

CHAPTER 2013-137

Committee Substitute for Committee Substitute for House Bill No. 87

An act relating to mortgage foreclosures; amending s. 95.11, F.S.; revising the limitations period for commencing an action to enforce a claim of a deficiency judgment after a foreclosure action; providing for applicability to actions commenced on or after a specified date; providing a time limitation for commencing certain actions; creating s. 702.015, F.S.; providing legislative intent; specifying required contents of a complaint seeking to foreclose on certain types of residential properties with respect to the authority of the plaintiff to foreclose on the note and the location of the note; authorizing sanctions against plaintiffs who fail to comply with complaint requirements; providing for nonapplicability to proceedings involving timeshare interests; creating s. 702.036, F.S.; requiring a court to treat a collateral attack on a final judgment of foreclosure on a mortgage as a claim for monetary damages under certain circumstances; prohibiting such court from granting certain relief affecting title to the foreclosed property; providing for construction relating to the rights of certain persons to seek specified types of relief or pursue claims against the foreclosed property under certain circumstances; amending s. 702.06, F.S.; limiting the amount of a deficiency judgment; amending s. 702.10, F.S.; revising the class of persons authorized to move for expedited foreclosure to include lienholders; defining the term “lienholder”; providing requirements and procedures with respect to an order directed to defendants to show cause why a final judgment of foreclosure should not be entered; providing that certain failures by a defendant to make certain filings or to make certain appearances may have specified legal consequences; requiring the court to enter a final judgment of foreclosure and order a foreclosure sale under certain circumstances; revising a restriction on a mortgagee to request a court to order a mortgagor defendant to make payments or to vacate the premises during an action to foreclose on residential real estate to provide that the restriction applies to all but owner-occupied residential property; providing a presumption regarding owner-occupied residential property; creating s. 702.11, F.S.; providing requirements for reasonable means of providing adequate protection under s. 673.3091, F.S., in mortgage foreclosures of certain residential properties; providing 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; providing legislative findings; providing for applicability; requesting the Florida Supreme Court to adopt rules and forms to expedite foreclosure proceedings; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (b) of subsection (2) of section 95.11, Florida Statutes, is amended, and paragraph (h) is added to subsection (5) of that section, to read:

95.11 Limitations other than for the recovery of real property.—Actions other than for recovery of real property shall be commenced as follows:

(2) WITHIN FIVE YEARS.—

(b) A legal or equitable action on a contract, obligation, or liability founded on a written instrument, except for an action to enforce a claim against a payment bond, which shall be governed by the applicable provisions of paragraph (5)(e), s. 255.05(10), s. 337.18(1), or s. 713.23(1)(e), and except for an action for a deficiency judgment governed by paragraph (5)(h).

(5) WITHIN ONE YEAR.—

(h) An action to enforce a claim of a deficiency related to a note secured by a mortgage against a residential property that is a one-family to four-family dwelling unit. The limitations 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.

Section 2. The amendments made by this act to s. 95.11, Florida Statutes, apply 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 under s. 95.11(2)(b), Florida Statutes 2012, before the effective date of this act must be commenced within 5 years after the action accrued or by July 1, 2014, whichever occurs first.

Section 3. Section 702.015, Florida Statutes, is created to read:

702.015 Elements of complaint; lost, destroyed, or stolen note affidavit.

(1) The Legislature intends that this section 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.

(2) 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 to four families which secures a promissory note must:

(a) Contain affirmative allegations expressly made by the plaintiff at the time the proceeding is commenced that the plaintiff is the holder of the original note secured by the mortgage; or

(b) Allege with specificity the factual basis by which the plaintiff is a person entitled to enforce the note under s. 673.3011.

(3) If a plaintiff has been delegated the authority to institute a mortgage foreclosure action on behalf of the person entitled to enforce the note, the complaint shall 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. This subsection is intended to require initial disclosure of status and pertinent facts and not to modify law regarding standing or real parties in interest. The term “original note” or “original promissory note” means the signed or executed promissory note rather than a copy thereof. The term includes any renewal, replacement, consolidation, or amended and restated note or instrument given in renewal, replacement, or substitution for a previous promissory note. The term also includes a transferrable record, as defined by the Uniform Electronic Transaction Act in s. 668.50(16).

