Residential Mortgage Foreclosure (FL)

A Lexis Practice Advisor® Practice Note by
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When a lender is faced with a defaulted loan secured by a mortgage on residential real property in Florida, it may pursue judicial foreclosure of the mortgage. This practice note provides an outline for complying with the federal statutes and regulations, state laws, and local rules governing residential mortgage foreclosures in Florida. This note is intended to help counsel for the lender ensure that all pre-suit obligations are met to avoid any delays or defenses to the foreclosure. However, the information contained herein is relevant to the borrower and its counsel as well.

For guidance on commercial mortgage foreclosure in Florida, see Commercial Mortgage Foreclosure (FL). For an overview of the mortgage foreclosure process, see 2 Florida Real Estate Transactions § 32.80.

PRE-SUIT REQUIREMENTS

A mortgage is security for a debt obligation. As such, prior to bringing a foreclosure action, it is imperative that you review the mortgage and promissory note or other security instrument to ensure compliance with any contractual pre-suit requirements contained in these documents.

Notice of Default

Many mortgages include a provision requiring that the mortgagor receive notice of the default, and, sometimes, an opportunity to cure it. In standard residential mortgages, this provision is often found in paragraph 22, about which there is a wealth of caselaw addressing whether compliance with the conditions precedent in paragraph 22 was demonstrated. See, e.g., Laurencio v. Deutsche Bank Nat'l Trust Co., 65 So. 3d 1190, 1192 (Fla. Dist. Ct. App. 2011).

Thus, the first step for the practitioner is to determine if the lender complied with all notice provisions, because a lender cannot foreclose unless it has demonstrated compliance with all contractual obligations. When pre-suit notice is required, it must include all required contents. See Samaroo v. Wells Fargo Bank, 137 So. 3d 1127 (Fla. Dist. Ct. App. 2014). In Samaroo, the acceleration notice did not include notice of the right to cure, but the lender refuted the borrower's affirmative defense that a proper acceleration notice was not given, arguing that it "substantially" complied with the contractual notice requirements, an argument the court rejected. Other cases have found that the mortgagee demonstrated "substantial" compliance with the obligations of the loan documents where a default notice did not give the required 30 days to cure the default, but the borrower did not demonstrate any resulting prejudice. See, e.g., Gorel v. Bank of New York Mellon, 165 So. 3d 44, 47 (Fla. Dist. Ct. App. 2015).

Notice of Assignment

In cases where the lender has acquired the loan by assignment, the assignee of the loan must give the debtor written notice of an assignment of the right to bill and collect a consumer debt "as soon as practical after the assignment is made, but at least 30 days before any action to collect the debt." Fla. Stat. Ann. § 559.715. Recent cases have held that Section 559.715 does not create a condition precedent to filing a foreclosure action. See Deutsche Bank Nat'l Trust Co. v. Hagstrom, 203 So. 3d 918, 921–22 (Fla. Dist. Ct. App. 2016); Brindise v. U.S. Bank Nat'l Ass'n, 183 So. 3d 1215, 1219 (Fla. Dist. Ct. App. 2016). However, the better practice is to provide the notice where applicable to avoid any defense based on the statute, which could delay a later foreclosure action.

Even in cases where the note or mortgage does not include any notice requirement, if the mortgage encumbers residential real property, it is advisable to send a notice of default that provides the borrower with notice of the availability of homeownership counseling from the Department of Housing and Urban Development (HUD). 12 U.S.C. § 1701x(c)(5).

Loss Mitigation

The federal Truth in Lending Act (TILA) creates loss mitigation procedures that certain lenders are required to follow depending on the type of loan at issue and the number of loans the lender makes, as well as when a borrower requests a loss mitigation application. 12 C.F.R. § 1024.41. These amendments also require notification to the borrower regarding loss mitigation options, and deadlines for providing such notices. The appendix to 12 C.F.R. § 1024.39 contains model clauses that can be included in the notice to the borrower. For delinquent loans on a primary residence (not including a home equity line of credit (HELOC)), the notice must include:

- A statement encouraging the borrower (or "consumer," as used in the regulation) to contact the lender or servicer
- A telephone number for the employee assigned to the consumer
- The lender or servicer's mailing address
- A brief description of the loss mitigation options that may be available, if applicable
- Application instructions or a statement telling the consumer how to obtain more information on loss mitigation options available, if applicable
- Website to access the HUD list of homeownership counselors or counseling organizations, and the HUD toll-free telephone number to access homeownership counselors or counseling organizations

You should confirm that any required notices regarding available loss mitigation options have been presented to the borrower prior to filing suit.

