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New Strategy in Foreclosure Battles Attacks Validity of Affidavits

Paola Iuspa-Abbott
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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 Florida 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, Fla., 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 plaintiffs 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 is it 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.

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 plaintiffs attorney or the loan servicer attest that documents are in order before signing the affidavits.

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