SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE	**:**	**SC09-1460**

BEN-EZRA & KATZ, P.A.'S OBJECTION TO THE PROPOSED AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE AND FORMS FOR USE WITH THE RULES OF CIVIL PROCEDURE SUBMITTED BY THE SUPREME COURT'S TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES

INTRODUCTION

Chief Justice Quince entered Administrative Order AOSC09-8 on March 27, 2009 in which she created and appointed members of the Supreme Court's Task Force on Residential Mortgage Foreclosure Cases (the "Task Force"). Clearly the rationale behind the establishment of the Task Force was sound. The courts are in a state of crisis as a result of budget cuts and the inundation of new mortgage foreclosure actions. Moreover, the Court correctly emphasized the benefit for lenders and borrowers to work together to resolve delinquencies before engaging in foreclosure, where in the current climate, all parties lose. Finally, as the Chief Justice observed, "the residential mortgage foreclosure crisis is of statewide proportions and should, to the extent possible, be addressed on a statewide basis

with uniform court rules, policies, and procedures to manage cases to protect the rights of homeowners and lenders and ... ease the burden on the courts." AOSC09-8.

At the time of the Task Force's creation we were concerned that the lack of representation of members of the residential foreclosure bar would compromise the balance and perspective of any report or proposed rule changes that would emerge from the Task Force's work. Our fears have been borne out by the Proposed Amendments to the Florida Rules of Civil Procedure and Forms for Use with the Rules of Civil Procedure (the "Proposed Rules") that were submitted by the Task Force. It is clear from the Final Report of the Task Force that great attention was given to protecting the rights of homeowners, but very little given to the rights of lenders. However, as it turns out, the concern with results of the Task Force's efforts is less its lack of balance than the fact that is has not fulfilled its mandate in any respect. The proposals, while obviously focused on the rights of borrowers, do not, in fact, provide any relief at all to the borrowers, the courts or the lenders. Its recommendations do not include "policies, procedures, strategies, and methods for easing the backlog of pending residential mortgage foreclosure cases," and they do not provide any additional protections to the rights of parties that did not already exist. See AOSC09-8.

The instant objection is directed primarily at the Proposed Amendments put forward by the Task Force. The Task Force proposes three changes to the existing rules and forms used in foreclosure actions.

First, the Task Force distinguishes residential foreclosure complaints from complaints in other civil actions and requires that the residential foreclosure complaints be verified.

Second, the Task Force would require foreclosure plaintiffs effecting constructive service of process to file an affidavit specifying the specific efforts made to locate the defendant.

Finally, the Task Force proposes that a new form for a motion to cancel and reschedule a foreclosure sale be used when the parties seek to cancel a foreclosure sale.

These proposed changes will not "facilitate early, equitable resolution of residential mortgage foreclosure cases." They will not address the situation on "a statewide basis with uniform court rules, policies, and procedures." And they will not "protect the rights of homeowners and lenders and ... ease the burden on the courts." AOSC09-8.

On the contrary, the Proposed Amendments undermine these goals. If implemented they will increase the amount of work required of foreclosure

plaintiffs without providing any meaningful protections for foreclosure defendants or alleviating the foreclosure backlog confronting the courts. They will increase litigation and will increase costs of foreclosure and, in turn, costs of obtaining and maintaining credit.

As discussed below, we respectfully object to the Proposed Amendments of the Task Force, and in a separate petition filed this day, we request that the undersigned law firm be permitted to participate in the oral argument.

DISCUSSION

I. The Task Force's Proposed Amendments impose undue and unreasonable burdens on foreclosure plaintiffs, will drive up the costs to borrowers, and make credit scarce.

A. The requirement that foreclosure complaints be verified is an empty gesture that adds no meaningful protection to foreclosure defendants.

The Task Force's suggestion that, unlike other civil complaints, foreclosure complaints be verified is intended to protect homeowners. The Task Force explained in its Final Report at page 43, that notes are frequently transferred many times prior to the filing of a foreclosure. The Task force observed that where a plaintiff is foreclosing under a note that has been lost, the real ownership of the note often remains questionable. And, the Task Force added, "there have been situations where two different plaintiffs have filed suit on the same note at the same time." Final Report at 43. The verification requirement is intended to ensure

that plaintiffs verify ownership of the note before filing the action. The verification, claims the Task Force, gives the trial judges authority to sanction those who file without first assuring themselves that they have authority to do so. Id.

