

BANKING ALERT

7/8/13

Florida Law Update: Recent Amendments Affecting Foreclosures

House Bill 87 (HB 87), an act relating to foreclosures (the “Act”), has been signed into law, effective July 1, 2013. The Act affects:

1. The statute of limitations and recoverable amounts in an action to enforce a claim for deficiency judgment;
2. Pleading requirements for foreclosure complaints;
3. The quality of title of a foreclosed property sold to persons unrelated to the mortgagee or mortgagor; and
4. Adequate protection for actions to enforce lost, stolen or destroyed promissory notes.

The Act is remedial in nature and applies to all mortgages encumbering real property and all promissory notes secured by a mortgage.

Residential mortgage foreclosure cases – one-year time limitation for enforcing deficiency claims (Fla. Stat. § 95.11(5)(h)):

- Actions to enforce claims for deficiency related to a note secured by a mortgage against a residential property that is a one-family to four-family dwelling unit are required to be brought within one year.
- The period commences on the day after the clerk of court issues the certificate or the day after the mortgagee accepts a deed in lieu of foreclosure.
- The new time limitation applies to all actions commenced on or after July 1, 2013. As to non-time barred actions commenced before that date, a deficiency action must be brought within 5 years after accrual or by July 1, 2014, whichever occurs first.

Limit on amount of deficiency judgment for owner-occupied residential property (Fla. Stat. § 702.06):

- This has been amended to read that the amount of a deficiency of an owner-occupied residential property may not exceed the difference between the judgment amount, or in the case of a short sale, the outstanding debt and fair market value of the property on the date of the sale.
- There is a rebuttable presumption that a residential property for which a current homestead exemption for taxation was granted is an owner-occupied residential property.

New pleading requirements for residential mortgage foreclosure complaints (Fla. Stat. § 702.015(2)):

- Complaints seeking to foreclose on residential property filed after July 1, 2013 must contain affirmative allegations expressly made by the plaintiff that the plaintiff is the holder of the original note secured by the mortgage or allege with specificity the factual basis by which the plaintiff is entitled to enforce the note.

New pleading requirements for mortgage foreclosure complaints in which the plaintiff is a servicer or has been delegated authority (Fla. Stat. § 702.015(3)):

- If the plaintiff has been delegated the authority to institute a mortgage foreclosure action, the complaint must describe the authority of the plaintiff and identify, with specificity, the document that grants plaintiff the authority to act on behalf of the person entitled to enforce the note.

New pleading requirements for all foreclosure complaints (Fla. Stat. § 702.015(4)):

- The plaintiff must, under penalty of perjury, file a certification with the court contemporaneously with the foreclosure complaint stating the following:
 - a. Plaintiff is in possession of the original promissory note;
 - b. Location of the note;
 - c. Name and title of the individual giving the certification;
 - d. The name of the person who personally verified such possession; and
 - e. Time and date on which the possession was verified; and
 - f. Correct copies of the note and all allonges to the note must be attached to the certification; and
 - g. The original note and the allonges must be filed with the court before entry of any judgment of foreclosure or judgment on the note.
- If the plaintiff does not possess the original note and seeks to enforce a lost, destroyed or stolen instrument, an affidavit executed under penalty of perjury must be attached to the complaint demonstrating:
 - A clear chain of all endorsements, transfers, or assignments of the promissory note that is the subject of the action;
 - Facts showing that the plaintiff is entitled to enforce a lost, destroyed, or stolen instrument (and adequate protection shall be provided before entry of final judgment);
 - The affidavit must include as exhibits copies of the note and allonges, audit reports showing receipt of the original note, or other evidence of the acquisition, ownership and possession of the note as may be available to plaintiff;
 - The court may sanction plaintiff for failure to comply with the affidavit requirement.

Quality of title is protected post-foreclosure (Fla. Stat. § 702.036):

- Florida courts must treat actions to set aside, invalidate or challenge validity of foreclosure judgments solely as a claim for monetary damages and may not grant relief affecting quality of title if:
 - The party seeking relief was properly served in the foreclosure lawsuit;
 - Final judgment of foreclosure was entered as to the property;
 - All applicable appeals periods have run with no appeals having been taken or any appeals having been finally resolved;
 - The property has been acquired for value by a person not affiliated with the foreclosing lender or the 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 of the county where the property was located.
 - The following are considered persons “affiliated with the foreclosing lender”:
 - The foreclosing lender;
 - Any loan servicer for the loan being foreclosed;
 - Any past or present owner or holder of the loan being foreclosed;

- Any maintenance company, holding company, foreclosure services company, or law firm under contract to any of the above with regard to the loan being foreclosed; or
 - Any parent entity, subsidiary, or other person who directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with any of the above.
- After foreclosure of a mortgage based upon enforcement of a lost, destroyed or stolen note, a person who is not a party to the foreclosure action but claims to be the person entitled to enforce the promissory note secured by the foreclosed mortgage has no claim against the property after it is conveyed for valuable consideration to a person not affiliated with the foreclosing lender or the foreclosed owner.

Defining the reasonable means of providing adequate protection for lost, destroyed or stolen notes in mortgage foreclosure actions (Fla. Stat. § 702.11):

- The Act provides guidance to Florida's courts concerning the means by which a party seeking to enforce a lost, destroyed or stolen instrument may provide "adequate protection" against loss that might occur by reason of another party's claim to enforce the instrument. (See Fla Stat. § 673.3091 (2)). Florida's legislature has implemented the following as reasonable means for providing adequate protection:
 - A written indemnification agreement by a person reasonably believed sufficiently solvent to honor such an obligation;
 - A surety bond;
 - A letter of credit issued by a financial institution;
 - A deposit of cash collateral with the clerk of court; or
 - Such other security as the court may deem appropriate under the circumstances.
 - The security shall be for the time period through the running of statute of limitations for enforcement of the underlying note and conditioned to indemnify and hold harmless the maker of the note against any loss or damage, including principal, interest and attorney fees and costs, that might occur by reason of a claim by another person to enforce the note.
- Persons who wrongly claim to be the holder of or entitled to enforce a lost, stolen or destroyed note are liable to the actual holder of the note for actual damages, attorney's fees and costs.
 - The actual holder is not required to pursue recovery against the maker as a condition precedent.
- The new adequate protection statute applies to pending cases.

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