Supreme Court of Florida

IN RE: AMENDMENTS TO RULES OF
CIVIL PROCEDURE AND FORMS CASE NO. SC09-1460
FOR USE WITH RULES OF CIVIL PROCEDURE

COMMENTS OF THOMAS H. BATEMAN III AND JANET E. FERRIS

Thomas H. Bateman III and Janet Ferris are members of The Florida Bar in good standing and file these comments to the proposed amendments to the Rules of Civil Procedure submitted by the Supreme Court Task Force on Residential Mortgage Foreclosure Cases (Task Force) pursuant to the Court's published invitation to all interested persons to do so.[1]

We support the Task Force's recommendation that the complaint in a residential mortgage foreclosure case be verified. It is our personal experience that in the majority of the residential foreclosure cases that were filed and brought before us in our capacities as circuit judges, the complaint routinely and automatically contained a lost note count. However, the supposedly "lost note" miraculously appeared immediately prior (sometimes the same day) to the motion to dismiss, summary judgment or final hearing. This lack of investigation prior to the suit being filed constantly caused unnecessary challenges to the court's

[1] Bateman and Ferris are former circuit judges who retired earlier in 2009. Bateman is a Florida Supreme Court Certified Circuit and County Mediator and member of the Supreme Court's Alternative Dispute Resolution Policy and Procedures Committee. Ferris, before taking the bench, was a certified circuit mediator. Currently, she is in the process of completing her observations so as to become a certified circuit civil mediator again. In addition, Ferris is the former chairperson of the Supreme Court's Alternative Dispute Resolution Policy Committee before it was merged with the ADR Procedures Committee. Bateman is also chairperson of the Supreme Court's Task Force on the Management of Litigation in Complex Cases. This comment is submitted in the authors' personal capacity and not on behalf of any other group, committee, work group or task force.

scheduling dockets as well as headaches for the clerks, judicial assistants and judges who handle make every attempt to review court files in advance of hearings.

In addition, verification will cause (hopefully) plaintiff's counsel, who's signature on the complaint "constitute(s) … certificate(ion) by the attorney that the attorney has read the pleading or other paper; that to the best of the attorney's knowledge, information and belief there is good ground to support it; and that it is not interposed for delay" under Rule 2.515(a), Fla. R. Jud. Admin., to investigate the facts sufficiently to prevent the current common practice of including allegations in the complaint that are completely inconsistent with each other or with the exhibit that is attached to the complaint. (That is, assuming an exhibit has been attached to the complaint. More often than not, when there is a reference to an exhibit it is not attached to the complaint at all). The simple truth is that as a general rule when the complaint is filed in many residential mortgage foreclosure cases, the attorney for the plaintiff does not have any idea who the owner of the note and mortgage is; does not know if the mortgage has been assigned and, if it has, how many times or who is the current holder; or, if the named plaintiff even has standing to bring the action in the first place.

The Task Force's proposed amendment to the Rules of Civil Procedure that residential foreclosure complaints be verified should be approved and adopted.

With regard to the Civil Cover Sheet, Form 1.997, we support its amendment as well realizing that the proposed amendment the Task Force is recommending has been incorporated into the recommendations by the Task Force on the Management of Litigation in Complex Cases in case number SC08-1141.

Regarding the Task Force's recommendation for a new form for affidavit of diligent search and inquiry, we urge the Court to approve and promulgate the form for immediate use. Once again, calling on our experience as circuit judges who presided over residential mortgage foreclosure cases, we saw as many different affidavits of diligent search and inquiry as there were law firms filing them. The need for a form in the Rules of Civil Procedure is patently obvious and we urge the Court to approve the Task Force's recommendation. We note, however, that there may have been an inadvertent omission that should be addressed. The omission concerns the "Service Members Civil Relief Act" (SCRA) which is found at 50 U.S.C. App. § 501 *et seq.*

When a judgment, order or adverse ruling is sought against a party who has not made an appearance, it is the duty of the court to determine whether that party is in the military. The SCRA states that either side or the court may apply for information as to military service to the United States Department of Defense (DOD), which must issue a statement as to military service. 50 U.S.C. App. § 582. The office in Department of Defense to contact for information under the SCRA on whether a person is in the armed forces is:

