

Florida Foreclosure Litigation

Part 1: Proving the Case

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Elements of a Foreclosure

Foreclosure Actions Based on Breach of Contract

- Existence of a contract (obligation between the parties)
- Breach of the contract
- Damages (must be caused by breach)

Existence of a Contract

There must be an obligation between the parties to a foreclosure action (*Standing to foreclose*)

The original payee may enforce when there is no evidence of a transfer

If the party attempting to enforce the obligation is not the original payee, the transfer and/or negotiability of the note becomes important

- The note is transferred when delivered for purposes of giving the right to enforce
- Transfer gives the right to enforce

Existence of a Contract (continued)

Permitted Plaintiffs according to the UCC:

- Holder
- Nonholder in possession with rights of holder
- Person not in possession who is entitled to enforce

*It is not required that the person enforcing the instrument is the *owner*. A person may even be entitled to enforce if they are in wrongful possession.

Existence of a Contract (continued)

Standing is acquired on the date which the Plaintiff obtained its status. A specific date is not required, as long as evidence proves the transfer occurred before the filing of the Complaint.



Use any of the following to determine the time of standing:

- Pooling and Servicing Agreement
- "Screen shots" from servicing system
- Assignments of mortgage
- Bailee Letters (document transfer records)

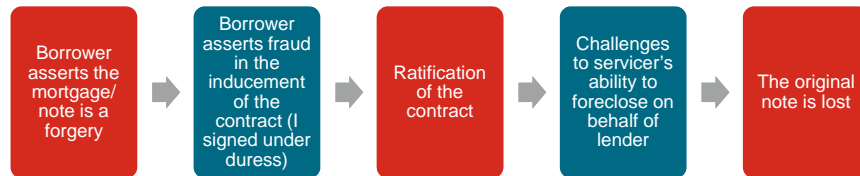
Existence of a Contract (continued)

The note as a negotiable instrument

- Special Indorsement: Made payable to the bearer or to a specifically named person or entity.
- Blank Indorsement: Indorsement doesn't specify any recipient, so by default becomes payable to bearer
- UCC §3-205

Note: If the note is transferred for value but not indorsed, the transferee has a right to the unqualified indorsement, but negotiation doesn't occur until the note is indorsed. (UCC §3-203)

Contract Problems



Enforcing a Lost Note

- **Lost Note Count in a Complaint must be accompanied by an affidavit as to the following (per Fla. Stat. 702.015):**
 - Clear chain of indorsements, transfers or assignments
 - Set forth facts showing entitlement to enforce
 - Include copies of the note and allonges and evidence of acquisition
- **Re-establishing a lost note requires testimony:**
 - The party seeking to enforce was entitled to enforce at the time of loss
 - Loss was not the result of a transfer or seizure
 - Party cannot reasonably obtain the instrument because it is lost or destroyed
- **To enforce a lost note, you must prove the terms**

Breach of the Contract

The breach = failure to pay

Is notice of lender's intent to accelerate required? *Not always!*

When the mortgage requires that a borrower be provided notice of intent to accelerate, proper notice is not given until the requisite information is communicated:

Breach of the Contract (continued)

Standard Fannie/Freddie mortgage requirements for notice are included in paragraph 22:

- Advise of the default
- Identify action required to cure default
- Identify date (not less than 30 days) by which default must be cured
- Notify that failure to timely cure may result in acceleration, foreclosure and judicial sale
- Inform of right to reinstate after acceleration
- Inform of right to assert defenses in foreclosure action

And now...a word about acceleration

Having a copy of the notice letter is not sufficient! You must be able to demonstrate that it was sent

Acceleration occurs upon the filing of the foreclosure Complaint

Florida's statute of limitations requires that acceleration occur within five years of the date of default

Currently, the law in Florida permits a lender to accelerate on any date of default within 5 years, even if prior attempts to accelerate were unsuccessful (U.S. Bank v. Bartram)

Damages

Principal
Balance

Interest

Taxes

Insurance

Late
Charges

Property
Preservation

Additional
Fees

Attorney
Fees

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Part 2: Litigation Tools in a Foreclosure Action

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Discovery – Written

- Written Discovery
 - Request for Admissions – Fla. R. Civ. P. 1.370
 - Automatically deemed admitted if not timely answered
 - Request for Production – Fla. R. Civ. P. 1.350
 - Interrogatories – Fla. R. Civ. P. 1.340
 - The power of 1.340(a) - limited to thirty (inclusive of sub-parts) absent leave of court