(4) If the plaintiff is in possession of the original promissory note, the plaintiff must 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. Correct copies of the note and all allonges to the note must be attached to the certification. The original note and the allonges must be filed with the court before the entry of any judgment of foreclosure or judgment on the note.

(5) If the plaintiff seeks to enforce a lost, destroyed, or stolen instrument, an affidavit executed under penalty of perjury must be attached to the complaint. The affidavit must:

(a) Detail a clear chain of all endorsements, transfers, or assignments of the promissory note that is the subject of the action.

(b) Set forth facts showing that the plaintiff is entitled to enforce a lost, destroyed, or stolen instrument pursuant to s. 673.3091. Adequate protection as required under s. 673.3091(2) shall be provided before the entry of final judgment.

(c) 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.

(6) The court may sanction the plaintiff for failure to comply with this section.

(7) This section does not apply to any foreclosure proceeding involving timeshare interests under part III of chapter 721.

Section 4. Section 702.036, Florida Statutes, is created to read:

702.036 Finality of mortgage foreclosure judgment.—

(1)(a) In any action or proceeding in which a party seeks to set aside, invalidate, or challenge the validity of a final judgment of foreclosure of a mortgage or to establish or reestablish a lien or encumbrance on the property in abrogation of the final judgment of foreclosure of a mortgage, the court shall treat such request solely as a claim for monetary damages and may not grant relief that adversely affects the quality or character of the title to the property, if:

1. 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.

2. The final judgment of foreclosure of the mortgage was entered as to the property.

3. 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.

4. 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.

(b) This subsection does not limit the right to pursue any other relief to which a person may be entitled, including, but not limited to, compensatory damages, punitive damages, statutory damages, consequential damages, injunctive relief, or fees and costs, which does not adversely affect the ownership of the title to the property as vested in the unaffiliated purchaser for value.

(2) For purposes of this section, the following, without limitation, shall be considered persons affiliated with the foreclosing lender:

(a) The foreclosing lender or any loan servicer for the loan being foreclosed;

(b) Any past or present owner or holder of the loan being foreclosed;

(c) Any maintenance company, holding company, foreclosure services company, or law firm under contract to any entity listed in paragraph (a), paragraph (b), or this paragraph, with regard to the loan being foreclosed; or

(d) 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 in paragraph (a), paragraph (b), or paragraph (c).

(3) 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 section 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.

Section 5. Section 702.06, Florida Statutes, is amended to read:

702.06 Deficiency decree; common-law suit to recover deficiency.—In all suits for the foreclosure of mortgages heretofore or hereafter executed the entry of a deficiency decree for any portion of a deficiency, should one exist, shall be within the sound discretion of the court; however, in the case of an owner-occupied residential property, 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. For purposes of this section, there is a rebuttable presumption that a residential property for which a homestead exemption for taxation was granted according to the certified rolls of the latest assessment by the county property appraiser, before the filing of the foreclosure action, is an owner-occupied residential property. shall be within the sound judicial discretion of the court, but The complainant shall also have the right to sue at common law to recover such deficiency, unless the court in the foreclosure action has granted or denied a claim for a deficiency judgment provided no suit at law to recover such deficiency shall be maintained against the original mortgagor in cases where the mortgage is for the purchase price of the property involved and where the original mortgagee becomes the purchaser thereof at foreclosure sale and also is granted a deficiency decree against the original mortgagor.

Section 6. Section 702.10, Florida Statutes, is amended to read:

702.10 Order to show cause; entry of final judgment of foreclosure; payment during foreclosure.—

(1) A lienholder After a complaint in a foreclosure proceeding has been filed, the mortgagee may request an order to show cause for the entry of final judgment in a foreclosure action. For purposes of this section, the term “lienholder” includes 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 foreclosure. Upon filing, and the court shall immediately review the request and the court file in chambers and without a hearing complaint. If, upon examination of the court file complaint, the court finds that the complaint is verified, 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 defendant to show cause why a final judgment of foreclosure should not be entered.

