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Justice Watch: Foreclosure Attorneys Targeted In 3rd DCA Ruling

Two Miami foreclosure attorneys say they were just doing their jobs defending homeowners when they ended up being targeted in an appellate decision by Third District Court of Appeal Judge Leslie B. Rothenberg.

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After Miami foreclosure attorney Bruce Jacobs agreed to write an appellate brief for an ill colleague, he begged off making the oral argument before the Third District Court of Appeal in October.

Jacobs, who hosts "Debt Warriors with Bruce Jacobs" on WZAB, 880 AM The Biz, was smarting from an order to show cause issued by the appellate court earlier this year in another foreclosure case after a bank admitted not owning his client's mortgage the day before oral argument.

The Third DCA, though, ended up accusing him of making frivolous arguments and threatened sanctions but has yet to follow through. Then in the foreclosure case he took as a favor, Jacobs caught the appellate court's wrath again in a decision written by Judge Leslie B. Rothenberg.

She blamed the homeowners' appellate attorneys for "defending an indefensible appeal," cited "material misrepresentations" in the homeowners' motion for final judgment filed by trial attorney Robert Lithman and found fundamental error by Miami-Dade Circuit Judge Jose M. Rodriguez in an opinion issued Nov. 20.

Rothenberg also was one of the judges who filed the order to show cause against Jacobs. He now wonders if the Third DCA is singling out foreclosure defense attorneys for vigorously defending homeowners.

"In 18 years of practicing law, this is the first practice area I've ever felt any backlash for making good faith arguments," Jacobs said. "It's not just me. Other attorneys have faced threats of sanctions for making good faith arguments in foreclosure appeals."

Jacobs, who represented banks for years, said the foreclosure crisis could be resolved if banks gave meaningful modifications that let people stay in their homes.

"The dirty secret is that banks make more money when they foreclose. That is why the loan modification process is such a frustrating disaster. That is why it's so important to litigate these cases in court," Jacobs said. "And we know there has been massive fraud in these cases," he added, referring to the robo-signing scandal.

Lithman of Robert P. Lithman P.A. in Coral Gables, represented Mary Gamarra de Headley and Todd Headley of Miami Shores at trial

and argued their appeal. He is at a loss to explain what compelled Rothenberg to question the ethics and professionalism of himself and Jacobs in the eight-page decision.

'Duty Of Candor'

"We also remind counsel for the Headleys of his duty of candor to the tribunal," Rothenberg wrote for the three-judge panel. "Not only did he file a misleading pleading, which led the trial court to err, he compounded the error by defending an indefensible appeal." Joining her on the unanimous opinion were Judges Ivan F. Fernandez and Thomas Logue.

Lithman, who has been practicing law since 1976, asked, "Why would Judge Rothenberg personally attack me?" He said he will ask for a rehearing but doubts it will be granted.

BAC Home Loans Servicing Inc., Bank of America's mortgage servicing arm, appealed after Rodriguez granted a default judgment to the couple. The company failed to appear at several hearings or answer the couple's affirmative defenses. A counterclaim alleged fraud in the inducement and violation of the state's Deceptive and Unfair Trade Practices Act, among other things.

The judge ruled in favor of the couple after an attorney for BAC attended a rescheduled hearing but said he was not authorized to present the bank's case, Lithman said.

"I'm looking at the judge, and he's looking back at me, and we're both incredulous," Lithman said.

The Headleys, who could have sought monetary damages, asked Rodriguez to forgive the \$344,000 mortgage. He did.

Rothenberg said Rodriguez's decision to forgive the loan violated BAC's due process rights. She said any redress on the Headleys' counterclaim must be monetary and not made through nullification of the mortgage. She called the circuit court's decision last year "inexplicable and extraordinary" because it had not been pleaded.

"What's an appropriate remedy?" Lithman asked. "Extinguishing a mortgage that had already been determined to have been procured by fraud or awarding money damages or both?"

Rothenberg noted in a footnote that the Headleys hadn't paid their mortgage since February 2008.

She quoted Florida Bar Rule 4-3.3, which states a lawyer shall not knowingly make a false statement or offer evidence the lawyer knows to be false, and found misrepresentations in Lithman's motion for final judgment.

He said Rodriguez "carefully considered what he was doing and did the right thing."

The appellate court reversed final judgment and remanded "for a determination of damages, if any."

Attorney R. Eric Bilik with McGuireWoods in Jacksonville was one of several attorneys representing BAC in the case. He referred questions to BAC, which issued a statement saying it was pleased with the appellate decision.

Frivolous or Zealous?

Jacobs is concerned he will be accused of unethical behavior in a pending appeal where he alleges fraud by a lender. He said foreclosure is an evolving area of law and is not well-settled.

And while there are bad foreclosure defense lawyers who deserve to be sanctioned, Jacobs said he uses well-researched legal arguments to expose the wrongs of lenders.

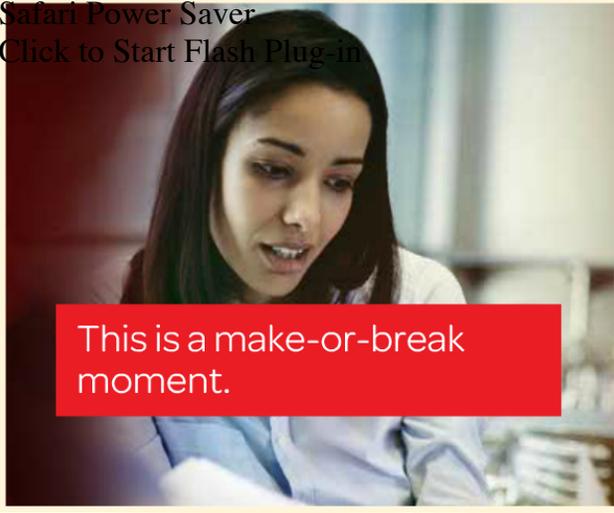
"Good foreclosure defense lawyers should be commended, not criticized," he said. "Foreclosures are a problem, and a lot of people are getting hurt. We are witnessing the largest transfer of real estate from taxpaying, middle-class homeowners to foreign investors, banks and Wall Street hedge funds."

Jacobs said he is concerned Rothenberg's opinion will sully his reputation.

The cheeky South Florida Lawyers Blog picked up on the decision. One anonymous commentator said, "On the scale of frivolous appeals that baby doesn't register." Another commentator said Jacobs was "fighting a war he cannot win."

"I've had a number of lawyers, and even a judge ask me: 'Wow! What did you do?' " Jacobs said. "All I did was help a friend draft his answer brief. I was never involved at the trial court level. Now judges I've worked very hard to impress with my knowledge of foreclosure law are questioning whether I intentionally misled one of their own. It's very unsettling, and it makes my job harder."

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