

What To Know About Fla.'s New Fast-Track Foreclosure Law

Law360, New York (August 09, 2013, 1:26 PM ET) -- According to the Florida House of Representatives, the state of Florida has been negatively impacted by the national foreclosure crisis, and as a result, Gov. Rick Scott and the Florida Legislature want to minimize the impact upon the judicial branch both in terms of funding and caseload.

It is reported that the average time to complete a residential foreclosure in Florida is 853 days, as compared to the national average of 414 days. Thus, in an attempt to shorten Florida's lengthy residential foreclosure timeline, Scott signed House Bill 87 on June 7, 2013 (Chapter 2013-137, L.O.F.).

House Bill 87, or "the Fair Foreclosure Act," provides several important changes relating to Florida's residential foreclosure process. As more fully described herein, the primary goal of the bill is to reduce the amount of time foreclosure matters remain pending before a judgment is entered.

To that end, the following two important amendments are contained within the bill:

(1) Implementing an order-to-show-cause procedure, similar to the procedure in place for commercial foreclosures in Florida, in which the plaintiff can — in conjunction with the filing of the verified complaint — move for an order to show cause, requiring the defendants to file an answer within 20 days of the filing of any complaint. If an answer is not filed, the court may enter a judgment of foreclosure.

(2) Allowing for third parties, including condominium and homeowners' associations, to utilize the statutory expedited procedure.

Specifically, the bill has been codified into the following statutes:

Section 702.10

- Allows any lienholder, instead of just the mortgagee, to utilize the statutory expedited foreclosure procedure.
- Creates an alternative foreclosure proceeding intended to expedite the foreclosure process in cases where there is no legitimate defense or cases that are uncontested:

- After filing a complaint, the plaintiff may request an order to show cause for the entry of final judgment, and the court must immediately review the request and court file in chambers without a hearing.
- If the court finds that the complaint is verified, complies with Section 702.015 of the Florida Statutes (as discussed below), and alleges a cause of action, the court must promptly issue an order to the other parties named in the action to show cause why a final judgment of foreclosure should not be entered. The order shall:
 - State a date for the hearing no sooner than the latter of 20 days after service of the order, or 45 days after service of the initial complaint, or when service is obtained by publication — no sooner than 30 days after the first publication.
 - State that the filing of defenses before the hearing to show cause that raises a genuine issue of material fact — which would preclude the entry of summary judgment or otherwise constitute a legal defense to foreclosure — shall constitute cause for the court not to enter final judgment.
 - State that the defendant has the right to file affidavits or other papers before the hearing to show cause and may appear personally or by way of an attorney at the hearing.
 - State that if a defendant files defenses or appears personally at the time of the hearing, the hearing time will be used to hear and consider the defendant’s motion and arguments.
 - State that the court may enter an order of final judgment of foreclosure at the hearing, and if such a determination is entered, the court must enter a final judgment ordering the clerk of court to conduct a foreclosure sale.
 - State that if defendant fails to appear or file a defense, the court may enter a default against such defendant and, if appropriate, a final judgment of foreclosure.
- 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 plaintiff has shown entitlement to a final judgment, and upon the filing with the court of the original note, satisfaction of 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.
- In addition to any other relief that the court may order, in any action for foreclosure other than owner-occupied residential real estate, the plaintiff may request that the court enter an order directing the 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.
- Similar to Section 702.06, the bill again provides that there is a rebuttable presumption that a homestead property is an owner-occupied residential property.
- Section 702.10 applies to causes of action that were pending on June 7, 2013.

The bill also contains several other important changes as follows:

Section 95.11

- Reduces the statute of limitations from five years to one year for deficiency judgments on foreclosure actions.
- Applies to any action commenced on or after July 1, 2013, regardless of when the claim accrued.

Section 702.015

- Requires plaintiff, upon filing of a foreclosure action, to make certain initial disclosures establishing plaintiff's status and entitlement to enforce the promissory note, including where a plaintiff seeks to enforce a lost, destroyed or stolen instrument. The plaintiff must attach an affidavit detailing facts and evidence that support the plaintiff's position of authorization to enforce the lost, destroyed or stolen instrument.
- Does not apply to foreclosure proceedings involving timeshare interests.
- In addition, the bill authorizes sanctions against plaintiffs that fail to comply with the complaint requirements.
- Applies to cases filed on or after July 1, 2013.

Section 702.036

- Provides finality of mortgage foreclosure judgments for certain purchasers of property, such as third parties, not affiliated with the foreclosing lender or foreclosed owner. This does not, however, preclude a party's right to pursue other relief, such as money damages.
- Took effect on June 7, 2013.

Section 702.06

- Limits the amount of a deficiency in the case of an owner-occupied residential property to no greater than 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 bill provides that there is a rebuttable presumption that a homestead property is an owner-occupied residential property.
- Took effect on June 7, 2013.

Section 702.11

- Defines adequate protections for lost, destroyed or stolen notes in mortgage foreclosure, including a written indemnification agreement by a person reasonably 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 the court, or such other security as the court may deem appropriate under the circumstances.
- The bill also provides that any person who wrongly claims to be the holder of a note or entitled to enforce a note and causes the mortgage secured thereby to be foreclosed is liable to the actual holder of the note for actual damages, together with attorney fees and costs of the actual holder of the note in enforcing his or her rights. Also, the actual holder of the note may pursue recovery directly against any adequate protections given.
- Applies to causes of action that were pending on June 7, 2013.

While the fast-track system implemented under the bill is intended to expedite the time frame it takes for a foreclosure case to be resolved, it is unclear whether in practice, the bill will have the intended impact.

Florida's courts remain inundated with foreclosure matters, with the metro area — which covers Palm Beach, Broward and Miami-Dade counties — leading the nation in foreclosures over the last few years, according to many estimates.

The order to show cause procedure gives plaintiffs the option of moving to do so at the time of the filing of the complaint and requires a defendant to file an answer or suffer the consequences of the judgment being granted. The burden for the filing of the answer, however, is low under Florida law. Accordingly, the filing of any answer generally precludes the entry of a judgment in commercial foreclosure actions, which we would expect to be the same under the new bill.

In addition, the bill allows a third party, such as a condominium and homeowners' association, to use these expedited procedures. We would expect that many condominium and homeowners' associations, which have been aggressive in the past, may use this procedure in an effort to force a lender to take title to the subject property as soon as possible and thereby become responsible for the attendant condominium and homeowners' association fees.

Finally, this bill is also likely to increase compliance costs associated with foreclosing on a home by requiring more detailed information to be disclosed in a shorter time frame when prosecuting foreclosures.

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