(a) The order shall:

1. Set the date and time for ~~a hearing on the order~~ to show cause. ~~However, The date for the hearing may not occur be set sooner than the later of 20 days after the service of the order to show cause or 45 days after service of the initial complaint.~~ When service is obtained by publication, the date for the hearing may not be set sooner than 30 days after the first publication. ~~The hearing must be held within 60 days after the date of service. Failure to hold the hearing within such time does not affect the validity of the order to show cause or the jurisdiction of the court to issue subsequent orders.~~

2. Direct the time within which service of the order to show cause and the complaint must be made upon the defendant.

3. State that the filing of defenses by a motion, a responsive pleading, an affidavit, or other papers or ~~by a verified or sworn answer at or before the hearing to show cause that raise a genuine issue of material fact which would preclude the entry of summary judgment or otherwise constitute a legal defense to foreclosure shall constitute~~ constitutes cause for the court not to enter ~~the attached~~ final judgment.

4. State that ~~a~~ the defendant has the right to file affidavits or other papers before at the time of the hearing to show cause and may appear personally or by way of an attorney at the hearing.

5. State that, if ~~a~~ the defendant files defenses by a motion, a verified or sworn answer, affidavits, or other papers or appears personally or by way of an attorney at the time of the hearing, the hearing time ~~will~~ may be used to hear ~~and consider whether~~ the defendant's motion, answer, affidavits, other papers, and other evidence and argument as may be presented by the defendant or the defendant's attorney raise a genuine issue of material fact which would preclude the entry of summary judgment or otherwise constitute a legal defense to foreclosure. ~~The order shall also state that the court may enter an order of final judgment of foreclosure at the hearing and order the clerk of the court to conduct a foreclosure sale.~~

6. State that, if ~~a~~ the defendant fails to appear at the hearing to show cause or fails to file defenses by a motion or by a verified or sworn answer or files an answer not contesting the foreclosure, such ~~the~~ defendant may be considered to have waived the right to a hearing, and in such case, the court may enter a default against such defendant and, if appropriate, a final judgment of foreclosure ordering the clerk of the court to conduct a foreclosure sale.

7. State that if the mortgage provides for reasonable attorney ~~attorney's~~ fees and the requested attorney ~~attorney's~~ fees do not exceed 3 percent of the

principal amount owed at the time of filing the complaint, it is unnecessary for the court to hold a hearing or adjudge the requested attorney ~~attorney's~~ fees to be reasonable.

8. Attach the form of the proposed final judgment of foreclosure which the movant requests the court to will enter, ~~if the defendant waives the right to be heard~~ at the hearing on the order to show cause.

9. Require the party seeking final judgment mortgagee to serve a copy of the order to show cause on the other parties ~~the mortgagor~~ in the following manner:

a. If a party ~~the mortgagor~~ has been served pursuant to chapter 48 with the complaint and original process, or the other party is the plaintiff in the action, service of the order to show cause on that party ~~order~~ may be made in the manner provided in the Florida Rules of Civil Procedure.

b. If a defendant ~~the mortgagor~~ has not been served pursuant to chapter 48 with the complaint and original process, the order to show cause, together with the summons and a copy of the complaint, shall be served on the party ~~mortgagor~~ in the same manner as provided by law for original process.

Any final judgment of foreclosure entered under this subsection is for in rem relief only. ~~Nothing in~~ This subsection does not ~~shall~~ preclude the entry of a deficiency judgment where otherwise allowed by law. The Legislature intends that this alternative procedure may run simultaneously with other court procedures.

(b) The right to be heard at the hearing to show cause is waived if a ~~the~~ defendant, after being served as provided by law with an order to show cause, engages in conduct that clearly shows that the defendant has relinquished the right to be heard on that order. 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 an attorney at the hearing duly scheduled on the order to show cause presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard. If a defendant files defenses by a motion, ~~or by a verified or sworn answer, affidavits, or other papers or presents evidence~~ at or before the hearing which raise a genuine issue of material fact which would preclude entry of summary judgment or otherwise constitute a legal defense to foreclosure, such action constitutes cause and precludes the entry of a final judgment at the hearing to show cause.

