

## *Refaie v. Bayview Loan Servicing, LLC*

Court of Appeal of Florida, Second District

May 14, 2021, Opinion Filed

Case No. 2D19-4780

### Reporter

2021 Fla. App. LEXIS 6895 \*; 46 Fla. L. Weekly D 1125; 2021 WL 1931892

NICK REFAIE, Appellant, v. BAYVIEW LOAN SERVICING, LLC, and BRANCH BANKING AND TRUST COMPANY, Appellees.

**Notice:** NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

**Prior History:** Appeal pursuant to [Fla. R. App. P. 9.130](#) [\*1] from the Circuit Court for Hillsborough County; Sandra Taylor, Senior Judge.

Bayview Loan Servicing, LLC v. Refaie, 2015 Fla. Cir. LEXIS 62206 (Fla. Cir. Ct., Nov. 24, 2015)

### Core Terms

disbursements, certificate, foreclosure, certificate of title, legal description, surplus, foreclosure sale, sixty-day, deed, final judgment, surplus proceeds, incorrect, file a claim, filing of the certificate, property address, trial court, sixty days, ambiguous, corrected, patent, surplus fund, conveyance, mortgage

### Case Summary

#### Overview

**HOLDINGS:** [1]-Pursuant to [§ 45.032\(3\), Fla. Stat.](#), issuance of the certificate of disbursements triggers the running of the 60-day period for filing claims to surplus monies following a foreclosure sale; here, the incorrect legal description and property address on the certificate of title did not invalidate the foreclosure or conveyance of the property because no error occurred prior to entry of the final judgment of foreclosure. All relevant documents preceding the certificate of title contained the correct property address and legal description and all parties were on notice of the foreclosure proceedings and sale of the property, and the bank's motion for surplus proceeds, filed more than 60 days after the filing of the certificates of disbursements, was untimely.

#### Outcome

Judgment reversed and remanded.

### LexisNexis® Headnotes

## Foreclosures

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

### [HNI](#) [↓] Standards of Review, De Novo Review

An issue of statutory interpretation is subject to de novo review.

Real Property

Law > Financing > Foreclosures > Judicial Foreclosures

### [HN2](#) [↓] Foreclosures, Judicial Foreclosures

The Florida Supreme Court has concluded that in order to reconcile the various statutes pertaining to surpluses following judicial foreclosure sales, the triggering event for the 60-day window begins when the clerk files the certificate of disbursements rather than the date of the foreclosure sale. [Section 45.032\(1\), Fla. Stat.](#), defines terms that apply to numerous statutes pertaining to judicial foreclosure sales, not just [§ 45.032](#), and the definition of "surplus" in [§ 45.032\(1\)\(c\)](#) includes a reference to the filing of the certificate of disbursements. This statutory presumption—that surplus funds are by definition contingent on the certificate of disbursements—implies that the 60-day period to file a claim seeking disbursement of surplus funds begins to run upon the filing of the certificate of disbursements. The specific 60-day period referenced in each of the subsections regarding determination of payment or entitlement to surplus funds runs for 60 days after the clerk issues a certificate of disbursements.

Governments > Legislation > Interpretation

Real Property

Law > Financing > Foreclosures > Judicial

### [HN3](#) [↓] Legislation, Interpretation

To conclude the 60-day window regarding filing a claim for surpluses following judicial foreclosure sales instead commences upon the filing of the certificate of sale would produce an inconsistent application of [§45.031\(7\)\(b\), Fla. Stat.](#), and [§ 45.032\(3\), Fla. Stat.](#) Ultimately, there cannot be two different sixty-day cutoff periods for filing claims for surplus funds. The court must interpret related statutory sections in pari materia if parts of the statute are unclear or ambiguous. The doctrine of in pari materia is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent. If a part of a statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with other parts of the same statute or others in pari materia, the court will examine the entire act and those in pari materia in order to ascertain the overall legislative intent. Harmonization of [§§ 45.031, 45.032](#) leads to the conclusion that the 60-day period for the filing of claims to surplus funds begins upon the issuance of the certificate of disbursements—that is, after the sale has been confirmed through the issuance of the certificate of title, and after the actual surplus amount has been determined.

