

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO RULES
OF CIVIL PROCEDURE AND FORMS
FOR USE WITH RULES OF CIVIL
PROCEDURE**

CASE NO.: SC09-1460

**FLORIDA DEFAULT LAW GROUP, P.L.'S
COMMENTS TO RULE PROPOSALS**

COMES NOW, Florida Default Law Group, P.L. (“FDLG”) and files these comments to the petition for *Emergency Rule and Form Proposals of the Task Force on Residential Mortgage Foreclosure Cases* filed by the Honorable Jennifer D. Bailey, Circuit Court Judge on or about August 17, 2009, (the “Petition”).

FDLG is a Florida law firm that focuses its practice primarily on the representation of lenders in residential mortgage foreclosure cases. Accordingly, the rule and form proposals contained in the Petition uniquely impact the day-to-day operations of FDLG. The comments contained herein are solely those of FDLG and should not otherwise be interpreted or construed as reflecting the opinion(s) of any FDLG clients.

The Petition contains four (4) suggested changes to the Fla. R. Civ. P. and the Forms for Use with the Rules of Civil Procedure as follows: (i) an amendment to Fla. R. Civ. P. 1.110(b) (requiring verification of residential mortgage foreclosure complaints); (ii) an amendment to Form 1.997, Civil Cover Sheet (adding specificity to the Civil Cover Sheet); (iii) the adoption of a new Form for Use with the Rules of Civil Procedure (standardizing affidavits of diligent search); and, (iv) the adoption of a new Form for Use with the Rules of Civil Procedure (standardizing motions to cancel and reschedule foreclosure sales). (*See* Petition at 1-2). FDLG has no comments with respect to the proposed amendment to Form 1.997, Civil Cover Sheet (*see* Petition at 3-4) or the

adoption of a new Form for Use with the Rules of Civil Procedure (standardizing motions to cancel and reschedule foreclosure sales), (*see* Petition at 5). Accordingly, FDLG shall limit its comments to the proposed amendments to Fla. R. Civ. P. 1.110(b) (*see* Petition at 2-3) and the adoption of a new Form for Use with the Rules of Civil Procedure (standardizing affidavits of due and diligent search), (*see* Petition at 4-5).

Amendment to Fla. R. Civ. P. 1.110 General Rules of Pleading

The Supreme Court Task Force on Residential Mortgage Foreclosure Cases (the “Task Force”), proposes in the Petition the following amendment to Fla. R. Civ. P. 1.110(b):

(b) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, must state a cause of action and shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader deems himself or herself entitled. Relief in the alternative or of several different types may be demanded. Every complaint shall be considered to demand general relief.

When filing an action for foreclosure of a mortgage on residential real property the complaint shall be verified. When verification of a document is required, the document filed shall include and other, affirmation, or the following statement:

“Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.” (*See* Petition at 2-3).

FDLG agrees with the position taken by those members of the Florida Bar Civil Rules Committee who voted in opposition to the proposed amendment to Fla. R. Civ. P. 1.110(b), particularly the *Comments Opposing Proposal* by member Don Christopher as set forth in Appendix K, page 26 to the Task Force’s *Final Report and Recommendations*

on Residential Mortgage Foreclosure Cases dated August 17, 2009, (the “Final Report”). Rather than reiterate Mr. Christopher’s comments herein, FDLG adopts these arguments and for these reasons respectfully requests that this Court deny the Petition in so far as the proposed amendment to Fla. R. Civ. P. 1.110(b).

Alternatively, should this Court find that the proposed amendments to Fla. R. Civ. P. 1.110(b) suggested by the Task Force are appropriate for the reasons set forth in the Petition and the Final Report, FDLG contends that the proposed amendments to Fla. R. Civ. P. 1.110(b) do not fully and completely fulfill the charge of the Task Force by this Court.