(c) In a mortgage foreclosure proceeding, when a final default judgment of foreclosure has been entered against the mortgagor and the note or mortgage provides for the award of reasonable attorney ~~attorney's~~ fees, it is unnecessary for the court to hold a hearing or adjudge the requested attorney ~~attorney's~~ fees to be reasonable if the fees do not exceed 3 percent of the principal amount owed on the note or mortgage at the time of filing, even if

the note or mortgage does not specify the percentage of the original amount that would be paid as liquidated damages.

(d) If the court finds that all defendants have the defendant has waived the right to be heard as provided in paragraph (b), the court shall promptly enter a final judgment of foreclosure without the need for further hearing if the plaintiff has shown entitlement to a final judgment and upon the filing with the court of the original note, satisfaction of the conditions for establishment of a lost note, or upon a showing to the court that the obligation to be foreclosed is not evidenced by a promissory note or other negotiable instrument. If the court finds that ~~a the~~ defendant has not waived the right to be heard on the order to show cause, the court shall ~~then~~ determine whether there is cause not to enter a final judgment of foreclosure. If the court finds that the defendant has not shown cause, the court shall promptly enter a judgment of foreclosure. If the time allotted for the hearing is insufficient, the court may announce at the hearing a date and time for the continued hearing. Only the parties who appear, individually or through an attorney, at the initial hearing must be notified of the date and time of the continued hearing.

(2) Except as provided in paragraph (i), in any an action for foreclosure, other than owner-occupied residential real estate, in addition to any other relief that the court may award, the plaintiff the mortgagee may request that the court enter an order directing the mortgagor defendant to show cause why an order to make payments during the pendency of the foreclosure proceedings or an order to vacate the premises should not be entered.

(a) The order shall:

1. Set the date and time for hearing on the order to show cause. However, the date for the hearing may shall not be set sooner than 20 days after the service of the order. If Where service is obtained by publication, the date for the hearing may shall not be set sooner than 30 days after the first publication.

2. Direct the time within which service of the order to show cause and the complaint shall be made upon each the defendant.

3. State that a the defendant has the right to file affidavits or other papers at the time of the hearing and may appear personally or by way of an attorney at the hearing.

4. State that, if a the defendant fails to appear at the hearing to show cause and fails to file defenses by a motion or by a verified or sworn answer, the defendant is may be deemed to have waived the right to a hearing and in such case the court may enter an order to make payment or vacate the premises.

5. Require the movant mortgagee to serve a copy of the order to show cause on the defendant mortgagor in the following manner:

a. If a defendant ~~the mortgagor~~ has been served with the complaint and original process, service of the order may be made in the manner provided in the Florida Rules of Civil Procedure.

b. If a defendant ~~the mortgagor~~ has not been served with the complaint and original process, the order to show cause, together with the summons and a copy of the complaint, shall be served on the defendant mortgagor in the same manner as provided by law for original process.

(b) The right of a defendant to be heard at the hearing to show cause is waived if the defendant, after being served as provided by law with an order to show cause, engages in conduct that clearly shows that the defendant has relinquished the right to be heard on that order. ~~A~~ The defendant's failure to file defenses by a motion or by a sworn or verified answer or to appear at the hearing duly scheduled on the order to show cause presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard.

(c) If the court finds that a ~~the~~ defendant has waived the right to be heard as provided in paragraph (b), the court may promptly enter an order requiring payment in the amount provided in paragraph (f) or an order to vacate.

(d) If the court finds that the mortgagor has not waived the right to be heard on the order to show cause, the court shall, at the hearing on the order to show cause, consider the affidavits and other showings made by the parties appearing and make a determination of the probable validity of the underlying claim alleged against the mortgagor and the mortgagor's defenses. If the court determines that the plaintiff mortgagee is likely to prevail in the foreclosure action, the court shall enter an order requiring the mortgagor to make the payment described in paragraph (e) to the plaintiff mortgagee and provide for a remedy as described in paragraph (f). However, the order shall be stayed pending final adjudication of the claims of the parties if the mortgagor files with the court a written undertaking executed by a surety approved by the court in an amount equal to the unpaid balance of the lien being foreclosed ~~the mortgage on the property~~, including all principal, interest, unpaid taxes, and insurance premiums paid by the plaintiff ~~the mortgagee~~.