If a borrower has submitted a loss mitigation application, prior to filing suit, confirm with the lender that the application has been addressed and there are no loose ends. For example, if the application submitted was incomplete, confirm that the lender attempted to contact the borrower regarding the incomplete items. This information will be necessary to defeat any defense that foreclosure is premature or that the lender has unclean hands. For the practitioner representing a borrower trying to avoid foreclosure, it is imperative that you carefully document any communications with the lender regarding loss mitigation options and keep copies of all documents submitted in connection with a loss mitigation application to ensure that the application has been addressed and any applicable appeals have been pursued.

For further guidance, see Mortgage Servicing Issues and Regulatory Considerations.

PREPARATION OF THE FORECLOSURE COMPLAINT

Section 702.015 of the Florida Statutes was enacted to "expedite the foreclosure process by ensuring initial disclosure of a plaintiff's status" in the initial complaint. Rather than attempt to rely on a general allegation that it is the holder of the note or is otherwise entitled to enforce the note, the new statute requires a plaintiff filing a residential mortgage foreclosure action to allege its specific factual basis for standing in the complaint. Below are some practical considerations for the preparation of the foreclosure complaint to ensure compliance with Fla. Stat. Ann. § 702.015 and other applicable rules.

Title Search

If all required pre-suit notices have been given and the borrower has failed to cure the default, the next step is to determine all necessary and proper parties to the foreclosure action. This step requires obtaining a title report to identify not only ownership and encumbrances but all recorded documents that affect the property, including condominium or homeowners' association documents, any other claims such as superior or subordinate mortgages, and any lien claims. These reports are also valuable because they can identify any title defects or defects in the mortgage instrument, which can be corrected in the foreclosure action.

Venue and Jurisdiction

Florida's circuit courts have exclusive original jurisdiction over mortgage foreclosure actions. Fla. Stat. Ann. § 26.012. As for venue, the foreclosure action may be brought in the county where the property is located. Fla. Stat. Ann. § 47.011. If the mortgaged property lies in more than one county, the foreclosure may be filed in either county. Fla. Stat. Ann. § 702.04.

Statute of Limitations

The statute of limitations for a mortgage foreclosure is five years under Fla. Stat. Ann. § 95.11(2)(c). The Florida Supreme Court recently confirmed that each new default can restart the statute of limitations. Bartram v. U.S. Bank Nat'l Ass'n, 211 So. 3d 1009, 1019 (Fla. 2016).

Necessary Parties

Necessary parties to the foreclosure action include the parties to the note or other loan instrument and the mortgage, as well as the owner of the property. Cmty. Fed. Sav. & Loan Ass'n of Palm Beaches v. Wright, 452 So. 2d 638, 640 (Fla. Dist. Ct. App. 1984). A foreclosure judgment that does not include the record title owners of the property at the time the foreclosure action was filed is void. Citibank, N.A. v. Villanueva, 174 So. 3d 612 (Fla. Dist. Ct. App. 2015). Junior lienholders must be included in the foreclosure action in order to extinguish their interests. Conversely, senior lienholders are not necessary parties because the foreclosure of a junior lien does not affect their interest.

When a first mortgage is being foreclosed, a condominium or homeowners' association may be a necessary party to the foreclosure action because the relevant "safe harbor" provisions in the condominium and homeowners' association statutes provide that the foreclosing lender's liability for past due assessments is capped so long as the association is joined as a defendant in the foreclosure action. Fla. Stat. Ann. §§ 718.116(b), 720.3085(2)(c).

Standing

The foreclosure complaint must establish that the plaintiff has standing at the time the foreclosure is filed. Am. Home Mortgage Servicing, Inc. v. Bednarek, 132 So. 3d 1222, 1223 (Fla. Dist. Ct. App. 2014), citing McLean v. JP Morgan Chase Bank Nat'l Ass'n, 79 So. 3d 170, 173 (Fla. Dist. Ct. App. 2012). "A plaintiff who is not the

original lender may establish standing to foreclose a mortgage loan by submitting a note with a blank or special endorsement, an assignment of the note, or an affidavit otherwise proving the plaintiff's status as the holder of the note." Focht v. Wells Fargo Bank, N.A., 124 So. 3d 308, 310 (Fla. Dist. Ct. App. 2013).

A party may also have standing to file the action as a representative of the lender, consistent with Rule 1.210 of the Florida Rules of Civil Procedure, which permits an action to be prosecuted in the name of someone other than but acting for the real party in interest. Fla. R. Civ. P. 1.210. Thus, "[a loan] servicer that is not the holder of the note may have standing to commence a foreclosure action on behalf of the real party in interest, but it must present evidence, such as an affidavit or a pooling and servicing agreement, demonstrating that the real party in interest granted the servicer authority to enforce the note." Rodriguez v. Wells Fargo Bank, N.A., 178 So. 3d 62, 63 (Fla. Dist. Ct. App. 2015) (citations omitted).