Governments > Legislation > Statute of Limitations > Time Limitations

### [HN4](#) [↓] Statute of Limitations, Time Limitations

the issuance of the certificate of disbursements triggers the running of the sixty-day period for filing claims to surplus monies following a foreclosure sale.

Real Property Law > Deeds > Construction &

Interpretation

Real Property Law > Deeds > Validity  
Requirements > Property Descriptions

claim for disbursement of surplus proceeds following a judicial foreclosure sale.

### [HN5](#) [↓] **Deeds, Construction & Interpretation**

While a patently ambiguous deed—meaning a deed containing no evidence that would provide guidance as to the property attempted to be conveyed—is void as to an attempted conveyance, the same does not hold true for a certificate of title containing an incorrect legal description after entry of a final judgment of foreclosure.

**Counsel:** John R. Hightower, Jr., of JRH.Law PLLC, Temple Terrace; and Dustin D. Deese of Dustin D. Deese, PA, Dade City, for Appellant.

Robert M. Coplen and Elizabeth C. Fitzgerald of Robert M. Coplen, P.A., Largo, for Appellee Branch Banking and Trust Company.

Real Property Law > Deeds > Construction & Interpretation

Real Property Law > Deeds > Validity  
Requirements > Property Descriptions

No appearance for Bayview Loan Servicing, LLC.

**Judges:** SMITH, Judge. NORTH CUTT and BLACK, JJ., Concur.

### [HN6](#) [↓] **Deeds, Construction & Interpretation**

To be sure, Florida courts liberally construe the sufficiency of a legal description in a deed. The rule is that a description is sufficient if, by relying on the description read in light of all facts and circumstances referred to in the instrument, a surveyor could locate the land. The modern view is that the description is sufficient if the reference to the property in the deed is such that the court, by pursuing an inquiry based upon the words of reference, is able to identify the particular property to the exclusion of all other property.

**Opinion by:** SMITH

## Opinion

Real Property  
Law > Financing > Foreclosures > Judicial  
Foreclosures

### [HN7](#) [↓] **Foreclosures, Judicial Foreclosures**

Pursuant to [§ 45.032\(3\), Fla. Stat.](#), and case law, the filing of the certificate of disbursements is the controlling event that triggers the running of the 60-day period during which a claimant must file a

SMITH, Judge.

Mortgagor and original titleholder Nick Refaie challenges the amended order granting the Renewed Motion for Surplus filed by Branch Banking and Trust Company (BB&T) that directed the disbursement amount of approximately \$66,161, plus interest, to BB&T from the court registry following the foreclosure sale and satisfaction of the judgment amount. Because the initial motion for surplus filed by BB&T was untimely, we reverse and remand for further proceedings.

I.

The foreclosure below involved property located on Rollingview Drive in Temple Terrace, Florida. Mr. Refaie was the owner of record of the Rollingview property as defined in [section 45.032\(1\)\(a\), Florida Statutes](#) (2015). In September 2011 senior lienholder, BankAtlantic, filed a complaint against Mr. Refaie, seeking [\*2] to foreclose its mortgage lien.<sup>1</sup> A final uniform judgment of foreclosure was entered on November 23, 2015, and on March 8, 2016, a foreclosure sale was held at which BB&T was the highest bidder. A certificate of title was issued in favor of BB&T on March 21, 2016, but it contained the wrong property address and the wrong legal description.<sup>2</sup> Thereafter, a certificate of disbursements was issued, signed by the Hillsborough County Clerk of Court on March 25, 2016, and docketed on April 4, 2016. This certificate reflected the payment of \$112,410 to Bayview in satisfaction of the foreclosure judgment and a remaining \$66,161 surplus amount in the clerk's registry pending further order of the court.

