Community Counsel

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COURT ORDERED MEDIATION IN FORECLOSURES ENDS

Will the ending of Florida's Managed Mediation Program for residential mortgage foreclosure cases shorten the time banks take to foreclose on delinquent owners? The short answer is yes, but not for awhile. Will this help Florida community associations? Maybe.

Generally, the longer it takes a bank to foreclose a mortgage the more an association and its members will suffer, unless the association is able to rent the property or sell its interest. However, if the property is deteriorating this may not be a viable option. If an owner is not paying the mortgage, it is unlikely that assessments are being paid. The longer a bank takes to foreclose, the longer it will take to get a new owner who will start paying assessments.

In March 27, 2009, the Chief Justice of the Supreme Court of Florida created a task force to look into the foreclosure crisis facing Florida and its court system. By the end of the 2009, the task force had submitted its *Final Report and Recommendations on Residential Mortgage Foreclosure Cases*, leading to the Supreme Court of Florida's Administrative Order AOSC09-54, creating the statewide Managed Mediation Program for residential mortgage foreclosures as a means for the court system to address the overwhelming number of mortgage foreclosure cases flowing into the court system.

Following the order, Managed Mediation Programs were adopted by the individual counties throughout the State. Banks were required to go through an elaborate process which added months to the foreclosure process. While the effectiveness of the mediation program has been debated, it is now obvious that the program did very little to relieve the congestion of the court system.

The task force and the Supreme Court of Florida believed that forced mediation would result in a sharp increase in settlements between the mortgagors and the banks, removing those cases from the court system. What they failed to realize was that the economic crisis was so severe that few individuals could qualify for any type of workout program. The result "on the ground" was that these unsuccessful forced mediations kept cases in the court system, causing even more congestion in the courts and making the mortgage foreclosure process longer.

Now, after a few years of the Managed Mediation Program, the Supreme Court of Florida has issued order AOSC11-44, terminating the statewide program. Cases already referred to and pending in the program will remain in the program but the Supreme Court will not require new cases to go through the Managed Mediation Program. However, because every county in the state had issued its own administrative order requiring mediation, the counties will need additional time to change their own procedures, if they do so at all.

As each county ends the Managed Mediation Program and new cases come into and through the court system, one stop along the lengthy mortgage foreclosure process will be gone. Then it will be the job of community association lawyers to ensure that banks stop delaying the process unnecessarily, unless the delay benefits the association in any particular case.

RECENT CASES

- If governing documents give a legal, monetary remedy to association for a violation, an action for an injunction is not appropriate and no attorneys fees can be awarded when violation is voluntarily corrected.
- In the absence of proof of intent, a clerical error in the name of a party in an affidavit is not fraud.

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RECENT CASE SUMMARIES

In **Alorda vs. Sutton Place Homeowners Association, Inc.**, 37 Fla. L. Weekly D100a, (Fla. 2nd DCA, January 6, 2012) Owner lived in a multifamily town home community. Pursuant to the governing documents, Owner was required to maintain insurance on their residential property and annually provide proof of such coverage to Association. Specifically, the declaration stated that at the time of purchase all owners must provide proof of such coverage and that on the purchase anniversary date each year, all owners must provide proof that such coverage has been renewed. Owner failed to provide proof of insurance on the first anniversary of purchase. Association sent demand letters to Owner to provide proof of insurance, however Owner failed or refused these demands. In September 2008, Association sent its offer to engage in presuit mediation regarding the coverage issue. Although Owner agreed at that time to provide the proof of coverage, he continued to fail to do so. Association tried one last time on March 9, 2009 to resolve the matter. When these efforts failed, Association filed its complaint against Owner on April 9, 2009. By the complaint, Association sought the equitable remedy of injunctive relief, specifically asking the trial court to *"...enter a permanent mandatory injunction requiring that the Defendant obtain the insurance coverages as are described in the Declaration*." On May 6, 2009, Owner's attorney sent a letter advising that Owner had obtained the insurance. Owner provided a copy of the declaration pages, dated March 19, 2009. Owner's attorney requested that Association dismiss the case. When Association refused, Owner's attorney filed a motion to dismiss arguing that the trial court lacked jurisdiction to enter a temporary injunction because an adequate remedy at law existed. Specifically, pursuant to the terms of the declaration, if an owner failed to provide proof of insurance, Association could obtain the insurance and assess the owner for the cost of the insurance. Thus, Owner's attorney argued that Association had an adequate remedy at law (buying the insurance and billing for the cost) and thus injunctive relief was not available to Association. Ultimately, the trial court dismissed the complaint as moot, and conducted a hearing at which it determined that Association was the prevailing party and was entitled to more than $10,000 in attorney's fees. On appeal, Owner again argued that the elements necessary to support a claim for mandatory injunction did not exist. The Second District Court of Appeal reversed the trial court and held that under the terms of the declaration in this case, Association could never prevail in its request for an injunction. As such, the complaint, on its face, fails to state a cause of action. Because this impossibility prevented the award of fees to Association, the appellate court was compelled to reverse the trial court.

In **Lake Charleston Homeowners Association, Inc. vs. Haswell**, 37 Fla. L. Weekly D243d (Fla. 4th DCA, January 25, 2012) Association appealed the trial court's order granting Owner's motion for relief from a final judgment of foreclosure. The trial court granted the motion on the basis that Association, which is actually named "Lake Charleston *Maintenance* Association, Inc." misnamed itself in the affidavit filed in support of its motion for summary judgment as "Lake Charleston *Homeowners* Association, Inc." Association argued that this misnomer did not entitle the defendant to relief. Owner brought his motion based upon alleged fraud, misrepresentation, or other misconduct of an adverse party. Owner's counsel alleged that Association's counsel committed fraud and misconduct because he "should have been aware that he named the wrong entity." In response, Association filed a motion to correct the misnomer as a mere clerical mistake. The trial court denied Association's motion to correct the clerical mistake. Thereafter, the trial court held an evidentiary hearing on Owner's motion for relief from judgment. Although the trial court found that there was no fraud or intent to defraud, the affidavit was nonetheless wrong and therefore inaccurate. On appeal to the Fourth District Court of Appeal, the appellate court reversed the trial court. The appellate court noted that Association had committed a simple clerical mistake. As such, the trial court was required to deny Owner's motion for relief from judgment, and to grant association's motion to correct the error.

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