

PUBLICATION

Recent, Significant Changes in Florida's Law of Foreclosure

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July 19, 2013

On June 7, 2013, Florida Governor Rick Scott signed into law House Bill 87, now known as Chapter 2013-137,¹ which provides for substantial changes in mortgage foreclosures filed in Florida. Although foreclosure defense attorneys are of the opinion that the bill "favors banks,"² the bill contains "pro-borrower" provisions, as it shortens the time period to seek a deficiency judgment, and provides for more stringent standing requirements for lenders filing mortgage foreclosure complaints on or after July 1, 2013. Below are a few key points:

Foreclosure Complaints-Standing

The most substantial change for lenders is the creation of Florida Statutes § 702.015, which was created to speed up the foreclosure process, but in actuality, requires more paperwork for lenders. ***A lender who fails to comply with this statute may be subject to sanctions.***³ The statute applies to a plaintiff filing a complaint, on or after July 1, 2013, seeking to foreclose upon residential real property (one to four family dwellings), and requires the following:⁴

- Affirmative allegations that the plaintiff is the holder of the original note secured by the mortgage **OR** specific allegations of the factual basis by which the plaintiff is entitled to enforce the note.⁵
- When a party, such as a loan servicer, has been delegated authority to file a mortgage foreclosure action on behalf of the note holder, the complaint must describe the authority and identify with specificity the document that grants the party to act on behalf of the note holder, such as a power of attorney.⁶
- When the plaintiff possesses the original note, as a condition precedent to and contemporaneously with filing the complaint, the plaintiff must attach copies of the note and all allonges, and certify, *under penalty of perjury*, that it possesses the original note and provide specific details regarding its physical location and plaintiff's verification of same.⁷
- When the plaintiff seeks to enforce a lost, destroyed or stolen note, it must execute an affidavit *under penalty of perjury*, and attach it to the complaint. The affidavit must include the following: (1) a chain of all endorsements, assignments or transfers of the note; (2) facts showing plaintiff is entitled to enforce the note; and (3) exhibits including copies of the note and allonges, audit reports showing *physical receipt* of the original note, or other evidence of acquisition, ownership and possession of the note. The plaintiff must also provide adequate protection as required under Florida Statutes § 673.3091(2) before final judgment.

Deficiency Judgments-Limitations Period and Amount Recoverable

The bill also reduces the statute of limitations period for a lender seeking a deficiency judgment on a note secured by a mortgage on residential property (one to four family dwellings), from five years to *one year*, for a deficiency action commencing on or after July 1, 2013, regardless of when the cause of action accrued.⁸ The bill also limits the amount recoverable, in the case of owner-occupied residential property, to the difference between the judgment amount (or with a short sale, the outstanding debt) and the fair market value of the property on the date of the sale.⁹

Irrevocability of Mortgage Foreclosure Judgments

The new bill also creates Florida Statutes § 702.036, which provides for the finality of mortgage foreclosure judgments. The statute provides that an action to set aside, invalidate or challenge the validity of a final judgment of foreclosure, or to establish or reestablish a lien or encumbrance of property, is limited to monetary damages if all of the following apply: (1) the party seeking relief from the final judgment of foreclosure was properly served in the foreclosure action; (2) the final judgment of foreclosure was entered as to the property; (3) all applicable appeals periods have run and appeals are resolved; and (4) the property has been acquired for value, by a person not affiliated with the foreclosing lender or foreclosed owner, at a time in which no *lis pendens* regarding the suit to set aside, invalidate or challenge the foreclosure appears in the official records.¹⁰

The statute also provides that after a mortgage foreclosure based upon the enforcement of a lost, destroyed or stolen note, a person not a party to the foreclosure, but who claims to be the person entitled to enforce the note, has no claim against the property after it is conveyed for valuable consideration to a person not affiliated with the foreclosing lender or foreclosed owner. The rightful note enforcer may still recover adequate protection given pursuant to Florida Statutes.

Orders to Show Cause

The bill makes several revisions to the show cause process in Florida Statutes § 702.10, applicable to pending causes of action, including allowing a condominium, homeowners' or cooperative association with a lien on unpaid property assessments (or those associations that may file a lien against the property subject to the foreclosure), to request an order to show cause for the entry of a final judgment of foreclosure. Previously only the lender had this ability. The summary judgment standard is used, and at the hearing, defendants will need to claim a specific, allowable defense to prevent the foreclosure. The bill exempts owner-occupied residences from an order to show cause why the court should not enter an order requiring the borrower to make payments during the pendency of the foreclosure or enter an order to vacate the premises.

Adequate Protection for Lost, Destroyed, or Stolen Notes

The bill creates a new statute, Florida Statutes § 702.11, applicable to pending causes of action, and provides that a court may find the following as constituting adequate protection for lost, destroyed or stolen notes:¹¹ (1) a written indemnification agreement by a person reasonably believed sufficiently solvent; (2) surety bond; (3) letter of credit issued by a financial institution; (4) deposit of cash collateral with the clerk of court; or (5) other security that the court deems appropriate under the circumstances. The bill also outlines the liability of a person who wrongly claims to be the holder of a note or entitled to enforce a lost, stolen or destroyed note, and the remedies the actual note holder has against that person.