Attaching Copies of Loan Documents to Complaint

Copies of the note and mortgage must be attached to the complaint as exhibits. Fla. R. Civ. P. 1.130(c). Any instruments, including assignments, which demonstrate standing should also be attached as exhibits. Sometimes loan documents will include information, such as Social Security or bank account numbers, that is confidential pursuant to Rule 2.420 of the Rules of Judicial Administration. If any of the loan documents include this information, it should be redacted prior to filing copies and if the originals must be filed, the procedure to designate this information as confidential must be followed. Fla. R. Jud. Admin. 2.420(d).

Verification of the Foreclosure Complaint

Recent amendments to Florida's Rules of Civil Procedure require that foreclosure complaints for residential real property be verified. Fla. R. Civ. P. 1.110(b). The form of the foreclosure complaint for residential mortgages is set forth in Fla. R. Civ. P. 1.115 and Fla. R. Civ. P. Forms 1.944(a) (for use when the location of the original promissory note is known) and 1.944(b) (for use when the location of the original promissory note is unknown). See also Fla. Stat. Ann. § 702.015. The complaint must be verified and include allegations regarding the basis for plaintiff's standing, the default, the amounts owed, and the location of the original promissory note. Rule 1.110(b) does not preclude the verification of a foreclosure complaint by an employee of the plaintiff bank's loan servicer. U.S. Bank N.A. v. Marion, 122 So. 3d 398, 399 (Fla. Dist. Ct. App. 2013); Deutsche Bank Nat'l Trust Co. v. Prevratil, 120 So. 3d 573, 575 (Fla. Dist. Ct. App. 2013). Caselaw interpreting the rule notes that the verification does not need to include any information about the signer's authority to verify the complaint. Deutsche Bank Nat. Trust Co. v. Plageman, 133 So. 3d 1199, 1202 (Fla. Dist. Ct. App. 2014); U.S. Bank, N.A. v. Wanio-Moore, 111 So. 3d 941, 941 (Fla. Dist. Ct. App. 2013), citing BAC Home Loan Servicing, L.P. v. Stentz, 91 So. 3d 235, 236 n.2 (Fla. Dist. Ct. App. 2012).

Certification regarding Possession of Original Promissory Note

If the plaintiff has physical possession of the original promissory note, it is required to file a certification with the court stating (1) that it has possession of the original promissory note, (2) the physical location of the promissory note, (3) the names and titles of those signing the certification, and (4) the date and time the location of the promissory note was verified. Fla. R. Civ. P. 1.115(c).

A promissory note is a negotiable instrument and therefore the original is required. Fla. Stat. Ann. § 673.1041. Other instruments can be secured by mortgages include an HELOC. Such instruments do not fit the statutory definition of a negotiable instrument since they are not for a "fixed amount of money" (i.e., a principal balance) but instead include a "draw" amount. Third Fed. Sav. & Loan Ass'n of Cleveland v. Koulouvaris, 247 So. 3d 652, 655

(Fla. Dist. Ct. App. 2018); Chuchian v. Situs Invs., LLC, 219 So. 3d 992, 993 (Fla. Dist. Ct. App. 2017). Because these instruments are not negotiable instruments, the original note need not be produced.

Lost or Destroyed Promissory Notes

If the complaint is based upon an instrument that has been lost or destroyed, the plaintiff must file an affidavit attached to the complaint detailing a clear chain of all endorsements or assignments of the note, setting forth facts showing that the plaintiff is entitled to enforce the lost or destroyed note pursuant to Fla. Stat. Ann. § 673.3091 and include copies of the note, any allonges to the note, audit reports showing physical receipt of the original note, or other evidence of acquisition and possession of the note as exhibits. Fla. R. Civ. P. 1.115(d).

If the complaint is based on a promissory note that has been lost, the complaint should include a claim to re-establish it pursuant to Fla. Stat. Ann. § 71.011.

Reformation

If the loan documents include any errors such as an incorrect party name or incorrect property description, the foreclosure complaint should include a count to reform the instrument. Because a mortgage foreclosure is an equitable proceeding, reformation is permitted in order to reflect the true intent of the parties.

For complaint forms, see Mortgage Foreclosure Complaint (Location of Promissory Note Known) (FL) and Mortgage Foreclosure Complaint (Location of Original Note Unknown) (FL).

