA 2014). Thus, the determining factor in this case is whether the final judgment was void due to an error in the legal description in the mortgage and judgment.”

In this case, the “bank argues that the judgment was void ‘because the owner of the property identified in the judgment was not made a party to the underlying case.’” The court explained that:

The bank argues that the instant case is similar to Wright, and that the final summary judgment in this case is void because the due process rights of the owner of the described property in the mortgage and judgment were violated in that the actual owner was never made a party to the action. However, there are two problems with the argument. First, there is no evidence in the record that there is an owner of the described property other than the homeowner named in the complaint, or that the property, as described in the mortgage and judgment, even exists. Second, if the property described in the mortgage and final judgment does exist, and if there is an owner of the property other than the homeowner named in the complaint, that owner was not the party challenging the final summary judgment.

“[C]onstitutional rights are personal and may not be asserted vicariously.” Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973). This also holds true specifically for due process challenges. See State v. Muller, 693 So. 2d 976, 978 (Fla. 1997) (holding that a defendant

lacked standing to challenge a violation of the due process rights of the non-defendant owners of a vehicle). Therefore, the due process argument that the judgment is void is not applicable in this case.

Although not cited by either party, we agree with the analysis of the Second District regarding the authority of the court to correct errors in the legal descriptions in mortgages and foreclosure judgments:

When a mortgage contains an incorrect legal description, a court may correct the mistake before foreclosure. If, however, the mistaken legal description is not corrected before final judgment of foreclosure, and the mistake is carried into the advertisement for sale and the foreclosure deed, a court cannot reform the mistake in the deed and judgment; rather, the foreclosure process must begin anew. *Lucas v. Barnett Bank of Lee Cnty.*, 705 So. 2d 115, 116 (Fla. 2d DCA 1998) (citing *Fisher v. Villamil*, 62 Fla. 472, 56 So. 559 (1911)).

As the Second District noted, “[w]hile the mortgagee who bid its mortgage at the sale might have understood exactly what property was being offered, other potential bidders at the sale might not have had the same understanding.” *Id.*

In conclusion, the court stated: "As to the named parties in this proceeding, there is no issue of subject matter jurisdiction or personal jurisdiction. We therefore determine that the final summary judgment was voidable, not void, and the bank’s motion to vacate was time-barred under rule 1.540(b)."