Discovery - Depositions

- Corporate Representative – Fla. R. Civ. P. 1.310(b)(6)
 - Topics for the deposition, what is “reasonable particularity”
 - Duces tecum?
 - Narrowing the scope of the deposition
- Fact Witnesses
 - Location of the deposition
 - Proper issuance of subpoenas
 - The deponent is not the Plaintiff, the “client” conundrum

Discovery - Depositions

- Should you depose the borrower?
 - Opportunity for settlement
 - Determine specific allegations and challenges to your foreclosure
 - Secure documents that you cannot otherwise locate (through duces tecum request)

Defensive Motions

- Motions to Compel Discovery
- Motions to Quash
- Motions to Dismiss

Motions to Compel Discovery

- Motions to Compel Responses vs. Motions to Compel Better Responses
 - The importance of framing the scope of permissible discovery
- Effects of a Motion for Extension of Time
- What constitutes a “good faith effort”
- When is a possible objection waived
 - Privilege
 - Relevance

Motions to Quash

- Service of Process is governed by FSA 48.031 and requires strict compliance
- Requirements of FSA 48.031(5)
 - 1st Page- Date and Time of service
 - Process Server's identification number and initials
 - List on Return of Service form all initial pleadings delivered and served
 - Return of Service must be filed with the court
- Types of Service
 - Personal
 - Substitute
 - Publication

Motions to Quash

- A facially valid return of service shifts the burden to the defendant to show that service was otherwise improper
 - Evidentiary Question: Any determination to fight a Motion to Quash should include a time and money analysis in addition to any analysis with respect to the actual merits of the motion

Motions to Dismiss

- Elements of a foreclosure complaint are now governed by FSA 702.015
- Rooted in Fla. R. Civ. P. 1.140(b) and any ground provided for in 1.140(b) not enumerated in the motion is deemed waived
- Confined to the four corners of the Complaint
- Allegations in the Complaint accepted as true (pleading vs. proof)

FSA §57.105

- Fee paid to prevailing party when:
 - At any time during a civil proceeding
 - Regarding any claim or defense
 - Court finds that the losing party knew or should have known that the claim or defense was not supported by facts or law
 - Based on knowledge of party at the time claim or defense was first presented, or at any time prior to trial.

FSA §57.105

- Safe Harbor:
 - Serve a copy of the motion, but do not file it
 - Give opposing counsel an opportunity to withdraw the questioned claim or defense
 - If not withdrawn within 21 days, the motion may be filed
 - Considered at a hearing by preponderance of the evidence standard

Motion for Summary Judgment

- Fla. R. Civ. P. 1.510(c)
 - Must identify the “summary judgment evidence” on which movant is relying
 - Motion must be served at least 20 days prior to hearing and include a copy of all “summary judgment evidence”
- What is a “genuine issue of material fact”
 - Affidavits in opposition
- The effect of outstanding discovery

Motion for Summary Judgment

- Strategic considerations - MSJ or trial?
 - Do affidavits invite more depositions
 - No genuine issue of material fact vs preponderance of the evidence
 - Appellate standards of review

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Part 3: Foreclosure Trials

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Setting Trials- Is the case at issue?

Fla. R. Civ. P. 1.440 controls whether the case is set by the Court or noticed as ready for trial by a party:

- *Dispose of motions directed to the last pleading; or*
- *20 days after service of the last pleading (if no motion has been filed which is directed to the pleading)*

**It is reversible error to proceed with trial when a case is not at issue and the parties have not waived objections*

Setting Trials

- Either party may file and serve Notice of Readiness once the case is at issue
- Court may set trial by sending a trial order
- Trial may be set no less than 30 days out

Witnesses and Exhibits

- Witness Lists
 - General “Corporate Representative” vs. naming a specific witness
 - Listing borrowers as witnesses

****Tip: If you list borrowers as witnesses, consider serving subpoenas. If you don't, they may not appear.***

Witnesses and Exhibits

- Exhibit Lists
 - Promissory Note
 - Mortgage
 - Loan Payment History
 - Breach Letter
 - Pooling and Servicing Agreement/Loan Schedule
 - Power of Attorney
 - Servicing Notes
 - Bailee Letter/Screen Shots
 - Other Correspondence
 - Public records, agency records, court files

Trial Preparation

- Attorneys- Prepare every trial as if it is a fully litigated, fully contested case
- Witnesses- Focus on what you know... not on what you don't know

Trial Preparation

- Review the trial order
- Outline the case
- Identify problems
- Compile case law
- Schedule an initial witness prep (telephonic) and then prepare in person as much as possible.
- Communicate with opposing counsel

Trial Preparation

- Witness Preparation
 - Talk through case strategy
 - Get to know your witness
 - Encourage investigation
 - Never script a direct examination
 - Practice, practice, practice!