LIS PENDENS

As part of the foreclosure, the plaintiff should prepare a notice of lis pendens for recording in the public records in the county where the property that is the subject of the foreclosure action is located. See Loidl v. I & E Group, Inc., 927 So. 2d 1016, 1018 (Fla. Dist. Ct. App. 2006). Pursuant to Fla. Stat. Ann. § 48.23(c)(1)(b), a notice of lis pendens must contain "The date of the institution of the action, the date of the clerk's electronic receipt, or the case number of the action." Fla. R. Civ. P. Form 1.918 states "NOTE: This form is not to be recorded without the clerk's case number." The procedures used to record the lis pendens with the case number vary widely between the different clerk's offices around the state. One way to ensure that the lis pendens includes the case number is to file the complaint first, then once the new case number is assigned, include it in the lis pendens to be filed immediately thereafter. You should confirm that the clerk in the county where the action is pending will automatically record the lis pendens upon filing in the case, because not all counties follow the same procedure. It is imperative to record the lis pendens as soon as possible because once the notice of lis pendens is recorded, any holders of unrecorded interests must intervene in the case within 20 days, otherwise their rights are extinguished. See Adhin v. First Horizon Home Loans, 44 So. 3d 1245, 1254 (Fla. Dist. Ct. App. 2010).

After the lis pendens is recorded, the foreclosure plaintiff's attorney should run a title search on the gap period covering the time between the last title search used to prepare the complaint and the date of recording the lis pendens. If any parties acquired an interest in the property during this period, they should be joined as defendants in the foreclosure action in order to foreclose their interest in the property.

For a form, see Notice of Lis Pendens (Foreclosure) (FL).

SERVICE OF THE FORECLOSURE COMPLAINT

All defendants joined in the foreclosure action must be served with process pursuant to Fla. Stat. Ann. § 48.031. Forms of summons are set forth in Fla. R. Civ. P. Form 1.902. In a foreclosure action, the summons should list all

documents, in addition to the foreclosure complaint, that are being served on the defendant. During the peak of the foreclosure crisis in Florida, many judicial circuits adopted administrative orders requiring certain notices be served on foreclosure defendants. As such, you must carefully check the rules in the county where the foreclosure is being filed to ensure compliance with these rules.

Personal or substitute service is permitted under Florida law. Florida's long-arm statute, Fla. Stat. Ann. § 48.193(1)(c), provides that a person who holds a mortgage or owns real estate in Florida is subject to the jurisdiction of a Florida court.

When the process server prepares the return of service, confirm that all required information is included on the service return so that you can follow up, if necessary, while the service encounter is still fresh in his or her mind. The service statutes are strictly construed. If a return of service is defective on its face because it does not satisfy one of the statutory requirements under Fla. Stat. Ann. § 48.031, the defendant is relieved from presenting evidence to overcome the presumption of validity and the burden shifts to the plaintiff to prove valid service. Service is defective on its face when the processor includes the wrong date of service, when the documents served are not initialed, or when the name of the person being served is omitted.

For a form, see Summons (Foreclosure) (FL).

If personal or substitute service cannot be obtained, a foreclosure defendant may be served by publication only if the plaintiff makes repeated attempts at personal service and a diligent search and inquiry for other locations where the defendant might be located. Fla. Stat. Ann. § 49.021. This search must include all of the areas of inquiry set forth in an affidavit outlined in Fla. R. Civ. P. Form 1.924.

For a form, see Affidavit of Diligent Search and Inquiry (Foreclosure) (FL).

DEFENSES IN FORECLOSURE

A foreclosure defendant must present any defenses to the foreclosure in its answer because affirmative defenses are waived if not pled. Jojo's Clubhouse, Inc. v. DBR Asset Management, Inc., 860 So. 2d 503, 504 (Fla. Dist. Ct. App. 2003). The defendant has the burden of proof with respect to any defense asserted. Commonly raised affirmative defenses in the residential foreclosure context are discussed below.

Lack of Notice

To defeat a defense regarding lack of required notice, a demand letter must be authenticated by someone with personal knowledge of its contents and authenticity, or by someone who can identify the record as a business record that fits within the hearsay exception set forth in Fla. Stat. Ann. § 90.803(6). To defeat this defense, the lender must also demonstrate that the notice included all provisions required in the loan documents. See earlier section, Notice of Default under Pre-suit Requirements.

Estoppel and Waiver

Several recent cases have addressed situations in which a borrower asserted a defense of estoppel or waiver after a lender orally agreed to and/or accepted reduced mortgage payments. Most loan documents include non-waiver provisions, and the Banking Statute of Frauds (Fla. Stat. Ann. § 687.0304(2)) provides that "[a] debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and debtor." However, this statute does not preclude asserting a defense based on an alleged oral modification. When such allegations are sufficiently

specific and have been relied upon by the borrower, these facts may create a genuine issue of material fact and defeat summary judgment. Roach v. Totalbank, 85 So. 3d 574 (Fla. Dist. Ct. App. 2012).

