

Foreclosure Crisis

New strategy attacks validity of affidavits

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When it comes to fighting foreclosures, homeowners and their lawyers may have found a new strategy to score courtroom victories.

Defense lawyers across the state are increasingly attacking the validity of affidavits that owners of notes must file with the courts as part of the foreclosure process. Attorneys like Dustin Zacks, of the firm Ice Legal in West Palm Beach, are successfully arguing that plaintiffs — usually a trust that owns the note or the servicer of the note — are violating court rules by filing affidavits with no records attached to support their foreclosure suits. The records include details of the loan, borrower fees and payment history.

The Florida Rules of Civil Procedure (Rule 1.510) states that “sworn or certified copies” of all records referred to in the affidavit must be attached as evidence in the foreclosure case.

The rule helps ensure that homeowners’s due process rights aren’t violated — namely that the lender has to prove it is entitled to press its claim.

In a foreclosure suit, the plaintiff’s affidavit outlines how much the homeowner owes, asserts that there are no unresolved disputes between the lender and borrower and that the home is legally ready to be sold.

Judges rely on the affidavits as critical evidence when they hand down a summary judgment in favor of the lenders, which paves the way for the sale of a property at a foreclosure auction. Since most foreclosure cases are unopposed, the validity of the affidavits and compliance to the rules have rarely been questioned.

When a summary judgment is denied — because an affidavit is flawed, among other reasons — the homeowner can face the lender at trial.

A deficient affidavit can be the difference between homeowners losing their properties through a summary judgment or going to trial, Zacks said.

“These affidavits are the linchpin of cases when they are trying to win a house at summary judgment,” he said. “A summary judgment cuts short [a homeowner’s] right to a full trial.”

Several judges and lawyers say deficient affidavits are rare in most other civil cases, but are rampant in foreclosure cases.

“Our entire judicial system is under attack as a result of this foreclosure process,” said St. Petersburg lawyer Matthew Weidner, who blogs about foreclosures. “Judges, just like us, have just sort of overlooked this in the midst of this crisis.”

AG’s Investigation

Foreclosure firms are increasingly under scrutiny for questionable practices, including the alleged falsification of documents. Earlier this month, Florida Attorney General Bill McCollum launched a probe into the Law Offices of David J. Stern in Plantation; the Law Offices of Marshall C. Watson in Fort Lauderdale; and Shapiro & Fishman, with offices in Boca Raton and Tampa.

McCollum’s office is investigating whether the three law firms submitted false affidavits or fabricated court documents to obtain final judgments against homeowners.

The Law Offices of David J. Stern and Shapiro & Fishman deny wrongdoing and have filed motions to quash or modify the subpoenas issued by the AG office.

Defense lawyers, who have been filing civil lawsuits against the foreclosure law firms, welcomed the investigation. They claim some plaintiff lawyers are rushing through large volumes of foreclosures on behalf of lenders, often improperly serving notice on homeowners or filing false pleadings.

Some judges say they don’t have the resources nor it is their job to make sure every affidavit is proper, but at least two said they are interested in hearing the argument.

“It is a genuine question that should be raised,” said Miami-Dade Circuit Judge Jennifer Bailey. “The question is, where should each judge draw the line about the degree of investigation they are going to do on these affidavits? There is no clear answer.”

In June, Zacks persuaded Palm Beach Circuit Judge Howard Harrison Jr. to deny a motion for summary judgment because of a flawed affidavit.



Dustin Zacks

Harrison told a representative of the Bank of New York, the loan's trustee, that it needed to produce the loan records rather than having an employee of the plaintiff attorney or the loan servicer attest that documents are in order before signing the affidavits.

"It basically just says he looked at and plugged some numbers in," Harrison said, according to a transcript of a June 29 hearing. "If they are not contested, that's fine. But where somebody just basically says, 'I looked at the records,' this is it. That's not enough for me to agree."

Harrison's ruling gave Elizabeth and David Mosquera a temporary break. The couple owes \$1 million on a six-bedroom Wellington home they bought for \$1.4 million in 2007, according to Palm Beach County property records. The couple fell behind on their mortgage payments last year.

In May, Zacks got Palm Beach Circuit Judge Jack Cook to strike an affidavit that did not include records. Now it will be up to Wells Fargo Bank, as trustee, to file a new affidavit.

Challenging Rule

In addition to requiring a copy of the records, Rule 1.510 also says that the person signing the affidavit must have personal knowledge of the facts of the case. That can be a challenge since most loans have been sold several times since they were originated and have been processed by different servicers. Many notes and mortgages are not available for review.

Since the foreclosure crisis started in 2008, it has become common for plaintiff lawyers and servicers to assign an employee to sign hundreds of affidavits, even though they usually are not familiar with the cases.

"I'd like to see in one of these cases where a defense lawyer cross examines, takes a deposition of these people [so] we can see whether they ought to be charged with perjury for all of these affidavits," Pinellas Circuit Judge Anthony Rondolino said during an April 7 hearing.

At that hearing, he vacated a summary judgment he granted in January in favor of GMAC Mortgage.

Rondolino reconsidered his decision after defense lawyer Michael Wasylik of Dade City asked for a rehearing to challenge GMAC's affidavit, which did not include any sworn or certified documents.

Rondolino said he hasn't seen many defense lawyers use flawed-affidavit arguments as a defense, "but when they do raise these issues, I listen to the argument carefully."

Wasylik said summary judgements that were granted based on insufficient affidavits can be appealed and set aside.

"If courts are fooled into granting judgments ... it could be disastrous for Florida's real estate," he said.

Attorney Mark Romance, with Richman Greer in Miami, said people who lost their homes to foreclosure can appeal a judgment that was the result of an insufficient affidavit or on a mistake.

"That doesn't help necessarily the person whose home has been foreclosed upon and sold ... but they can still get some relieve from the court," he said.

Nonjudicial process?

The Florida Bankers Association is pushing state lawmakers to make the foreclosure process nonjudicial so lenders can repossess properties faster.

It can take more than a year for uncontested cases to move through the overworked court system and several years if a homeowner defends the case.

A bill proposed by the FBA to make foreclosures nonjudicial failed earlier this year during the legislative session in Tallahassee. The industry group is considering re-introducing the bill in the 2011 session, said Anthony DiMarco, the FBA's executive vice president and director of government affairs.

"Everybody has the right to a defense, but if they do it just to slow down the process, they are just going to slow down the [recovery of the housing market,]" DiMarco said. "And the faster we get through all this, the faster we are going to get to the end of the crisis and we can move on."

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