(e) ~~If In the event~~ the court enters an order requiring the mortgagor to make payments to the plaintiff mortgagee, payments shall be payable at such intervals and in such amounts provided for in the mortgage instrument before acceleration or maturity. The obligation to make payments pursuant to any order entered under this subsection shall commence from the date of the motion filed under this section ~~hereunder~~. The order shall be served upon the mortgagor no later than 20 days before the date specified for the first payment. The order may permit, but may ~~shall~~ not require, the plaintiff mortgagee to take all appropriate steps to secure the premises during the pendency of the foreclosure action.

(f) ~~If In the event~~ the court enters an order requiring payments, the order shall also provide that the plaintiff is mortgagee shall be entitled to possession of the premises upon the failure of the mortgagor to make the payment required in the order unless at the hearing on the order to show cause the court finds good cause to order some other method of enforcement of its order.

(g) All amounts paid pursuant to this section shall be credited against the mortgage obligation in accordance with the terms of the loan documents; ~~provided, however, that any payments made under this section do~~ shall not constitute a cure of any default or a waiver or any other defense to the mortgage foreclosure action.

(h) Upon the filing of an affidavit with the clerk that the premises have not been vacated pursuant to the court order, the clerk shall issue to the sheriff a writ for possession which shall be governed by ~~the provisions of s.~~ 83.62.

(i) This subsection does not apply to foreclosure of an owner-occupied residence. For purposes of this paragraph, there is a rebuttable presumption that a residential property for which a homestead exemption for taxation was granted according to the certified rolls of the latest assessment by the county property appraiser, before the filing of the foreclosure action, is an owner-occupied residential property.

Section 7. Section 702.11, Florida Statutes, is created to read:

702.11 Adequate protections for lost, destroyed, or stolen notes in mortgage foreclosure.—

(1) In connection with a mortgage foreclosure, the following constitute reasonable means of providing adequate protection under s. 673.3091, if so found by the court:

(a) A written indemnification agreement by a person reasonably believed sufficiently solvent to honor such an obligation;

(b) A surety bond;

(c) A letter of credit issued by a financial institution;

(d) A deposit of cash collateral with the clerk of the court; or

(e) Such other security as the court may deem appropriate under the circumstances.

Any security given shall be on terms and in amounts set by the court, for a time period through the running of the 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.

(2) Any person who wrongly claims to be the holder of or pursuant to s. 673.3011 to be entitled to enforce a lost, stolen, or destroyed note and causes the mortgage secured thereby to be foreclosed is liable to the actual holder of the note, without limitation to any adequate protections given, for actual damages suffered together with attorney fees and costs of the actual holder of the note in enforcing rights under this subsection. In addition, the actual holder of the note may pursue recovery directly against any adequate protections given.

(a) The actual holder of the note is not required to pursue recovery against the maker of the note or any guarantor thereof as a condition precedent to pursuing remedies under this section.

(b) This section does not limit or restrict the ability of the actual holder of the note to pursue any other claims or remedies it may have against the maker, the person who wrongly claimed to be the holder, or any person who facilitated or participated in the claim to the note or enforcement thereof.

Section 8. The Legislature finds that this act is remedial in nature 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 of this act. In addition, the Legislature finds that s. 702.015, Florida Statutes, as created by this act, applies to cases filed on or after July 1, 2013; however, the amendments to s. 702.10, Florida Statutes, and the creation of s. 702.11, Florida Statutes, by this act, apply to causes of action pending on the effective date of this act.

Section 9. The Supreme Court is requested to amend the Florida Rules of Civil Procedures to provide expedited foreclosure proceedings in conformity with this act and is requested to develop and publish forms for use in such expedited proceedings.

Section 10. This act shall take effect upon becoming a law.

Approved by the Governor June 7, 2013.

Filed in Office Secretary of State June 7, 2013.