Lack of Standing

If the foreclosure plaintiff is not the original lender, a foreclosure defendant usually attempts to assert a defense due to a lack of standing. A promissory note may be enforced be any of the persons listed in Fla. Stat. Ann. § 673.3011, or a holder in due course. See Fla. Stat. Ann. § 673.3021. If a promissory note is endorsed in blank, this permits it to be enforced by a holder. See, e.g., Stone v. BankUnited, 115 So. 3d 411, 413 (Fla. Dist. Ct. App. 2013) (rejecting argument challenging the plaintiff's standing where note was endorsed in blank in light of the plaintiff's testimony demonstrating that it "acquired ownership of the note and mortgage through the purchase and assumption agreement" with the FDIC).

If the loan is being enforced by a subsequent holder, then the new holder must make efforts to confirm the accuracy of the prior holder's records regarding the loan, including any payments and the default. Holt v. Calchas, LLC, 155 So. 3d 499, 504 (Fla. Dist. Ct. App. 2015) (records from a prior servicer must, of course, have some indicia of accuracy, either through personal knowledge or a witness).

If a promissory note secured by a mortgage is sold or assigned, the UCC does not require that the mortgage be formally assigned. Fla. Stat. Ann. § 679.3101. Absent formal assignment of mortgage or delivery, the mortgage in equity passes as an incident of the debt. Perry v. Fairbanks Capital Corp., 888 So. 2d 725, 726 (Fla. Dist. Ct. App. 2004). See also Harvey v. Deutsche Bank Nat. Trust Co., 69 So. 3d 300, 304 (Fla. Dist. Ct. App. 2011) (holding that because plaintiff possessed original note and filed it with the circuit court, its standing may be established from its status as a note holder, regardless of any recorded assignments).

Payment

A borrower may also assert the lack of any default as a defense (i.e., that the borrower has been timely making its payments as required by the loan documents). Again, the burden of proof as to this defense is on the borrower. Deese v. Mobley, 392 So. 2d 364, 367 (Fla. Dist. Ct. App. 1981).

Statute of Limitations and Repose

The statute of limitations and the statute of repose are affirmative defenses that must be pleaded or else they are waived. Doe v. Hillsborough Cty. Hosp. Auth., 816 So. 2d 262, 264 (Fla. Dist. Ct. App. 2002). The Florida Supreme Court recently confirmed that each new default can restart the statute of limitations. Bartram v. U.S. Bank Nat'l Ass'n, 211 So. 3d 1009, 1019 (Fla. 2016).

Unclean Hands

Foreclosure is an equitable proceeding, and a lender can be estopped from foreclosing when the borrower establishes that the lender has unclean hands. City First Mortg. Corp. v. Barton, 988 So. 2d 82, 85 (Fla. Dist. Ct. App. 2008), citing Knight Energy Servs., Inc. v. Amoco Oil Co., 660 So. 2d 786, 789 (Fla. Dist. Ct. App. 1995). However, "[a] party must prove that he was injured for the unclean hands doctrine to apply." McCollem v. Chidnese, 832 So. 2d 194, 196 (Fla. Dist. Ct. App. 2002). The defense of unclean hands requires demonstration of egregious conduct by the lender. For one of the rare examples where such conduct was found, see Shahar v. Green Tree Servicing LLC, 125 So. 3d 251 (Fla. Dist. Ct. App. 2013). The failure to comply with the requirements of the loan documents is not unclean hands. Cong. Park Office Condos II, LLC v. First-Citizens Bank & Trust Co., 105 So. 3d 602, 610 (Fla. Dist. Ct. App. 2013).

Usury

Under Fla. Stat. Ann. § 687.03, a contract for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 18% per annum simple interest is deemed usurious. If the loan exceeds $500,000 in amount or value, then the applicable statutory section is Fla. Stat. Ann. § 687.071. A usurious contract is unenforceable according to the provisions of Fla. Stat. Ann. § 687.071(7).

JUDGMENT

When the defendants have failed to file or serve any response to the foreclosure complaint and the clerk has entered a default against them, you can proceed to a default judgment. If any of the defendants have served a response and asserted affirmative defenses, the foreclosing plaintiff must demonstrate that the defenses are legally or factually insufficient, either via a summary judgment motion with supporting affidavits or through a trial.

Summary Judgment

Because mortgage foreclosure is based on contract, the process lends itself to resolution via summary judgment pursuant to Fla. R. Civ. P. 1.510. To defeat summary judgment, a foreclosure defendant must demonstrate that there is a genuine issue of material fact or law that precludes the entry of judgment for the lender. Any affidavits filed in opposition to a motion for summary judgment must be based on personal knowledge. Campbell v. Salman, 384 So. 2d 1331, 1333 (Fla. Dist. Ct. App. 1980) (affirming final summary judgment when the affidavit filed in support of an affirmative defense was based upon information and belief), citing Fla. R. Civ. P. 1.510(e).