Magistrate Jurisdiction

Separately, and additionally, the Supreme Court of Florida has recently amended Florida Rule of Civil Procedure 1.490, to help alleviate the residential mortgage foreclosure case backlog. The amendments expand the use of magistrates in residential mortgage foreclosure cases by authorizing referral of those cases to magistrates now based upon implied consent of the parties, while providing an opportunity for the parties to object. Although this amendment was created to alleviate the backlog, it may have the opposite effect, since parties may still file exceptions to the magistrate's report and recommendation, and set same for hearing before a circuit court judge. Therefore, instead of a motion being heard on one occasion before a circuit court judge, two hearings may become common practice: one hearing before the magistrate, and another hearing before the circuit court judge on the exceptions to the magistrate's report.¹²

¹ The bill may be accessed online [here](#).

² See *The Florida Bar News, Letters, Foreclosure Legislation*, dated April 15, 2013.

³ However, a court already has the inherent authority to sanction parties, rendering this provision unnecessary. It is unclear why the legislature did not include a corresponding provision to allow the court to sanction defendants who raise frivolous challenges to standing merely to delay foreclosure action. Regardless, a court does have the authority to sanction defendants pursuant to its inherent authority and Florida Statutes § 57.105. See *Korte v. US Bank Nat'l Assoc. as Trustee for Asset-Backed Pass-Through Certificates Series 2006-WFH3, et al.*, 64 So. 3d 134, 135 (Fla. 4th DCA 2011) (per curiam) (affirmative defenses that are "not supported by the material facts of the case, but are nonetheless asserted for the primary purpose of delaying the entry of a final judgment" are sanctioned.); *JPMorgan Chase Bank, N.A. v. Hernandez*, 2011 WL 2499641, *3 (Fla. 3d DCA 2011). But in reality, this phenomenon has been around a long time – as stated by Judge Letts in a specially concurring opinion:

At this stage there is little or nothing in the record to reveal whether the borrowers really do have valid defenses or whether they are merely stalling the inevitable. Certainly, the motion to dismiss reveals no valid defenses. For example, the primary thrust of the motion to dismiss is that the allegations in the complaint are "insufficient and defective," ... I am cognizant of the fact that lenders, ... seldom, if ever, relish foreclosures. Nonpayment on the note is normally the only reason the lender goes to court.

As a consequence, I urge the trial judge not to hesitate to award section 57.105, Florida Statutes (Supp.1986), fees, if the defenses, when presented, reflect a complete absence of a justiciable issue in law or fact. It is true that defaulting borrowers are likely to be without funds; however, I would point to the amended 1986 version of section 57.105 which calls for the reasonable fee "to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney...." (emphasis added).

Connelly v. Glendale Federal Sav. and Loan Ass'n, 508 So. 2d 553, 553-54 (Fla. 4th DCA 1987) (Letts, J., specially concurring) (emphasis in original). *In fact, former 5th DCA judge Pleus, sitting as a senior judge in a foreclosure action, had this to say regarding in the case of Wells Fargo Bank, NA v. Ceus*, 2011 WL 2693114 (Fla.Cir.Ct. 2011) (Pleus, J., Trial Order):

The Court notes that it has become common practice for mortgage defense firms to file answers with boiler plate affirmative defenses such as the lack of standing, the RICO Act, et cetera. The sole purpose is for delay and everyone knows it. Many of these so called "defenses" are set forth on the internet.. Most do not apply or are factually and legally frivolous. Several of the above defenses in this case are in that category.

⁴ The statute includes condominiums and cooperatives, but excludes timeshare interests under part III of Florida Statutes Chapter 721.

⁵ This is phrased disjunctively.

⁶ See *Deutsche Bank Nat'l Trust Co., as Indenture Trustee on Behalf of the Holders of the Accredited Mortgage Loan Trust 2006–1 Asset Backed Notes v. Prevratil*, 2013 WL 845285 (Fla. 2d DCA March 8, 2013)(holding that a loan servicer, with a power of attorney, may verify a complaint on behalf of the investor). Further, the legislature intended that this subsection not modify the law regarding standing or real parties in interest. See Florida Statutes § 702.015(3).

⁷ This certification appears unnecessary since the bill already requires a plaintiff to make "affirmative allegations" that it "is the holder of the original note secured by the mortgage" or "[a]llege with specificity the factual basis by which the plaintiff is a person entitled to enforce the note" pursuant to Florida Statutes § 673.3011, and prior to the bill, a plaintiff was and still is already required to verify its statements in a complaint, pursuant to Florida Rule of Civil Procedure 1.110(b).

⁸ The amended statute is Florida Statutes § 95.11.

⁹ The amended statute is Florida Statutes § 702.06. The language in the statute appears to preclude the recovery of reasonable attorneys' fees and costs incurred in obtaining the deficiency judgment.

¹⁰ Essentially, in cases where this statute applies, an "innocent" third party who purchases a foreclosed home cannot be divested of that home if the foreclosure is later found to be fraudulent, since the original owner's recovery is limited to monetary damages.

¹¹ Adequate protection as required under Florida Statutes § 673.3091.

¹² Further, it appears that a party's failure to file an exception to the magistrate's report does not affect appellate rights, since at least one appellate court has held that when a trial court accepts a magistrate's recommendations and enters an order accordingly, it is not necessary that the losing party have filed an exception to preserve its right to appeal. See *Aspsoft, Inc. v. Webclay*, 983 So. 2d 761, 764 n.1 (Fla. 5th DCA 2008).