As proposed, the amendments to Fla. R. Civ. P. 1.110(b) require only the verification of a complaint by a plaintiff in actions for foreclosure of a mortgage on residential real property. (*See* Petition at 3). The rationale espoused in the Petition for this amendment is as follows:

Requiring the plaintiff to verify its ownership of the note at the time of filing provides incentive to review and ensures that the filing is accurate, ensures that investigation has been made and that the plaintiff is the owner and holder of the note. This requirement will reduce confusion and give the trial judges the authority to sanction those who file without assuring themselves of their authority to do so. (*See* Petition at 3).

The section of the Final Report entitled *Attorney Involvement in the Mortgage Foreclosure Crisis* (see Final Report at 20-22), offers yet further support for the verification of complaints. Yet, the Task Force’s Final Report does not limit its criticism to Plaintiffs and their counsel. To the contrary it is equally critical of “the defense bar side of the equation” stating:

(Defense) Lawyers are advertising for clients to pay them, and they will delay foreclosure. Defenses based on loan closing irregularities are being pleaded without any good faith investigation, in some cases after the

statute of repose has already expired. Boilerplate motions to dismiss and discovery requests are filed without ever being set for hearing or for motions to compel. Not infrequently, an answer is filed raising multiple defenses without any discovery, and the attorney then subsequently withdraws from the case due to nonpayment of fees. Nonpayment of fees would seem to be somewhat foreseeable for a defendant who is in foreclosure. Defense lawyers should litigate in good faith, defend in a timely fashion, and not manipulate the courts or the case for simple purposes of delay. (*See* Final Report at 21).

Despite the express acknowledgement by the Task Force in the Final Report of these problems on the “the defense bar side of the equation”, which appear to warrant a similar verification proposal for defendants pleadings, the Petition is completely devoid of any corresponding proposals to eliminate the acknowledged and pervasive practice of the filing of pleading and others papers by defendants without regard to the merit of the same and solely for the purpose of interposing delay in the foreclosure process. FDLG submits that, if as suggested by the Final Report, the accuracy and veracity of pleadings filed with the Court is a concern of the Task Force on both the Plaintiffs and Defendants side of the equation in residential mortgage foreclosure actions; then, the proposed requirement of verification should similarly apply to defensive pleadings. It is counterintuitive that the Task Force can in its Petition extol the virtues of verification of pleadings by Plaintiffs, while simultaneously acknowledging in the Final Report an identical problem on “the defense bar side of the equation” without making similar recommendations to this Court regarding verification of pleadings by defendants.

Accordingly, FDLG proposes the following amendment to Fla. R. Civ. P. 1.110(b), (c) and (d), which it believes more fully and completely addresses the Task Force’s concerns as set forth in the Final Report:

(b) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim,

must state a cause of action and shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader deems himself or herself entitled. Relief in the alternative or of several different types may be demanded. Every complaint shall be considered to demand general relief.

When filing an action for foreclosure of a mortgage on residential real property, or a counterclaim, crossclaim, or third-party claim in such action, the complaint, counterclaim, crossclaim, or third-party claim shall be verified. When verification of a document is required, the document filed shall include and other, affirmation, or the following statement:

“Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.”

(c) The Answer. In the answer a pleader shall state in short and plain terms the pleader's defenses to each claim asserted and shall admit or deny the averments on which the adverse party relies. If the defendant is without knowledge, the defendant shall so state and such statement shall operate as a denial. Denial shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of an averment, the pleader shall specify so much of it as is true and shall deny the remainder. Unless the pleader intends in good faith to controvert all of the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or may generally deny all of the averments except such designated averments as the pleader expressly admits, but when the pleader does so intend to controvert all of its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial.

When filing answer to a claim for the foreclosure of a mortgage on residential real property the affirmative defenses shall be verified. When verification of a document is required, the document filed shall include and other, affirmation, or the following statement:

“Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.”

(d) Affirmative Defenses. In pleading to a preceding pleading a party shall set forth affirmatively accord and satisfaction, arbitration and award,

assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms if justice so requires, shall treat the pleading as if there had been a proper designation. Affirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under rule 1.140(b); provided this shall not limit amendments under rule 1.190 even if such ground is sustained.