1. Ownership is not a legal requirement for foreclosure.

The Petition says that Plaintiff's status as owner and holder of the note at the time of filing has become a significant issue. This is a red herring issue created by the mortgage defense bar and should not be an issue in any foreclosure case with rare exception. The black letter law in Florida is that (a) a foreclosure plaintiff need not be either the owner or holder of the mortgage to have standing, and (b) a foreclosure defendant may not raise standing as a defense unless the defendant has another bona fide defense that is not viable against the plaintiff but only against the "real" plaintiff.

a. A foreclosure plaintiff need not be either the owner or holder of the mortgage to have standing.

A foreclosure plaintiff need not be either the owner or the holder of the note to have the right to enforce the note. Fla. Stat. 673.3011 provides in pertinent part:

> The term "person entitled to enforce" an instrument means:
> (1) The holder of the instrument;

> (2) *A nonholder in possession of the instrument who has the rights of a holder*;

Fla. Stat. 673.3011 (2009) (emphasis added).

A mere transferee of a the note has standing to enforce it as a "non-holder in possession of the instrument who has the rights of a holder" within the meaning of Fla. Stat 673.3011. Transferee status is defined by Fla. Stat. 673.2031, which provides in pertinent part:

> (1) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.
> (2) Transfer of an instrument, whether or not the transfer is a negotiation, *vests in the transferee any right of the transferor to enforce the instrument*, including any right as a holder in due course

Fla. Stat. 673.2031 (2009) (emphasis added).

The clear and unambiguous language of these two sections read together is that the holder of a note can transfer the note to an agent for the purpose of enforcing it and thereby "vest" in the agent the rights of the holder including the right to enforce the note. This transfer of rights occurs without effecting a transfer of that actual ownership or holder status. The transferee is a "non-holder" who is entitled to enforce the note.

Thus, the very requirement to verify ownership and/or holder status is at odds with the clear and unambiguous substance of the relevant Florida Statutes.

b. A foreclosure defendant may not raise standing as a defense unless the defendant has another bona fide defense that is not viable against the plaintiff but only against the "real" plaintiff.

The supposedly "significant issue" of standing cannot even be raised in most foreclosure actions. An essential purpose of Article 3 of the Uniform Commercial Code is to ensure the negotiability and enforceability of commercial paper. One way that purpose is achieved is by limiting the defenses that can be raised. In particular, a foreclosure defendant cannot raise standing as a defense unless the defendant has another bona fide defense that is not viable against the plaintiff in the case but only against the allegedly "real" plaintiff. This is a venerable rule laid down by the Florida Supreme Court in *Jones v. Central Hanover Bank and trust Co.* 147 So. 895 (Fla. 1933) and in *City of Lakeland v. Select Tenures, Inc.*, 176 So. 274 (Fla. 1937).

In the words of the *Jones* opinion, "It is not a good plea to allege that a note sued on is the property of another, and not of the plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, and which could not be set up against the plaintiff." *Jones*, 147 So. at 896.

2. Existing standards are sufficient to serve the intended purpose.

As a preliminary matter, existing standards already provide incentives for attorneys and their clients to verify the truth of the assertions made in their filings.

See e.g., Section 57.105, Florida Statutes. But, more fundamentally, the recommendation begs the question of whether false statements of fact are more likely to arise in residential mortgage foreclosure cases than in any other civil action. If the sanctions available to trial courts are insufficient to encourage thorough fact-checking then they should be enhanced across-the-board for all civil actions.

The proposed amendment will clearly drive up the cost of filing foreclosure actions. Lenders and their lawyers will not, in the end, bear these costs. They will be passed along to the consumers. Higher credit costs will not help achieve the policy goals stated in this Court's Administrative Order SC09-8.

B. The proposed Affidavit of Diligent Search and Inquiry is similarly inefficient and provides homeowners no additional protections.

The Task Force proposes a New Form Affidavit of Diligent Search and Inquiry that requires foreclosure plaintiffs seeking to constructively serve missing defendants to itemize the specific efforts made to locate these defendants. Chapter 49, Florida Statutes deals with constructive service. It is well established that a plaintiff need only file an affidavit stating that a diligent search has been made; it need not enumerate all the supporting facts. *Floyd v. Federal National Mortgage Assoc.*, 704 So. 2d 1110, 1112 (Fla. 5th DCA 1998); *Demars v. Village of Sandalwood Lakes Homeowners Ass'n, Inc.*, 625 So. 2d 1219 (Fla. 4th DCA 1993).