> Defense Manpower Data Center
> [Attn: Military Verification]
> 1600 Wilson Blvd., Suite 400
> Arlington, VA 22209-2593
> [Telephone 703-696-6762 or -5790/ fax 703-696-4156].
>
> Go to the DMDC website for SCRA inquiries, https://www.dmdc.osd.mil/scra

We also support the Task Force's recommendation for a new form for motions to cancel and reschedule foreclosure sales. Far too often, a sale of the property goes forward only to be challenged or an error discovered later and the sale has to be set aside. Once again, the mechanics of the current practice in the circuits are as numerous as there are members of The Florida Bar. A form in the Rules of Civil Procedure will bring consistency to all of the state's courts. We believe, however, that any party, whether *pro se* or through counsel, should be able to utilize the form. Therefore, we recommend that the first line of the form be amended to read**: "______________________ moves this court to cancel and reschedule a mortgage foreclosure sale on the following grounds:"**[2]

Finally, we believe that the Task Force recommendation for amending the Rules of Civil Procedure does not go far enough.

A constant and continuing problem is the inability of the courts to learn in a way that does not breach the confidentiality requirements of Chapter 44, Florida Statutes and the Florida Rules for Certified & Court-Appointed Mediators whether the proper parties, representatives and attorneys appear at the mediation session.

Under Rule 1.720(b), Florida Rules of Civil Procedure, a court "shall" impose sanctions "if a party fails to appear at a duly noticed mediation conference without good cause." The rule requires the parties or representatives ("with full authority to negotiate on behalf of the entity") to be "physically present" at the mediation. The rule goes on to state:

[2] We also recommend that antiquated language such as "Comes now" and "Wherefore Premises Considered" be eliminated not only from this form but from all of the forms being proposed.

> Otherwise, unless stipulated by the parties or changed by order of the court, a party is deemed to appear at a mediation conference if the following persons are physically present:
>
> (1) The party or its representative having full authority to settle without further consultation.
>
> (2) The party's counsel of record, if any.
>
> (3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation. (emphasis supplied)

In the foreclosure mediation conferences currently being conducted around the state, the "physically present" requirement is being honored in the breach. And, the Task Force in its report to the court has recommended permitting appearance by telephone. Candidly, the lender representatives in mortgage foreclosure cases in this day and time are swamped and most are in states other than Florida. It would be impossible to get them to physically appear at every mediation that is scheduled for their institution.

Recognizing this circumstance, however, does not alter the fact that there are many who either do not appear at all, or who appear without full settlement authority, or who are handling several mediations at a time causing the instant mediation session to be delayed unnecessarily. And, the courts are not being told about this failure to comply with the appearance rule. The dilemma for the mediator is that she learns that the lender representative (or the attorney) doesn't have full settlement authority until the mediation session has commenced. At that

point the mediator and the mediator participants are bound by the rules of confidentiality. Therefore, we recommend the following amendment to rule 1.720, Fla. R. Civ. P. so the mediator can report to the court whether the parties have complied with the appearance requirements of the rule without breaching confidentiality. Then it will be up to the court and the parties "upon motion" to address the issue of failure to appear.

RULE 1.720. MEDIATION PROCEDURES

(b) Sanctions for Failure to Appear. If a party fails to appear at a duly noticed mediation conference without good cause, the court upon motion shall impose sanctions, including an award of mediator and attorneys' fees and other costs, against the party failing to appear. If a party to mediation is a public entity required to conduct its business pursuant to chapter 286, Florida Statutes, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity. Otherwise, unless stipulated by the parties or changed by order of the court, a party is deemed to appear at a mediation conference if the following persons are physically present:

(1) The party or its representative having full authority to settle without further consultation.

(2) The party's counsel of record, if any.

(3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.

Notwithstanding the limitations on reporting to the court in rule 1.730, the mediator shall report to the court if a

party or representative has not complied with the appearance requirements of this subdivision. The mediator's report shall be limited to reporting only that a party or representative did not appear, without further explanation or comment. An appearance by a party or representative without full authority to settle without further consultation shall be considered a failure to appear under this subdivision.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of this response has been sent by electronic email and by U.S. Mail to the Honorable Jennifer D. Bailey, Dade County Courthouse, 73 West Flagler Street, Miami, Florida 33130 on October 1, 2009.

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Thomas H. Bateman III