

IN THE SUPREME COURT OF FLORIDA

Case No. SC17-954

2ND DCA Case No. 2D15-5198

Trial Court Case No.: 41 2014CA002512AX

**THE BANK OF NEW YORK MELLON
FKA THE BANK OF NEW YORK, as
successor trustee to JPMorgan Chase
Bank, N.A., as Trustee on behalf of the
Certificateholders of the CWHEQ, Inc.,
CWHEQ Revolving Home Equity Loan
Trust, Series 2006-D,**

Petitioner,

v.

**DIANNE D. GLENVILLE A/K/A DIANE
D. GLENVILLE A/K/A DIANE
GLENVILLE and MARK S. GLENVILLE,**

Respondents.

**PETITION FOR DISCRETIONARY REVIEW OF A DECISION
OF THE DISTRICT COURT OF APPEAL OF FLORIDA, 2ND CIRCUIT**

PETITIONER'S BRIEF IN SUPPORT OF JURISDICTION

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1. Bank of New York Mellon v. Glenville, 2017 WL 1493788 (Fla. 2d DCA Apr. 26, 2017)	A-1
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail, postage prepaid and E-Mail, to the following on this 19th day of June, 2017:

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2017 WL 1493788

District Court of Appeal of Florida,
Second District.

The BANK OF NEW YORK MELLON, f/k/a The
Bank of New York, as Successor Trustee to
JPMorgan Chase Bank, N.A., as Trustee on behalf
of the Certificateholders of the CWHEQ, Inc.,
CWHEQ Revolving Home Equity Loan Trust,
Series 2006–D, Appellant,

v.

Dianne D. GLENVILLE, a/k/a Diane D. Glenville,
a/k/a Diane Glenville; and Mark S. Glenville,
Appellees.

Case No. 2D15–5198

Opinion filed April 26, 2017

Synopsis

Background: Bank filed claim seeking surplus funds from foreclosure sale. The Circuit Court, Manatee County, John F. Lakin, J., denied the claim as untimely. Bank appealed.

[Holding:] On rehearing, the District Court of Appeal, Sleet, J., held that the 60-day time limit for filing claim commenced on date of foreclosure sale, not date of issuance of certificate of sale.

Affirmed; conflict certified.

West Headnotes (4)

[1] **Appeal and Error**

⚙️Cases Triable in Appellate Court

The interpretation of a statute is a question of law, and it is therefore subject to a de novo review.

Cases that cite this headnote

[2] **Statutes**

⚙️Plain language; plain, ordinary, common, or literal meaning

When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

Cases that cite this headnote

[3] **Mortgages and Deeds of Trust**

⚙️Proceedings for distribution

Bank seeking surplus funds from foreclosure sale was required to file its claim within 60 days of foreclosure sale, not 60 days from date of issuance of certificate of sale; statute's subsection setting out the 60-day time limit referred only to a sale, not to the certificate of sale, and statute did not use terms "sale" and "certificate of sale" interchangeably. Fla. Stat. Ann. § 45.031(7)(b).

Cases that cite this headnote

[4] **Mortgages and Deeds of Trust**

⚙️Briefs; statements of errors or issues

Bank waived for appellate review on rehearing its claim that 60-day period to file its claim seeking surplus funds from foreclosure sale began to run on date of issuance of certificate of title, where claim was based on case that had been published prior to filing of bank's initial appellate brief, and bank failed to raise claim in its appellate briefs that were submitted before appellate court's initial decision. Fla. Stat. Ann. § 45.031(7)(b); Fla. R. App. P. 9.330(a).

Cases that cite this headnote

Appeal from the Circuit Court for Manatee County; John F. Lakin, Judge

Attorneys and Law Firms

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Sheryl A. Edwards of The Edwards Law Firm, PL, Sarasota, for Appellees.

Opinion

BY ORDER OF THE COURT:

Appellant's motion for rehearing and request for certification are granted to the extent that the prior opinion dated January 20, 2017, is withdrawn, and the attached opinion is issued in its place. The motion for rehearing en banc is denied. No further motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

SLEET, Judge.

***1** The Bank of New York Mellon appeals the trial court's order denying its claim for surplus funds from a foreclosure sale.¹ Because the bank's claim was untimely, we affirm.

Under section 45.031(7)(b), Florida Statutes (2015), any person claiming a right to surplus funds must file a claim with the clerk of court within sixty days of the foreclosure sale. The record reflects that the underlying property was sold at public auction on July 2, 2015, and that the bank filed its claim for surplus funds as a subordinate lienholder on September 2, 2015, sixty-two days after the date the property was sold. The trial court denied the bank's claim as untimely filed. On appeal, the bank argues that a foreclosure sale is not complete until the clerk issues the certificate of sale. Because the certificate of sale in this case was issued on July 6, 2015, the bank claims that it had until September 4, 2015, to file a claim and that therefore its September 2, 2015, filing was

timely. We disagree.

[1] [2] "The interpretation of a statute is a question of law, and it is therefore subject to a de novo review." Mathews v. Branch Banking & Tr. Co., 139 So.3d 498, 500 (Fla. 2d DCA 2014) (citing W. Fla. Reg'l Med. Ctr., Inc. v. See, 79 So.3d 1, 8 (Fla. 2012)). "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Gulf Atl. Office Props., Inc. v. Dep't of Revenue, 133 So.3d 537, 539 (Fla. 2d DCA 2014) (quoting Hess v. Walton, 898 So.2d 1046, 1049 (Fla. 2d DCA 2005)).