Upon BB&T's April 19, 2016, motion, on May 25, 2016, the trial court ordered the clerk to issue a corrected certificate of title bearing the proper legal description for the property sold at the March 8, 2016, foreclosure sale; the clerk thereafter issued the corrected certificate of title on June 16, 2016, which included the proper legal description and property address. Subsequently, on June 20, 2016, BB&T filed a motion to direct the clerk to disburse the \$66,161, plus interest, in surplus proceeds [\*3] from the foreclosure sale, which the trial court

<sup>1</sup> After BankAtlantic filed the complaint, Bayview Loan Servicing, LLC, was substituted as plaintiff. In addition to Nick Refaie, the foreclosure complaint also named Najah Refaie, Ahmed Refaie, BB&T, and the Internal Revenue Service as defendants. At the time of the foreclosure, BB&T was a junior lienholder through succession by merger. Of those named parties, BB&T is the only appellee who made an appearance in this action, see [Fla. R. App. P. 9.020\(g\)\(2\)](#), due in likely part to its status as the titleholder after the foreclosure sale and its interest in the disbursement of excess funds.

<sup>2</sup> The certificate of title listed the property address as 9209 Knights Branch Street, Tampa, Florida and further included an incorrect legal description. Neither the property address nor the legal description in the certificate of title matched those for the Rollingview property as set forth in the final judgment of foreclosure.

granted.

## II.

[HNI](#) [↑] The issue before us is one of statutory interpretation and therefore subject to de novo review. See [Borden v. E.-European Ins., 921 So. 2d 587, 591 \(Fla. 2006\)](#). Mr. Refaie argues on appeal that BB&T untimely filed its claim for the disbursement of surplus proceeds from the foreclosure sale of the Rollingview property where BB&T filed its claim more than sixty days *after* the certificate of disbursements was issued, contrary to [section 45.032\(3\)\(a\)](#).<sup>3</sup> BB&T instead focuses on the certificate of title and contends that the original certificate of title could not have conveyed title to the Rollingview property because it bore the incorrect legal description and argues it timely filed its surplus claim within the sixty-day window from the corrected certificate of title. Thus, BB&T argues, the sixty-day time period was tolled until the clerk filed the corrected certificate of title on June 16, 2016, making BB&T's claim for the surplus proceeds timely.

We first turn to [section 45.032\(1\)\(c\)](#), which provides, "'Surplus funds' or 'surplus' means the funds remaining after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements." [Section 45.031\(7\)\(b\)](#) provides:

Disbursements of proceeds.—

... [\*4] .

### CERTIFICATE OF DISBURSEMENTS

The undersigned clerk of the court certifies that he or she disbursed the proceeds received from the sale of the property as provided in the order or final judgment to the persons and in the amounts as follows:

....

<sup>3</sup> [Section 45.032](#), which was amended in 2018, included the removal of the sixty-day window of time during which the clerk of court is required to hold the surplus of funds pending claims by subordinate lienholders. Ch. 2018-71, § 3, Laws of Fla.

IF YOU ARE A PERSON CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS. AFTER 60 DAYS, ONLY THE OWNER OF RECORD AS OF THE DATE OF THE LISPENDENS MAY CLAIM THE SURPLUS.

(Emphasis added.)