If a defendant has asserted affirmative defenses, the plaintiff must disprove the defenses or establish their legal insufficiency in order to obtain summary judgment. Pavolini v. Williams, 915 So. 2d 251, 253 (Fla. Dist. Ct. App. 2005).

Surrender of Original Note

To obtain a final foreclosure judgment where the action is based on a promissory note, the original note must be surrendered to the court. If the promissory note has been assigned by an allonge, the original allonge must also be filed with the court. Caballero v. U.S. Bank Nat'l Ass'n ex rel. RASC 2006-EMX7, 189 So. 3d 1044, 1045–46 (Fla. Dist. Ct. App. 2016). If any of these original documents include confidential information, the procedures to designate such confidential information must be followed when the documents are filed with the court. Fla. R. Jud. Admin. 2.420(d).

Foreclosure Judgment

Form foreclosure judgments are included in Fla. R. Civ. P. Form 1.996(a) and (b). The judgment must include the total amount due and awards interest at the statutory rate set forth in Fla. Stat. Ann. § 55.03. Unless the contract expressly provides that a specific interest rate applies post-judgment, the post-judgment interest rate set forth in Fla. Stat. Ann. § 55.03, shall apply.

For forms, see Final Foreclosure Judgment (Original Note in Plaintiff's Possession) (FL) and Final Foreclosure Judgment (Re-Establishment of Note) (FL).

Attorney's Fees

If the loan documents provide for the recovery of attorney's fees, these may be awarded in the final judgment, and the court must make a determination that the fees are reasonable based on the factors set forth in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), as modified by Standard Guaranty v.

Quanstrom, 555 So. 2d 828 (Fla. 1990), and Rule 4-1.5(B) of The Florida Bar of Rules of Professional Conduct (Fla. Bar Reg. R. 4-1.5). If a default judgment has been entered against the borrower and the note or mortgage provides for recovery of attorney's fees, pursuant to Fla. Stat. Ann. § 702.065, "it is not necessary for the court to hold a hearing or adjudge the requested attorneys' fees to be reasonable if the fees do not exceed 3 percent of the principal amount owed at the time of filing the complaint[.]"

A defendant is a "prevailing party" for purposes of awarding attorney's fees when the plaintiff's complaint is dismissed for failure to comply with conditions precedent, failure to prosecute, or when a suit is involuntarily dismissed due to the failure to comply with a court order. However, where the defendant successfully argues that the plaintiff lacks standing to enforce the loan documents and obtains dismissal of the complaint, the successful defendant is not entitled to recover attorney's fees pursuant to the same contract under the reciprocal provisions of Fla. Stat. Ann. § 57.105(7). Bank of New York Mellon Trust Co., N.A. v. Fitzgerald, 215 So. 3d 116 (Fla. Dist. Ct. App. 2017).

Redemption prior to Sale

The borrower in a foreclosure action has a statutory right to redeem the foreclosure judgment by paying all sums owed any time prior to the foreclosure sale pursuant to Fla. Stat. Ann. § 45.0315.

Liability for Homeowners/Condo Association Assessments

If a homeowner or condominium association is joined as a defendant in a foreclosure in order to take advantage on the statutory cap on assessments, the final judgment can reserve jurisdiction to determine the amount of assessments owed. A general reservation is insufficient to reserve jurisdiction with the trial court to determine the assessments. Grand Cent. at Kennedy Condo. Ass'n, Inc. v. Space Coast Credit Union, 173 So. 3d 1089, 1090–91 (Fla. Dist. Ct. App. 2015).

If the association answers the complaint and confirms that the safe harbor provision applies, it can be estopped from asserting that a greater amount is owed once the foreclosure is completed. Bank of Am., Nat'l Ass'n v. Enclave at Richmond Place Condo. Ass'n, 173 So. 3d 1095 (Fla. Dist. Ct. App. 2015).

Appeal

Under Rule 9.110(b) of the Florida Rules of Appellate Procedure, notice of appeal must be filed within 30 days of the rendition from the challenged order. Fla. R. App. P. 9.110(b).

Relief from Judgment

Fla. Stat. Ann. § 702.07 gives the trial court jurisdiction "to rescind, vacate and set aside a decree of foreclosure"; however, a motion to set aside a final judgment is still governed by Rule 1.540 of the Florida Rules of Civil Procedure, which requires some demonstration of mistake, inadvertence, surprise, or excusable neglect.