[3] This court has previously explained that "the language in section 45.031(7)(b) is clear and unambiguous: any person claiming a right to the surplus funds must file a claim with the clerk no later than sixty days after the sale." Dever v. Wells Fargo Bank Nat'l Ass'n, 147 So.3d 1045, 1047 (Fla. 2d DCA 2014); see also Mathews, 139 So.3d at 500 ("The language of section 45.031(7)(b) is clear and unambiguous in requiring that any person claiming a right to the surplus funds 'MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE.' " (emphasis omitted)). This subsection only refers to the "sale," not the "certificate of sale." § 45.031(7)(b). This is significant because section 45.031 assigns particular and distinct meanings to the terms "sale" and "certificate of sale" and does not use them interchangeably. See § 45.031(4) ("After a sale of the property the clerk shall promptly file a certificate of sale and serve a copy of it on each party" (emphasis added)); .031(5) ("If no objections to the sale are filed within 10 days after filing the certificate of sale, the clerk shall file a certificate of title and serve a copy of it on each party." (emphasis added)). Reading subsection (7)(b) to require a claim for surplus funds to be filed within sixty days of the certificate of sale—instead of the actual sale itself—would render subsection (4) meaningless and would confuse the meaning of other subsections of the statute.

***2** Additionally, such a reading would be inconsistent with this court's prior case law interpreting section 45.031(7)(b). In Mathews, this court explained that the bank "was required to file a claim with the clerk within sixty days after the sale of the property to preserve any claim it may have had to the surplus funds." 139 So.3d at 500 (emphasis added). Similarly, in Dever, this court used the date the property was sold at auction, not the date the certificate of sale was issued, as the start date for the sixty-day period. 147 So.3d at 1047. Although using

either date would not have changed the fact that the banks' claims were untimely, in both cases this court interpreted the language of the statute to refer to the date of the actual sale, not the issuance of the certificate of sale. See Mathews, 139 So.3d at 499–500; Dever, 147 So.3d at 1047.

¹⁴For the first time on rehearing, the bank argues that the date of the sale should be calculated from the date of the issuance of the certificate of title. In support, it cites Straub v. Wells Fargo Bank, N.A., 182 So.3d 878, 881 (Fla. 4th DCA 2016), which was published prior to the filing of the bank's initial brief. In Straub, the Fourth District held that "[u]nder section 45.01(1)(a), (2)(f), and (7)(b), a foreclosure 'sale' takes place when ownership of the property is transferred upon filing of the certificate of title." The bank waived this argument by failing to raise it in its appellate briefs. See Fla. R. App. P. 9.330(a) (stating that a motion for rehearing shall not include "issues not previously raised in the proceeding"); see also Teitelbaum, v. S. Fla. Water Mgmt. Dist., 176 So.3d 998, 1005 n.3 (Fla. 3d DCA 2015) (holding that an argument raised for the first time in a motion for rehearing was waived), review denied, SC15–1994, 2016 WL 1065552 (Fla. Mar. 16, 2016); Tillery v. Fla. Dep't of Juvenile Justice, 104 So.3d 1253, 1255 (Fla. 1st DCA 2013) ("[A]n argument not raised in an initial brief is waived."); Philip Morris USA, Inc. v. Naugle, 103 So.3d 944, 949 (Fla. 4th DCA 2012) ("It is a rather fundamental principle of appellate practice and procedure that matters not argued in the briefs may not be raised for the first time on a motion for rehearing." (quoting Ayer v. Bush, 775 So.2d 368, 370 (Fla. 4th DCA 2000))).

However, we recognize that our holding in this opinion conflicts with the Fourth District's holding in Straub. Therefore we must certify conflict. And we note that construing the term "sale" to refer to the issuance of the

certificate of title confuses the meaning of several subsections of section 45.031. See, e.g., § 45.031(1)(a) (requiring the trial court to "direct the clerk to sell the property at a public sale" and stating that "[a] sale may be held more than 35 days after the date of final judgment"); .031(2) (requiring publication of a "[n]otice of sale" that "shall contain ... [t]he time and place of sale"); .031(3) (stating that "[t]he sale shall be conducted at public auction" and requiring the highest bidder to post a deposit "[a]t the time of the sale"); .031(5) (requiring the clerk to file a certificate of title "[i]f no objections to the sale are filed within 10 days after filing the certificate of sale"); .031(6) ("When the certificate of title is filed the sale shall stand confirmed." (emphasis added)).

Because the bank filed its claim outside the statutory window, we must affirm the trial court's order denying the claim. In so doing, we note that the two cases on which the bank relies on appeal—In re Jaar, 186 B.R. 148, 154 (Bankr. M.D. Fla. 1995), and Shlishey the Best, Inc. v. CitiFinancial Equity Services, Inc., 14 So.3d 1271, 1275 (Fla. 2d DCA 2009)—are inapplicable here because they both concern a mortgagor's right of redemption, which is governed by section 45.0315, not section 45.031.

***3** Affirmed, conflict certified.

LaROSE and BADALAMENTI, JJ., Concur.

All Citations

--- So.3d ----, 2017 WL 1493788

Footnotes

- ¹ Diane and Mark Glenville were the property owners and defendants in the foreclosure action. They are entitled to the surplus funds remaining with the clerk more than sixty days after the foreclosure sale pursuant to section 45.031(7)(b), Florida Statutes (2015).