Mr. Refaie maintains that the sixty days to file a claim starts to run from the day the certificate of disbursements is issued—not the certificate of title or the date of the sale of the property. We reach the same conclusion. The Florida Supreme Court reviewed this very issue in *Bank of New York Mellon v. Glenville*, 252 So. 3d 1120, 1128-29 (Fla. 2018), which originated in this court and involved a situation factually similar to that presented here. In *Glenville*, a judgment of foreclosure was entered against Diane and Mark Glenville, the record owners of the residential property at issue. *Id.* at 1123. A judicial sale of the property followed. *Id.* After the sale, the clerk of court issued certificates [\*5] of sale and title, respectively, as well as a certificate of disbursements, all of which contained the requisite language regarding a potential surplus of proceeds pursuant to the identical language from *section 45.031(1)(a)*, *Florida Statutes* (2015), at issue in this appeal. *Id.* Florida Housing Finance Corporation (Florida Housing), which held a third mortgage on the property, filed a claim for a portion of the surplus proceeds. *Id.* The Glenvilles subsequently filed a claim for the surplus proceeds remaining after disbursement to Florida Housing. *Id.* The second mortgage holder, Bank of New York Mellon (Mellon), then filed its claim for the surplus proceeds more than sixty days after the actual foreclosure sale but within sixty days of the clerk's filing of the certificates of sale, title, and disbursements. *Id.* at 1123-24. Faced with competing claims for the surplus proceeds, the trial court agreed with the Glenvilles' argument that

Mellon had untimely filed its claim because it had done so more than sixty days after the foreclosure sale. *Id.* at 1124. We affirmed the trial court's order, concluding that the language of *section 45.031* meant sixty days after the "sale" of the property, not the issuance of the "certificate of sale," as Mellon had argued. *Id.* (citing [\*6] *Bank of N.Y. Mellon v. Glenville*, 215 So. 3d 1284, 1285 (Fla. 2d DCA 2017)). In doing so, we certified conflict with *Straub v. Wells Fargo Bank, N.A.*, 182 So. 3d 878, 881 (Fla. 4th DCA 2016), in which the Fourth District held that the sixty-day period began to run upon the filing of the certificate of sale. *215 So. 3d at 1286-87.*

**HN2**[↑] The Florida Supreme Court accepted jurisdiction based on that certified conflict and concluded that in order to reconcile the various statutes pertaining to surpluses following judicial foreclosure sales, it was compelled to hold that the triggering event for the sixty-day window begins when the clerk files the certificate of disbursements rather than the date of the foreclosure sale. *See Glenville*, 252 So. 3d at 1126, 1128-29. The court noted that *section 45.032(1)* defines terms that apply to numerous statutes pertaining to judicial foreclosure sales, not just *section 45.032*, and that the definition of "surplus" in *subsection (1)(c)* includes a reference to the filing of the certificate of disbursements. *Glenville*, 252 So. 3d at 1126 ("[S]ection 45.032(1) defines certain terms that apply not just for purposes of *section 45.032* but '[f]or purposes of *ss. 45.031-45.035*.' *Section 45.032(1)(c)* specifically defines the term 'surplus' to mean 'the funds remaining after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements.'" (second alteration in original) (quoting *§ 45.032*)). This statutory presumption—that surplus funds are by definition contingent [\*7] on the certificate of disbursements—implies that the sixty-day period to file a claim seeking disbursement of surplus funds begins to run upon the filing of the certificate of disbursements. *See Glenville*, 252 So. 3d at 1126-27 (quoting *section 45.032(3)* for the proposition that the "specific

sixty-day period" referenced in each of the subsections regarding determination of payment or entitlement to surplus funds runs for "60 days after the clerk issues a certificate of disbursements").

[HN3](#)<sup>[↑]</sup> To conclude this sixty-day window instead commences upon the filing of the certificate of sale would produce an inconsistent application of [sections 45.031\(7\)\(b\)](#) and [45.032\(3\)](#). See [Glenville, 252 So. 3d at 1127](#) ("Ultimately, there cannot be two different sixty-day cutoff periods for filing claims for surplus funds."). We must interpret related statutory sections in pari materia if parts of the statute are unclear or ambiguous. See [E.A.R. v. State, 4 So. 3d 614, 629 \(Fla. 2009\)](#) ("The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent." (quoting [Fla. Dep't of State v. Martin, 916 So. 2d 763, 768 \(Fla. 2005\)](#))); [Fla. Dep't of Env't Prot. v. ContractPoint Fla. Parks, LLC, 986 So. 2d 1260, 1265-66 \(Fla. 2008\)](#) ("[I]f a part of a statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with [\*8] other parts of the *same statute* or others in pari materia, the Court will examine the entire act and those in *pari materia* in order to ascertain the overall legislative intent." (alteration in original) (quoting [Fla. State Racing Comm'n v. McLaughlin, 102 So. 2d 574, 575-76 \(Fla. 1958\)](#))). Following this principle, the supreme court noted that