The Florida Legislature recently enacted Fla. Stat. Ann. § 702.036 to promote the finality of a foreclosure final judgment. It provides that so long as (1) the party seeking relief from the final judgment of foreclose was properly served, (2) the applicable appeals period has expired, and (3) the property was purchased by a person not affiliated with the foreclosing lender or foreclosed owner, even if a party is successful in reversing a final judgment and proving that it was wrongfully foreclosed upon, it is limited to pursuing monetary damages against the lender and cannot reclaim property once sold to a third party.

FORECLOSURE SALES

The foreclosure judgment must schedule a foreclosure sale, which, pursuant to Fla. Stat. Ann. § 45.031(1)(a), can be no later than 35 days after the entry of the foreclosure judgment unless the plaintiff consents. Many recent cases have confirmed that this statute is mandatory and prevents a judge from postponing or cancelling a sale based on compassion for a foreclosure defendant attempting to save his or her home. Republic Fed. Bank v. Doyle, 19 So. 3d 1053, 1054 (Fla. Dist. Ct. App. 2009).

Postponement of Foreclosure Sale

Cancellations, continuances, and postponements of the foreclosure sale are within the discretion of the trial court. The movant must have accurate and factual reasons to postpone the sale and include the necessary elements included in the form motion found in Fla. R. Civ. P. Form 1.996(c).

For a motion requesting cancellation of a foreclosure sale, see Motion to Cancel and Reschedule Foreclosure Sale (FL).

Bankruptcy

If a borrower files a petition for bankruptcy, the foreclosure sale must be cancelled. “Often, the primary if not the sole reason for a bankruptcy action is to delay a foreclosure sale for the purpose of gaining extra time to market or refinance the property.” Nemours Found. v. Gauldin, 601 So. 2d 574, 576 (Fla. Dist. Ct. App. 1992).

Publication of the Foreclosure Sale

Publication of the foreclosure sale is governed by Fla. Stat. Ann. § 45.031(2), which lists all items that must be included in the notice. Notice of sale shall be published once a week for two consecutive weeks in a newspaper of general circulation, as defined in Chapter 50, Florida Statutes (Fla. Stat. Ann. §§ 50.011–50.0711) published in the county where the sale is to be held. The second publication must be at least five days before the sale.

Sale Procedures

A foreclosure sale must be held in accordance with the requirements of Fla. Stat. Ann. § 45.031(3). Many counties conduct foreclosure sales electronically, which is authorized pursuant to Fla. Stat. Ann. § 45.031(10), and the requirements for third-party bidders to register bids and submit deposits in advance of the sale vary greatly in the counties around the state. The clerk conducting the sale is authorized to charge an additional fee up to $70 for services in conducting or contracting for the electronic sale, on top of the “service charge of $70 for services in making, recording, and certifying the sale and title, which service charge shall be assessed as costs and shall be advanced by the plaintiff before the sale.” Fla. Stat. Ann. § 45.035(1) and (3).

The mortgagee is not obligated to bid at the foreclosure sale and can still move to obtain a deficiency judgment even if it elects not to bid at the sale. Residential Funding Corp. v. Barrera, 762 So. 2d 948, 949 (Fla. Dist. Ct. App. 2000), citing FDIC v. Circle Bar Ranch, Inc., 450 So. 2d 921 (Fla. Dist. Ct. App. 1984).

The purchaser at a foreclosure sale takes title to the property subject to all matters of which they have notice or could obtain knowledge of in the exercise of ordinary prudence and caution. U.S. Bank Nat’l Ass’n v. Rios, 166 So. 3d 202 (Fla. Dist. Ct. App. 2015).

Certificate of Sale

After the foreclosure sale, the clerk of court is required to prepare a certificate of sale in the form prescribed by Fla. Stat. Ann. § 45.031(4). A borrower's right of redemption terminates when the certificate of sale is issued following a foreclosure sale, unless the final judgment contains a provision to the contrary.

Objections to Foreclosure Sale

An objection to a foreclosure sale must be filed within 10 days of the sale to prevent title to the property from being issued. Fla. Stat. Ann. § 45.031(5). A party seeking to set aside a foreclosure sale must demonstrate that a judicial sale resulted from some mistake, accident, surprise, misconduct, fraud, or irregularity in the conduct of the sale, but inadequacy of the bid price does not need to be demonstrated in order to set aside a judicial foreclosure sale. Arsali v. Chase Home Fin. LLC, 121 So. 3d 511, 518 (Fla. 2013).

A third-party bidder may intervene in the foreclosure action in order to assert or defend against an objection to the sale. Any other party filing an objection to the sale must serve a copy of the objection upon the third-party bidder in order to provide the bidder with due process.

