

COMMUNITY ASSOCIATION LAW ALERT

6/20/13

Florida Legislature Moves to Expedite Foreclosure Process in HB 87

HB 87: An Act Relating to Mortgage Foreclosures (Effective June 7, 2013)

The most significant aspect of this legislation is that it allows community associations to move mortgage foreclosures forward by requesting that the court enter an “order to show cause” without conducting a hearing. If entered, the court sends the order to the other parties to the foreclosure, who must then explain to the court why a final judgment of foreclosure should not be entered.

Amending Section 95.11, Florida Statutes, to:

- Require that an action to enforce a claim of a deficiency related to a note secured by a mortgage against residential property that is a one-family to four-family dwelling unit be brought within one (1) year. The one (1) year period shall commence on the day after the Certificate is issued by the Clerk of Court or the day after the mortgagee accepts a deed in lieu of foreclosure.
- The amended s. 95.11, Florida Statutes applies to any action commenced on or after July 1, 2013, regardless of when the cause of action accrued. However, any action that would not have been barred by s. 95.11(2)(b) before June 7, 2013 must be commenced within five (5) years after the action accrued or by July 1, 2014, whichever occurs first.

Creating Section 702.015, Florida Statutes, to:

- Provide that the legislative intent of the new section is to expedite the foreclosure process by ensuring initial disclosure of a plaintiff’s status and the facts supporting that status, thereby ensuring the availability of documents necessary to the prosecution of the case.
- Require that a complaint that seeks to foreclose a mortgage or other lien on residential real property (including individual units of condominiums and cooperatives) designed principally for occupation by from one (1) to four (4) families which secures a promissory note:
 - Contain affirmative allegations expressly made by plaintiff at the time the proceeding is commenced 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 a person entitled to enforce the note under s. 673.3011.
- Require that if a plaintiff has been delegated authority to institute a mortgage foreclosure action on behalf of the person entitled to enforce the note, the complaint describe the authority of the plaintiff and identify, with specificity, the document that grants the plaintiff the authority to act on behalf of the person entitled to enforce the note.
- Require that if a plaintiff is in possession of the original promissory note, he or she file under penalty of perjury a certification with the court, contemporaneously with the filing of the complaint for foreclosure that the plaintiff is in possession of the original promissory note. The certification must set forth the location of the note, the name and title of the individual giving the certification, the name of the person who personally verified such possession and the time and date on which the possession was verified.

- Require that if the plaintiff seeks to enforce a lost, destroyed or stolen instrument, an affidavit executed under penalty of perjury be attached to the complaint. The affidavit must:
 - Detail a clear chain of all endorsements, transfers or assignments of the promissory note that is the subject of the action;
 - Set forth facts showing that the plaintiff is entitled to enforce a lost, destroyed, or stolen instrument pursuant to s. 673.3091;
 - Include as exhibits to the affidavit such copies of the note and the allonges to the note, 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 the plaintiff.
- Allow a court to sanction the plaintiff for failure to comply with this section.
- Provide that this section does not apply to any foreclosure proceeding involving timeshare interests under part III of chapter 721.

Creating Section 702.036, Florida Statutes, to:

- Require that a court treat any action to challenge the validity of a final judgment of foreclosure of a mortgage or establish/reestablish a lien or encumbrance on the property in abrogation of the final judgment of foreclosure of a mortgage as a claim for monetary damages and not grant relief that adversely affects the quality or character of the title to the property if:
 - The party seeking relief from the final judgment of foreclosure of the mortgage was properly served in the foreclosure lawsuit as provided in chapter 48 or chapter 49;
 - The final judgment of foreclosure of the mortgage was entered as to the property;
 - All applicable appeals periods have run as to the final judgment of foreclosure of the mortgage 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.
- “Persons affiliated with the foreclosing lender” for purposes of the preceding bullet point, include, without limitation:
 - The foreclosing lender or 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 entity listed above with regard to the loan being foreclosed;
 - 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 entity listed above.

- After foreclosure of a mortgage based upon the enforcement of a lost, destroyed or stolen note, a person who is not a party to the underlying foreclosure action but who claims to be the person entitled to enforce the promissory note secured by the foreclosed mortgage has no claim against the foreclosed property after it is conveyed for valuable consideration to a person not affiliated with the foreclosing lender or the foreclosed owner. This does not preclude the person entitled to enforce the promissory note from pursuing recovery from any adequate protection given pursuant to s. 673.3091 or from the party who wrongfully claimed to be the person entitled to enforce the promissory note under s. 702.11(2) or otherwise, from the maker of the note or from any other person against whom it may have a claim relating to the note.
- Plaintiffs may still pursue other relief which does not adversely affect the ownership of the title to the property as vested in the unaffiliated purchaser for value (compensatory damages, injunctive relief, fees and costs).

Amending Section 702.06, Florida Statutes, to:

- Provide that in the case of an owner-occupied residential property, the amount of a deficiency judgment 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 the sale.
- The complainant has the right to sue at common law to recover such deficiency unless the court in the foreclosure action granted or denied a claim for a deficiency judgment.

Amending Section 702.10, Florida Statutes, to:

- Allow a lienholder to request an order to show cause for the entry of final judgment in a foreclosure action.
 - “Lienholder” is defined as the plaintiff and a defendant to the action who holds a lien encumbering the property or a defendant who, by virtue of its status as a condominium association, cooperative association or homeowners’ association, may file a lien against the real property subject to the foreclosure.
 - Upon such filing, the court must immediately review the request and the court file in chambers without a hearing. If the court file complies with s. 702.015, and alleges a cause of action to foreclose on real property, the court shall promptly issue an order directed to the other parties named in the action to show cause why a final judgment of foreclosure should not be entered.
- Provides for nine (9) requirements/procedures with respect to the order directed to defendants to show cause why a final judgment of foreclosure should not be entered.
- Provides that the defendant’s failure to file defenses by a motion or by a sworn or verified answer, affidavits or other papers, or to appear personally or by way of attorney at the dealing, presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard.
- Provides that if the court finds that all defendants have waived the right to be heard, the court shall promptly enter a final judgment of foreclosure without the need for further hearing if the plaintiff has met certain requirements.

Creating Section 702.11, Florida Statutes, to:

- Provide requirements for reasonable means of providing adequate protection under s. 673.3091 in mortgage foreclosures of certain residential properties, including:
 - Written indemnification agreement by a person reasonably believed sufficiently solvent to honor such obligation;
 - A surety bond;
 - A letter of credit issued by a financial institution;
 - A deposit of cash collateral with the clerk of the court;
 - Such other security as the court may deem appropriate under the circumstances.
- Provide for liability of persons who wrongly claim to be holders of or entitled to enforce a lost, stolen or destroyed note and cause the mortgage secured thereby to be foreclosed in certain circumstances.
- Provide that the act is remedial and applies to all mortgages encumbering real property and all promissory notes secured by a mortgage, whether executed before, on, or after the effective date. Section 702.015 applies to cases filed on or after July 1, 2013. The amendments to s. 702.10 and s. 702.11 apply to causes of action pending on the effective date of the act.
- Request that the Florida Supreme Court adopt rules and forms to expedite foreclosure proceedings.

Please contact the following Roetzel attorneys for further information:

Ashley D. Lupo
239.649.2736 | alupo@ralaw.com

Sean M. Ellis
239.338.4245 | sellis@ralaw.com

Steven M. Falk
239.649.2718 | sfalk@ralaw.com

Jennifer A. Nichols
239.649.2724 | jnichols@ralaw.com