Where the defendant challenges the adequacy of the search, the plaintiff bears the burden of proving facts that demonstrate the efforts were in fact adequate. *Id*. The proposed form therefore, would impose obligations on the plaintiff that do not arise out of the constructive service statute.

As is the case with the proposed amendment requiring that foreclosure complaints be verified, the Task Force does not indicate how public policy would be served by imposing more stringent constructive service burdens on foreclosure plaintiffs than on other civil plaintiffs. And, as in the case of the proposed requirement that foreclosure complaints be verified, the Task Force does not address the consequences of such a rule change. As discussed above, the additional efforts required to complete a more detailed affidavit would create new foreclosure costs that would be borne by consumers. At a time when the federal government is doing everything possible to lower the cost of obtaining credit and increasing the incentives to lenders to extend credit, this Court should not adopt rules that do the opposite.

In addition to the above, there is a technical objection to the proposed form affidavit. The signature block appears to require a signature of the plaintiff itself. The plaintiff does not usually perform the diligent search. Its lawyer or investigator or process server does. If someone must sign the affidavit of diligent search it should be someone who is in a position to know the exact steps taken.

C. The New Form Motion to Cancel and Reschedule Foreclosure Sale implicitly requires court approval for the cancellation of a sale and will result in many unwarranted sales following last-minute settlements between borrowers and lenders.

The third proposed amendment, the New Form Motion to Cancel and Reschedule Foreclosure Sale, raises an important issue that we have addressed with several courts individually. Like many other plaintiffs' foreclosure firms, we include a clause in our proposed final judgments that allows the successful plaintiff to unilaterally cancel a foreclosure sale simply by not appearing at the sale (a "sales protection clause"). This clause is a perfect example of the actions we, as lawyers can take to achieve the goals established by AOSC09-8. It minimizes the burden on the courts while protecting the rights of **both** foreclosure defendants and plaintiffs. To understand how this clause protects the interests of the parties and the courts some background information is helpful.

When a court enters a final judgment of foreclosure it is holding that the plaintiff is entitled to collect its judgment against the property that serves as collateral for the loan. Simply speaking, the foreclosure sale is designed to enable the lender to collect the amount due under the note, either by collecting the amount paid by a third party or by purchasing the property with a credit bid in the amount

of the underlying loan. The sale is first and foremost a mechanism that protects the rights of the successful plaintiff.

Foreclosure defendants, meanwhile, almost never have an interest in seeing their properties sold at foreclosure sales. Therefore a cancellation of the sale by the plaintiff will not impinge on the rights of the defendant.

Upon the entry of a final judgment of foreclosure, the plaintiff ordinarily seeks a foreclosure sale as soon as possible so it can attempt to recover its investment and move on. However, just because a trial court has entered judgment in favor of a lender, the parties may not cease efforts to negotiate a mutually beneficial settlement. Often these negotiations continue until the "eleventh hour" – the day or even the night before a scheduled foreclosure sale. When the parties are able to reach an agreement at this late stage, an additional obstacle remains that often prevents them from saving the borrower's home – the scheduled sale.

Where the parties must move for and obtain a court order cancelling the sale, last minute agreements may be useless if they cannot bring their motion before the court in time. However, if the judgment contains a sales protection clause and the plaintiff can unilaterally cancel a sale, this problem is solved. When the clerk sees that no representative of the lender is present, the sale is cancelled automatically. The borrower's home is saved; the lender need not pay to send a representative to

bid; and the court need not rule on a motion that clearly serves the interests of all (except disinterested third parties looking for a windfall).

Another potential problem arises if the plaintiff's representative is involved in an accident, mishap or makes a mistake and cannot get to the sale in time. Without the sales protection clause the clerk will conduct the sale. If the plaintiff's representative is not present savvy third party bidders can purchase the property for much less than is owed under the judgment. This is usually a disaster for the lender and for the borrower. The lender loses a lot of money. The borrower loses their property (and any surplus proceeds that may have been produced from an arms-length sale). More litigation ensues. This litigation is usually fruitless because under the existing "grossly or startlingly inadequate" sales price standard, sales are very difficult to overturn. *Steding v. American General Finance*, 962 So. 2d 1036, 1037 (Fla. 5th DCA 2007). And, the court loses because it now has more work. The only winner is the savvy third party investor who was not a party to the action and who could lie in wait at the court house for a property to go sale without a plaintiff's representative present so that he or she can obtain a windfall.

