



Litigating in Florida: Updates and Recent Decisions

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Speeding Up the Foreclosure Process Using Florida Statutes Section 702.10

The Florida Supreme Court has reported an increase in new real estate and mortgage foreclosure filings of in excess of 170,000 cases during the past fiscal year. During the past three budget years, fiscal cuts have resulted in the loss of more than 290 positions within the judicial branch. Lenders are now painfully aware that the adjudication of foreclosure proceedings has slowed drastically as a result of the increase in filings coupled with the loss of judicial resources. However, an under-utilized procedure exists that may, in some cases, expedite the foreclosure process. Florida Statutes Section 702.10, sometimes nicknamed the summary foreclosure statute, allows a mortgagee to utilize an order to show cause to potentially secure a foreclosure judgment or other relief within 60 days after the order is issued.

Section 702.10 permits the issuance of two different types

of orders to show cause: an order to show cause why a judgment of foreclosure should not be entered; and an order to show cause why the mortgagor of non-residential property should not be compelled to make payments due under the note and mortgage. The motion(s) for order to show cause can be heard either before or after service of process. To secure either order, the mortgagee's complaint must be verified and state a facial cause of action to foreclose upon real property.

The motion to show cause why a judgment of foreclosure should not be entered must be accompanied by a proposed order satisfying all requirements of the statute and a proposed judgment of foreclosure. If the motion is heard before service of process, the hearing date must be more than 20 days after service of the order but in any case must be held within 60 days of service. The defendant must respond to the order either by filing a motion challenging the complaint or by providing evidence of its defenses. If a motion is filed and not heard prior to the show

cause hearing, the motion can be decided at the hearing. If there is no pending motion challenging the complaint at the time of the show cause hearing, the defendant must provide evidence of its defenses by either filing an affidavit or verified answer or by offering testimony at the hearing. Failure to provide sworn defenses constitutes a waiver of the defendant's right to be heard. The mere filing of an unverified answer is insufficient. If the right to be heard is not waived, the court must determine whether the defendant has shown cause why a judgment should not be entered. The resulting judgment is for foreclosure only, but does not preclude the entry of a deficiency judgment. Even if the judgment is not entered, the defendant's position is to an extent locked in by the sworn filings or testimony; in essence free discovery.

The motion to show cause why the mortgagor should not be compelled to make payments during the pendency of the proceeding is substantially the same except that no foreclosure judgment need be

attached to the motion, the show cause hearing is not required to be held within 60 days, and the property must be non-residential. If the right to be heard is waived or if the court, based upon the verified complaint and the evidence presented by the defendant, determines that the mortgagee is likely to prevail, the court may order the mortgagor to resume making payments at the times and in the amounts provided for in the mortgage prior to acceleration. Acceptance of the payments does not waive or cure any default. If the defendant fails to make payments as ordered, the mortgagee is entitled to the entry of a writ of possession for the property.

Both procedures have the potential to speed up the foreclosure process and, if used in conjunction with one another, may at least provide interim relief. The statute is underutilized and provides a mortgagee with some relief from the delays that currently plague the litigation process.

“Boilerplate” Objections to Document Requests Citing the Attorney-Client Privilege, Without the Production of a Privilege Log, May Result in Waiver of the Privilege

An increasingly commonplace discovery practice is the broad assertion of the attorney-client

and work-product privileges in responses to discovery requests. However, as exemplified in a recent decision from the District Court for the Northern District of Florida, this practice, without the production of a privilege log may not only be an insufficient assertion of such privileges, but may, in fact, lead to a waiver of such privileges.

In *Pensacola Firefighters’ Relief and Pension Fund v. Merrill Lynch*, No. 3:09-cv53/MCR/MD (N.D. Fla. June 28, 2010), the plaintiff sued, under the Securities Act of 1934, for breaches of fiduciary duty and fraud based on failure to disclose, and propounded requests for production on the defendant, Merrill Lynch. Merrill Lynch timely responded, asserting objections that the requests were overly broad, unduly burdensome, not reasonably limited in time and space, and that the requests sought material that was confidential or protected by the attorney-client or work-product privilege. Merrill Lynch did not, however, provide a privilege log detailing the documents withheld. After the parties conferred and were not able to resolve their disputes, the plaintiff filed a motion to compel. In the motion, the plaintiff asserted that Merrill Lynch waived the attorney-client privilege by asserting the privilege without timely producing a privilege log as

required by Civil Procedure Rule 26(b)(5).

The Magistrate Judge overseeing the dispute ordered Merrill Lynch to respond to the requests and to endeavor, with plaintiff, to resolve any remaining issues, but stated that he was not inclined to find an accidental or implied waiver of the attorney-client privilege. Merrill Lynch subsequently filed supplemental answers, but continued to assert that certain requests were overly broad. After the parties filed a status report, the Magistrate Judge held a hearing, after which he granted the plaintiff’s motion to compel, in part, and held that, based on the continued failure to produce a privilege log, Merrill Lynch had waived the attorney-client and work-product privileges. Merrill Lynch later filed a motion for partial reconsideration, to which it attached a short privilege log, and a motion for a protective order regarding allegedly confidential documents. The Magistrate Judge denied the motion for partial reconsideration as to the privilege issue.

Merrill Lynch then filed an objection with the District Court to the Magistrate Judge’s Orders regarding the privilege waiver. The Court recognized that in the event of a failure to produce a privilege log with the 30 days provided for responding to discovery

requests, a responding party must either agree with the opposing party to an extension or apply for a protective order prior to the expiration of that 30-day limit. Because Merrill Lynch did neither, the Court approved the Magistrate Judge's determination that Merrill Lynch's claim of privilege and request

for a protective order was "too little, too late."

Accordingly, although waiver of privilege is considered an extreme remedy, failure to follow the requirements for the production of a privilege log can lead to dire consequences. ■

**Courtesy of Berger Singerman's Dispute Resolution Team with offices in Fort Lauderdale, Miami, Boca Raton and Tallahassee.*

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