Certificate of Title

Pursuant to Fla. Stat. Ann. § 45.035(5), if no objections are filed within 10 days of the foreclosure sale, the clerk of court must file and serve a certificate of title issuing title to the property to the successful bidder. Upon such filing, the sale is confirmed "and title to the property shall pass to the purchaser named in the certificate without the necessity of any further proceedings or instruments." Fla. Stat. Ann. 45.035(6). The clerk must record the certificate of title pursuant to Fla. Stat. Ann. § 45.035(6).

Distribution of Proceeds from Sale

If the property is purchased by a third-party bidder at a foreclosure sale, the proceeds of the sale must be distributed in accordance with the requirements of the final judgment of foreclosure and Fla. Stat. Ann. § 45.035(7). The clerk is required to file and serve a certificate of the disbursements that identifies any excess proceeds available for distribution. Any party entitled to a distribution of excess proceeds must file a claim within 60 days of the issuance of the certificate of disbursements. The clerk will distribute the proceeds in accordance with the requirements of Fla. Stat. Ann. § 45.032. Section 2 of the statute establishes "a rebuttable legal presumption that the owner of record on the date of the filing of a lis pendens is the person entitled to surplus funds after payment of subordinate lienholders who have timely filed a claim" and includes a form for an owner to file a claim to the excess proceeds. If no claim is made to the surplus, the clerk is authorized to appoint a trustee to locate the owner of record entitled to the surplus. Fla. Stat. Ann. § 45.032(3)(c).

Writ of Possession

The purchaser at a foreclosure sale is entitled to possession of the premises from the time title vests in the purchaser. Neuschatz v. Rabin, 760 So. 2d 1018, 1018 (Fla. Dist. Ct. App. 2000). Therefore, if the foreclosed owner remains in possession of the property after the certificate of title is issued to the purchaser at the foreclosure, the purchaser may obtain a writ of possession, and the trial court retains jurisdiction to issue the writ.

Effect of Sale

Under Fla. Stat. Ann. § 45.0315, if a junior lienholder is joined as a defendant in the senior lienholder's foreclosure action, the junior lien is terminated upon the filing of the certificate of sale by the clerk of court, not upon the entry

of final judgment. See AG Group Investments, LLC v. All Realty Alliance Corp., 106 So. 3d 950, 952 (Fla. Dist. Ct. App. 2013).

Reforeclosure

If a junior lienholder is inadvertently omitted as a party in a foreclosure action, the plaintiff may bring an action for reforeclosure to extinguish the interest. The omitted junior lienholder can defend in the same manner as if the initial foreclosure had not happened. Marina Funding Group, Inc. v. Peninsula Prop. Holdings, Inc., 950 So. 2d 428, 430 (Fla. Dist. Ct. App. 2007), citing Abdoney v. York, 903 So. 2d 981, 983 (Fla. Dist. Ct. App. 2005).

DEFICIENCY JUDGMENTS

Based on a recent amendment to Florida law, an action for a deficiency judgment in an action to foreclose a residential mortgage must be commenced within one year of a certificate of title being issued or a deed in lieu being accepted by the lender. Fla. Stat. Ann. § 95.11(5)(h).

For residential property, pursuant to Fla. Stat. Ann. § 702.06, “The amount of the deficiency may not exceed the difference between the judgment amount, or in the case of a short sale, the outstanding debt, and the fair market value of the property on the date of sale.”

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Board certified in business litigation by The Florida Bar, Meghan is considered an expert in her field, practicing in all phases of civil and business litigation, including performing and analyzing discovery; drafting motions; attending mediations, hearings, and motion sessions; conducting witness depositions; and preparing for trial and appellate proceedings. Meticulous and hardworking, Meghan regularly represents businesses, banks, and landlords in both state and federal court at the trial level and on appeal.

Primarily focusing on real-property litigation, Meghan collaborates with her clients and colleagues to develop the strongest possible strategy to achieve client objectives, whether defensive or offensive, before disputes erupt into expensive and protracted litigation. She has extensive experience representing lenders in title claims, foreclosures, deficiencies, workouts, and REO matters; representing landlords regarding lease issues, tenant disputes, and eviction actions; and representing investors with respect to acquisitions of defaulted loans and loan portfolios. She handles real estate broker deposits and commission disputes, and Florida Real Estate Commission complaints. In addition, Meghan regularly counsels clients regarding alternate methods of dispute resolution.

With a passion for sharing her knowledge, Meghan is a contributing author to the 2016 supplement to *Foreclosures in Florida* (Lexis Nexis), which contains information she gained during the Great Recession while working with banks on loan defaults and foreclosure. In addition, she is in the process of co-authoring the forthcoming 2018 supplement.

Outside the courtroom, Meghan is passionate about and involved in Boys & Girls Clubs of Sarasota County.