Our sales protection clause allowing unilateral cancellation of foreclosure sales by plaintiffs achieves a laudable result. The Task Force's proposed New Form that requires a motion to the court to cancel a foreclosure sale requires additional work by plaintiffs lawyers and courts and does nothing to solve the

problem of last-minute settlements or accidents, which are useless when a judge cannot be found to order the cancellation of a sale. We urge the Court to reject the proposed form and instead adopt a rule standardizing the practice of allowing plaintiffs' lawyers to unilaterally cancel a foreclosure sale.

II. Other Objections to the Task Force's Report and concerns not raised by the task force.

As discussed in the introduction, our firm was dismayed at the composition of the Task Force. We understood then that voice of residential foreclosure plaintiffs' would not be heard and that significant concerns we have with the process as it exists and as it may be amended would not be addressed. We take this opportunity to raise two substantial concerns with what the Task Force did and did not do.

A. The Task Force ignored the Court's call for uniformity and standardization.

One of the primary goals identified by the Supreme Court was that the problems created by the volume and backlog are too great to be addressed on a circuit-by-circuit basis. The Task Force ignored this problem. Each circuit, and in some instances individual judges, has devised its own procedural rules to help cope with the foreclosure case load. The result is a Balkanized hodge-podge of unique foreclosure requirements and procedures. The Supreme Court called for

standardization and uniformity but the Task Force did not respond. This is a huge problem and causes a huge waste.

B. The mediation solutions being considered are inefficient and costly and will ultimately hurt consumers.

Mediation in general is a good idea. In fact, our clients usually expend great efforts reaching out to borrowers with *loss mitigation* options before referring mortgages to their attorneys for foreclosure. However, mediation as implemented by the various administrative orders is overbroad and burdensome. Generally, the lender must advance $750 and complete a "Form A" in connection with the filing of every foreclosure in one of the circuits that have mandated mediation.

The automatic referral of all foreclosures to mediate results in an enormous waste of money and other resources. First, not every property is borrower occupied or homestead, so not every case qualifies for mediation. Second, of those cases that do qualify, not every borrower is interested in mediating. Some borrowers do not intend to keep the property. Some are already working directly with the lender and some choose to litigate.

A preferable approach to alternative dispute resolution would require that defendants be provided information about the mediation option, and allow them to opt in by completing a simple form. Once they have self selected themselves the mediation centers will have less work to do and the lenders can then spend $750 to

deal with cases in which mediation is actually likely to produce a valuable result. As described above, increased costs, even those imposed on the lenders by rule or statute, will ultimately be passed along to the entire borrowing population in one way or another. That is bad for the economy and bad for the citizens of Florida.

For the reasons discussed above, the law firm of Ben-Ezra & Katz, P.A. respectfully requests that the Court reject the Proposed Amendments to the Florida Rules of Civil Procedure and Forms for Use with the Rules of Civil Procedure and that this Court direct a reconstituted task force that represents the full range of interested parties to recommend procedures that address the issues of efficiency, consistency and fairness in accordance with AOSC09-8, or that the Court promulgate its own such procedures.

Respectfully Submitted,

/s/Marc Ben-Ezra .

BEN-EZRA & KATZ, P.A.

Marc A. Ben-Ezra
Fla. Bar No. 861189
2901 Stirling Road, Ste. 300
Fort Lauderdale, Florida 33312
Telephone: (305) 770-4100
Facsimile: (305) 653-2329
September 30, 2009

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Objection was delivered on October 1, 2009 via courier to the chambers of the Honorable Jennifer D. Bailey, 73 West Flagler Street, Suite 1307 Miami FL, 33130-4764.

/s/Marc Ben-Ezra .

Marc A. Ben-Ezra

Florida Bar Number 861189

For Ben-Ezra & Katz, P.A.

CERTIFICATE OF COMPLIANCE WITH TYPE AND FONT

I hereby certify that this document is typed in compliance with the requirements set forth in Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/Marc Ben-Ezra .

Marc A. Ben-Ezra

Florida Bar Number 861189