

**SUPREME COURT OF FLORIDA**

**IN RE: AMENDMENTS TO :**  
**THE :**  
**FLORIDA RULES OF :**  
**CIVIL PROCEDURE :**  
\_\_\_\_\_ :

**Case No: SC09-1460**

**Case No: SC09-1579**

**BEN-EZRA & KATZ P.A.’S COMMENTS ON PROPOSED  
AMENDMENTS TO FORM 1.996, FINAL JUDGMENT OF  
FORECLOSURE**

The law firm of Ben-Ezra & Katz, P.A. (“BEKPA”) hereby responds to the Court’s invitation to the public to comment on the Proposed Amendments to Form 1.996 (Final Judgment of Foreclosure), and offers the following comments:

1. Paragraph 1 of Proposed Form 1.996(a) includes a field for the entry of a reasonable attorney’s fee. The field provides for entry of an hourly rate. But it does not provide courts with an option of authorizing a reasonable flat fee. At their clients’ request, many foreclosure plaintiffs’ law firms bill a flat fee rather than an hourly rate, or in some instances a combination of a flat fee plus a reasonable hourly rate. Form 1.996(a) should offer judges the option of authorizing a reasonable flat fee or combination flat fee plus hourly rate.

2. Traditionally, Final Judgments of Foreclosures have affirmed the plaintiffs’ right to assign rights under the judgment, including rights associated

with the bid at the foreclosure sale. While Proposed Form 1.996(a) does not purport to abrogate these rights, it fails to recognize affirmatively these rights. This omission could create confusion among the clerks of court. Additionally, without an affirmative recognition of these rights in the final judgment, plaintiffs seeking to assign rights will be forced to move in the trial courts for orders directing the clerks' offices to recognize their assignments. These additional and avoidable motions will create further unnecessary work for courts and parties alike. The new Form 1.996(a) should include an affirmation of the plaintiffs' rights of assignment.

3. Proposed Form 1.996(a) similarly fails to recognize affirmatively the foreclosure plaintiffs' rights to obtain a writ of possession upon request to the clerk without requiring additional judicial involvement. No compelling reason exists to burden the courts with subsequent motions for writs of possession where the merits of the motion are implicitly determined in the final judgment of foreclosure. The new Form 1.996(a) should recognize the plaintiffs' right to a writ of possession without being required to file a motion with the court.

4. Paragraph 6 of Proposed Form 1.996(a), in sweeping language, excepts from the judgment Home Owners' and other Association rights under Chapters 718 and 720, Florida Statutes. The Court's intent appears to have been to ensure that associations' statutory rights to limited payment of past due

assessments is not foreclosed. However, the language of proposed paragraph 6 is so broad that it could be interpreted to imply that these associations may not be foreclosed at all. The language of proposed paragraph 6 should be amended to reflect the very limited rights of these associations with respect to otherwise senior lienholders.

5. Finally, as we have argued earlier in these proceedings, the foreclosure sale is the right of a successful foreclosure plaintiff. *First Nationwide Savings v. Thomas*, 513 So. 2d 804 (Fla. 4<sup>th</sup> DCA 1987). The power to cancel the sale should remain with the plaintiff. In defense of this right, which was recognized both at common law<sup>1</sup> and by tradition, as manifested in practice in virtually every circuit court in the state (until very recently), we have argued, and continue to urge the Court to include in the Form Final Judgment of Foreclosure a Sales Protection Clause. A Sales Protection Clause would provide that the foreclosure sale may proceed only in the presence of a representative of the plaintiff. Such a clause would prevent mistaken sales to disinterested third-parties at grossly inadequate prices.

---

<sup>1</sup> "With respect to the cancellation and rescheduling of foreclosure sales, absent *extraordinary circumstances*, a mortgagee has the right to proceed to sale on any property on which it has successfully foreclosed its mortgage." *A Mortgage Company Formerly America's Mortgage Company v. Bowman*, 642 So. 2d 123 (Fla. 4<sup>th</sup> DCA 1994) (emphasis in original); *Chemical Mortgage Co. v. Dickson*, 651 So. 2d 1275, 1276 (Fla. 4<sup>th</sup> DCA 1995) ("when the bidding instructions are not timely obtained from the V.A., a mortgagee has the right to have the foreclosure sale rescheduled absent extraordinary circumstances."); See also, *Lawyers' Co-Operative Publishing Co. v. Bennett*, 34 Fla. 302; 16 So. 185 (Fla. 1894).

Such a provision would surely protect plaintiffs' rights to actualize their judgments. And, as we have repeatedly argued to this Court, the plaintiff's rights alone would justify inclusion of such a clause. However, a Sales Protection Clause would also protect defendants' rights by enabling them to continue negotiating with plaintiffs to prevent the sale of their homes until the last minute. Without giving plaintiffs the power to cancel a foreclosure sale, they will be less inclined to continue negotiating with defendants as sale dates approach. The Sales Protection Clause would also protect defendants by ensuring sales occur in arms-length transactions which are more likely to produce surplus proceeds that are payable to the defendants or other junior lienors. Finally, inclusion of a Sales Protection Clause would conserve judicial resources that are inevitably wasted supervising litigation relating to motions to set aside sales that should never have taken place, either because the parties reached a last-minute settlement, or because mistake or inadvertence allowed a disinterested third-party to purchase the property in the

absence of either plaintiff or defendant at a grossly inadequate price.

Wherefore, BEKPA respectfully requests the Court modify Proposed Form 1.996(a) as suggested in the comments above.

Respectfully submitted,

/s/ Marc Ben-Ezra

BEN-EZRA & KATZ, P.A.

Marc A. Ben-Ezra

2901 Stirling Road, Suite. 300

Fort Lauderdale, Florida 33312

Telephone: (305) 770-4100

Facsimile: (305) 653-2329

Florida Bar No. 861189

April 12, 2010

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a copy of this motion was furnished by mail to Mark A. Romance, Esq., Civil Rules Committee Chair, Richman Greer, P.A., 201 S. Biscayne Blvd., Suite 1000, Miami, FL 33131-4327 this 12th day of April, 2010.

/s/ Marc Ben-Ezra  
BEN-EZRA & KATZ, P.A.  
Marc A. Ben-Ezra  
Fla. Bar No. 861189