Trial Preparation

- Exhibits
 - Each exhibit has an evidentiary basis – learn what it is and be prepared to cite to law
 - Prepare for objections
 - Bring certified copies where appropriate
- Requests for Judicial Notice

Trying the Case

- Opening Statement – usually waived
- Direct Exam of Plaintiff's Witness:
 - Background – establish witness credibility
 - Knowledge of the loan
 - Standing to Foreclose
 - Status of Loan (default)
 - Condition Precedent (notice of acceleration)
 - Damages

Trying the Case

Hearsay and Business Records

- Record made at or near the time of events reflected
- Record made by a person with knowledge
- Record made in the course of ordinary business
- Regular business practice to keep this record

Trying the Case

Remember...
business record exception only applies
to business records!

Unique Issues

- Conforming Pleadings to the Evidence
- Avoiding motions to strike witnesses and exhibits
- Preservation of appellate record (more to come on Thursday)

Questions



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Part 4: Post-Judgment Motion Practice and Foreclosure Appeals

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Motions for Rehearing

- Governed by Fla. R. Civ. P. 1.530
- Must be filed within fifteen (15) days of operative order
- Relates to issues of law (contra-1.540)
- Ruled on by the Court without hearing in most jurisdictions (if granted, the Court will then request the parties coordinate a new hearing)

Motions to Vacate Judgment

- Governed by Fla. R. Civ. P. 1.540(b)
- 1 year statute of limitations if brought under 1.540(b)(1)-(3), no statute of limitations if brought under 1.540(b)(4) or (5)
 - mistake, inadvertence, excuse neglect
 - newly discovered evidence
 - fraud
 - void
 - no longer just or equitable

Motions to Vacate Judgment

- Does not relate to questions of law (contra-1.530)
- Understanding the distinction between void and voidable
- When is an evidentiary hearing needed to resolve a 1.540(b) motion?

Motions to Cancel Sale

- Typically raised through equity arguments to allow the parties additional time to attempt to resolve the matter post-judgment
 - pending short sales, modifications (including CFPB), additional relocation time
 - may also be substantive (pending motion to vacate or an appeal)
 - supersedeas bonds

Objections to Sale

- Must be filed within ten (10) days of the issuance of the certificate of sale
- Precludes the clerk from issuing certificate of title to the successful purchaser
 - orders overruling objections should direct the clerk to issue certificate of title “forthwith” to avoid further delays
- Traditionally limited to either improper notice or grossly inadequate bid price
 - *Arsali v. Chase Home Finance*, 121 So.3d 511 (Fla. 2013)

APPEALS

Most Common Appeals in Foreclosure:

- Final Appeal
- Non-Final Appeal
- Extraordinary Writs

APPEALS - FINAL

- Appeal of a Final Judgment of Foreclosure is a Final Appeal.
- Appeal is final when the order appealed ends the judicial labor in the case
- Initiated by filing a Notice of Appeal within 30 days of rendition of the order
- Clerk prepares the record on appeal

APPEALS – NON-FINAL

- Appeal of a post-judgment Motion to Vacate Final Judgment is an appeal of a “non-final” order
- Initiated by filing a Notice of Appeal within 30 days of rendition of the order
- Clerk of Court does not prepare the record, but Appellant is required to submit an Appendix along with the Initial Brief

APPEALS – EXTRAORDINARY WRITS

- Prohibition: Stops the trial court from exercising jurisdiction (Motion to Disqualify Judge)
- Mandamus: Compels trial judge to perform a nondiscretionary, ministerial act (compel trial judge to rule on a pending motion)
- Certiorari: Review orders that cannot otherwise be directly appealed/no other remedy exists (discovery orders)

APPEALS – THE RECORD

- Items filed with the trial court are fair game
- Transcripts may be filed or used to supplement the record
- Statement of Evidence may be used when no transcript was taken
- If the trial court did not have an opportunity to see something, it is not appropriate for the appellate record

APPEALS – TIPS FOR TRIAL LAWYERS

- Consult with an appellate lawyer re:
 - Whether to fight for a bond if the case is to be stayed
 - Whether to confess error
 - Whether you should appeal an incorrect ruling

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