[a] harmonization of [section 45.031](#) and [section 45.032](#) leads to the conclusion that the sixty-day period for the filing of claims to surplus funds begins upon the issuance of the certificate of disbursements—that is, after the sale has been confirmed through the issuance of the certificate of title, and after the actual surplus amount has been determined.

[Glenville, 252 So. 3d at 1128](#).

Following [Glenville](#), it is clear that Mr. Refaie is

correct in his assertion that [HN4](#)<sup>[↑]</sup> the issuance of the certificate of disbursements triggers the running of the sixty-day period for filing claims to surplus monies following a foreclosure sale. However, as the certificate of disbursements in this case issued following the certificate of title with an incorrect property address and legal description, BB&T argues the certificate of disbursements was "invalid" because it issued from a defective certificate of title.<sup>4</sup> BB&T equates the March 21, 2016, certificate of title to a faulty deed, wherein the [\*9] conveyance fails due to a patent ambiguity in the certificate of title. See [Mendelson v. Great W. Bank, F.S.B., 712 So. 2d 1194, 1196 \(Fla. 2d DCA 1998\)](#) ("[I]f the instrument's description of the property is patently ambiguous, and the instrument furnishes no other information from which the parties' intention can be gleaned, the attempted conveyance is void, and parol evidence may not be employed to cure the deficiency."). [HN5](#)<sup>[↑]</sup> While a patently ambiguous deed—meaning a deed containing no evidence that would provide guidance as to the property attempted to be conveyed—is void as to an attempted conveyance, the same does not hold true for a certificate of title containing an incorrect legal description after entry of a final judgment of foreclosure. Compare [Mitchell v. Thomas, 467 So. 2d 326, 328 \(Fla. 2d DCA 1985\)](#) (holding that a deed that omitted east and south boundary calls from the legal description was patently ambiguous because the conveyance was not discernable on the face of the deed), with [Salam v. U.S. Bank Nat'l Ass'n, 233 So. 3d 473, 477 \(Fla. 4th DCA 2017\)](#) (holding that a mortgage, which did not contain the property's legal description but that contained the names of the parties to a foreclosure lawsuit and the official recording stamp, was sufficient to establish prima facie foreclosure case).

[HN6](#)<sup>[↑]</sup> To be sure, Florida courts liberally

<sup>4</sup>This argument rests on the issuance of the certificate of title not because BB&T claims the sixty-day window began running from the time of the filing of the certificate of title but because the certificate of disbursements was invalid due to the incorrect legal description in the March 21, 2016, certificate of title.

construe the sufficiency of a legal description [\*10] in a deed. See [Mendelson, 712 So. 2d at 1196](#) ("The rule is that a description is sufficient if, by relying on the description read in light of all facts and circumstances referred to in the instrument, a surveyor could locate the land."); see also [Deutsche Bank Nat'l Tr. Co. ex rel. Holders of GSAMP Tr. 2005-AHL Mortg. Pass-Through Certificates, Series 2005-AHL v. Cope, 311 So. 3d 120, 125 n.2 \(Fla. 2d DCA 2020\)](#) (discussing cases related to patent ambiguities within deeds and recognizing, without reaching the issue, that older cases applying the "doctrine of patent ambiguity" may have eroded into "a more lenient standard" as discussed in *Hutchinson Island Realty, Inc. v. Babcock Ventures, Inc.*, 867 So. 2d 528, 532 (Fla. 5th DCA 2004)); [Bajrangi v. Magnethel Enters.](#), 589 So. 2d 416, 419 (Fla. 5th DCA 1991) (applying the modern view that "the description is sufficient if the reference to the property in the deed is such that the court, by pursuing an inquiry based upon the words of reference, is able to identify the particular property to the exclusion of all other property").

