

The Florida Supreme Court Lends a Helping Hand To Homeowners Facing Foreclosure and At The Same Time Throws Lenders a Curveball

The Florida Supreme Court (“Court”) issued an administrative order on December 28, 2009 (“Order”) establishing a managed mediation program to benefit homeowners facing foreclosure and which establishes certain parameters and procedures that must be followed. The Order is in response to an overwhelming number of residential foreclosures in Florida. As recited by the Court, it is estimated that there are currently 456,000 residential foreclosure cases pending statewide.

What does the Order mean to Homeowners?

Under the Order, homeowners who are in jeopardy of losing their primary residence, which is homesteaded under Florida law, and a foreclosure lawsuit is pending, the Order provides an opportunity to participate in mediation through the Court’s managed mediation program. The managed mediation program applies to federally insured mortgages (which most are). While the Order does not require a borrower to participate in managed mediation, if the borrower requests to participate in managed mediation, then the lender has to appear at the mediation either in person or by telephone and the individual appearing on the behalf of the lender must be empowered to make decisions.

Under normal circumstances, each party would share the cost of mediation equally. However, the Court recognized that borrowers facing foreclosure could not afford to pay. As such, the burden to pay the upfront costs of the managed mediation program rests with the lenders. The lender is entitled to recover the expenses incurred in connection with the managed mediation program if the borrower refuses to participate in mediation, if mediation is successful or the mediation is not successful. The lender is entitled to add any sums expended for mediation in its final judgment of foreclosure.

What does the Order mean to Lenders/Mortgagees?

Lenders/mortgagees holding a federally insured mortgage on homestead property which is the subject of a mortgage foreclosure lawsuit will now be required to attend and participate in mediation under the Court’s managed mediation program and will be required to pay the upfront costs up to \$750. As stated previously above, the fronted costs are recoverable or includable in the final judgment of foreclosure.

In addition, as a result of the Order, lenders/mortgagees could be faced with a new challenge or obstacle, depending on your point of view. The Order includes language which requires “[d]ocumentary evidence the plaintiff is the owner and holder in due course of the note and the mortgage sued upon”. The above language could prove to be very problematic because Florida law currently does not require the holder of the promissory note to be a “holder in due course” to enforce such holder’s rights under the promissory note, nor does Florida law recognize the concept of being holder in due course of a mortgage. Further, in most cases, the lender/mortgagee does not qualify as a holder in due course. As a result of the Court Order,

lenders/mortgagees will need to be prepared to respond if they are required by a court to demonstrate compliance with the Order by establishing that they are a holder in due course of the note and mortgage. Even if the lender/mortgagee could establish that it is a holder in due course of the note, it may not be enough as the court may also require that lender/mortgagee to establish that it is a holder in due course of the mortgage – which is not possible given that the law does not recognize the concept of being a holder in due course of a mortgage.

What Should Lenders/Mortgagees Do?

Be prepared to respond to the court that under Florida law that there is no requirement that the holder of a note must be a holder in due course to enforce its rights under the note. Although it is pure speculation on our part, we believe that the Court intended that lenders/mortgagees (plaintiffs) be required to establish their legal right to enforce the terms of the note and foreclose on the mortgage which makes perfect sense, but the choice of words used by the Court has far reaching implications which have yet to be determined. Time will tell. In the meantime, lenders/mortgagees and lawyers embroiled in foreclosure matters need to be prepared to respond when the time comes – which will be soon.

The foregoing article is intended to provide general information and is not a substitute for competent legal advice. Whether the Order will apply in any given situation will be determined by the facts of the particular case.