When filing affirmative defenses to a claim for the foreclosure of a mortgage on residential real property the affirmative defenses shall be verified. When verification of a document is required, the document filed shall include and other, affirmation, or the following statement:

“Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.”

Affidavit of Diligent Search Form

The Petition proposes the adoption of a new Form for Use with the Rules of Civil Procedure which standardizes affidavits of diligent search. FDLG has just one (1) comment with respect to the *New Form for Affidavit of Diligent Search and Inquiry* as set forth in Appendix A to the Petition. (See Petition at 19-21). FDLG’s comment is predicated primarily upon the fact that presently, the service of process vendors that are serving, or attempting to serve, summonses and foreclosure complaints are the persons who are also presently conducting a diligent search and inquiry for purposes of constructive service. There can be little doubt that the service of process vendors are the most appropriate persons to conduct a diligent search and inquiry. They are the persons who are initially visiting the subject property to serve the defendant(s)/mortgagor(s); and, when this visit discloses the absence of the defendant(s)/mortgagor(s), are conducting additional research to locate alternative addresses for the defendant(s)/mortgagor(s) so

they can hopefully be personally or constructively served. The additional research consists, more or less, of the various inquiries contained in the *New Form for Affidavit of Diligent Search and Inquiry* that are to be checked as applicable, e.g. Inquiry of Social Security Information, Telephone listings in the last known locations of defendant's residence, Statewide directory assistance search, etc.

Despite the fact that service of process vendors are the persons who are attempting to effectuate service of process and are uniquely situated to be the only persons who can fully and accurately complete the diligent search and inquiry, the *New Form for Affidavit of Diligent Search and Inquiry* contained in the Petition requires the certification and signature of the "Plaintiff". (See Petition at 21). The certification states as follows:

I understand that I am swearing or affirming under oath to the truthfulness of the claims made in this affidavit and that the punishment for knowingly making a false statement includes fines and/or imprisonment.

Unless the "Plaintiff" certification requirement is a simple oversight by the Task Force, this requirement appears to require residential foreclosure plaintiffs to take one of two courses of action: (i) personally perform the traditional functions of process servers by personally searching for alternative address information when the initial address information furnished by the plaintiff to counsel is not accurate such that the certification can be correctly executed with personal knowledge; or, (ii) swear and affirm under penalty of fines and/or imprisonment that the claims of its process servers, who provide this information, are accurate.

There is no legitimate basis for requiring certification of the *New Form for Affidavit of Diligent Search and Inquiry* by the "Plaintiff" and not support for such a

requirement is contained in the Petition or the Final Report. The problematic nature of the “Plaintiff” certification requirement is further underscored by the express language of the Petition itself which states:

The most significant addition is the additional criteria that if the process server serves and occupant in the property, he inquires of that occupant whether he knows the location of the borrower-defendant.

How can a “Plaintiff” be required to certify and affirm the substance of a conversation between its process server and an occupant of a particular property, when “Plaintiff” will most certainly never be present for such conversation? In light of the foregoing, FDLG would respectfully request that this Court modify the *New Form for Affidavit of Diligent Search and Inquiry* contained in the Petition to allow the execution and certification of the same by the appropriate process server who is performing this work, rather than requiring the “Plaintiff” to execute, certify and attest to the same.

Dated: This 1st day of October, 2009.

Respectfully submitted,

FLORIDA DEFAULT LAW GROUP, P.L.
9119 Corporate Lake Drive, Suite 300
Tampa, Florida 33634
(813) 342-2200 (Phone)
(813) 251-1541 (Facsimile)



RONALD R. WOLFE, ESQ.
Florida Bar No. 0138223
rwolfe@defaultlawfl.com

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Florida Default Law Group, P.L.'s Comments to Rule Proposals have been served via regular U.S. Mail on: Task Force Chair, The Honorable Jennifer D. Bailey, 73 W. Flagler Street, Suite 1307, Miami, Florida 33130-4764 on this 1st day of October, 2009.

A handwritten signature in black ink, appearing to be 'RWP', is written over a light gray rectangular background.

ATTORNEY