BB&T's focus on the sufficiency of the legal description in the March 21, 2016, certificate of title is therefore misplaced. Importantly, the incorrect legal description and property address on the certificate of title did not invalidate the foreclosure or conveyance of the Rollingview property because no error occurred prior to entry of the final judgment of foreclosure. It is true that "errors in the legal description of a property, contained in a deed or mortgage existing [\*11] prior to entry of the final judgment of foreclosure, cannot be remedied by simply amending or correcting the final judgment." [Baker v. Courts at Bayshore I Condo. Ass'n](#), 279 So. 3d 799, 801 (Fla. 3d DCA 2019); see also [Lucas v. Barnett Bank of Lee Cnty.](#), 705 So. 2d 115, 116 (Fla. 2d DCA 1998) (explaining that an incorrect legal description that is not corrected before entry of the final judgment of foreclosure and which is carried into the advertisement for sale and the foreclosure deed requires the court to begin the foreclosure case

anew because potential bidders at the sale may not know the specific property being sold); *Caddy v. Wells Fargo Bank, N.A.*, 198 So. 3d 1149, 1150 (Fla. 4th DCA 2016) (reversing and instructing trial court to vacate consent judgment of foreclosure, lis pendens, foreclosure sale, and certificate of title where incorrect legal description of property was contained in the deed and where trial court had granted lender's motion to nunc pro tunc amend the above documents without setting aside the consent judgment of foreclosure and certificate of title). However, as BB&T acknowledges, the lis pendens, the complaint, the final judgment of foreclosure, and the notice of foreclosure sale in this case all contained the correct property address and legal description.

In this case, all relevant documents preceding the certificate of title contained the correct property address and legal description [\*12] and all parties were on notice of the foreclosure proceedings and sale of the property. See [Hutchison v. Chase Manhattan Bank](#), 922 So. 2d 311, 315 (Fla. 2d DCA 2006) ("Due process of law requires that interested parties have fair notice and reasonable opportunity to be heard before a judgment or decree is rendered."). Of particular significance is the fact that there was only one certificate of disbursements filed by the clerk—even though the error in the certificate of title was later remedied in a corrected certificate of title, no subsequent certificate of disbursements was issued. The end result of the incorrect legal description in this case, postjudgment, amounted to no more than a scrivener's error, which had no effect whatsoever on the payment of all disbursements required by the final judgment or on the certificate of disbursements that shows the same. See, e.g., [Rodgers v. Deutsche Bank Nat'l Tr.](#), 256 So. 3d 885, 887-88 (Fla. 4th DCA 2018) (holding that the trial court did not abuse its discretion in denying the motion to vacate judgment of foreclosure that contained an incorrect legal description where the error occurred only upon, and not prior to, entry of the judgment).

**III.**

[HN7](#)<sup>[↑]</sup> Pursuant to [section 45.032\(3\)](#) and *Glenville*, the filing of the certificate of disbursements is the controlling event that triggers the running of the sixty-day period [\*13] during which a claimant must file a claim for disbursement of surplus proceeds. [Glenville, 252 So. 3d at 1127](#). There is nothing before us that suggests any deficiency in the certificate of disbursements, nor is there anything that suggests the certificate of disbursements was invalid due to the incorrect property address and legal description in the March 21, 2016, certificate of title. Thus, BB&T's motion for surplus proceeds, filed more than sixty days after the filing of the certificate of disbursements, was untimely. Accordingly, we reverse the amended order granting BB&T's renewed motion for surplus of the foreclosure proceeds and remand to the trial court for entry of an order consistent with this holding.

Reversed and remanded.

NORTHCUTT and BLACK, JJ., Concur.