

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2594

SPONSOR: Judiciary Committee and Senator Campbell

SUBJECT: Mortgage-foreclosure Proceedings

DATE: April 16, 2000 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Johnson	JU	Favorable/CS
2.			BI	
3.				
4.				
5.				

I. Summary:

The Committee Substitute for Senate Bill 2594 amends s. 702.10, F.S., which provides an expedited process for mortgage foreclosure proceedings. It is amended to provide that a hearing on the order to show cause must be held within 90 days of service of the order on the defendant. The section is amended to provide notice to the defendant that if an answer that does not contest the foreclosure is filed the court may determine that the defendant waived the right to a hearing and the court may enter a final judgement of foreclosure. Further, where a default judgment has been entered and the note or mortgage provides for reasonable attorney's fees, the court is not required to hold a hearing or to adjudge the requested attorney fees as reasonable where the fees do not exceed 3 percent of the principal amount owed at the time of filing.

This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Chapter 702, F.S., provides for foreclosure of mortgages, and section 702.10 provides an expedited process for foreclosure. This process provides that the mortgagee may move the court for an order to show cause for the entry of final judgment after a complaint in foreclosure has been filed. If service of process is obtained, the final hearing and final judgment can be entered 20 days after service. If constructive service is obtained, the hearing may not be set less than 30 days after the first publication.

The order to show cause must state:

- ▶ The date and time for the hearing;
- ▶ The time in which service must be obtained;
- ▶ The filing of defenses in a motion or answer by the date of the hearing constitutes cause for the court not to enter a final judgement;
- ▶ The defendant has the right to file affidavits or other papers at the hearing and may appear in person;

- ▶ That if the defendant files defenses by motion, the hearing time will be used to hear those defenses;
- ▶ That if the defendant fails to appear or file defenses, the defendant may be deemed to have waived the right to a hearing and the court may enter a final judgment of foreclosure.

Additionally, a copy of the proposed final judgment must be attached.

The final judgment entered based on the order to show cause shall provide only in rem relief. However, the section does not preclude the entry of a deficiency judgement as otherwise provided by law.

Where the court finds that the defendant waived the right to be heard the court may promptly enter a final judgment of foreclosure. If the defendant has not waived his or her right to be heard, the court shall determine whether there is cause not to enter the final judgement, and if no cause is found, the judgment must be entered.

Where the order to show cause is not requested by the mortgagee and the defendant does not answer the complaint a default may be entered pursuant to rule 1.160, Fla. Rules of Civ.Proc. In order to then collect on the judgment and to collect attorney fees, the mortgagee will need to request a hearing to determine unliquidated damages, which includes attorney fees unless the mortgage or note specifically provide the amount of such fees.

Section 702.01, F.S., provides that mortgage foreclosures are an action in equity. The court is required to sever all counter claims against the mortgagee for a separate trial and the foreclosure action is to be tried to the court without a jury.

Section 687.06, F.S., provides for the payment of attorney fees for enforcement of contracts either in law or equity. It states in part:

[I]t shall not be necessary for the court to adjudge an attorney's fee, provided in any note or other instrument of writing, to be reasonable and just, when such fee does not exceed 10 percent of the principal sum named in said note, or other instrument in writing.

In reviewing this provision the 4th DCA held that a fee of 10 percent or less is not to be examined by the courts for reasonableness or fairness absent a plea for equitable considerations such as unconscionability. *Dean v. Coyne*, 455 So.2d 576 (1984). However, this provision has been found to apply only when the percent is stated in the mortgage. Specifically, this section was found not to apply to a mortgage that requires payment of a reasonable fee but which did not specify the percentage. *Sepler v. Emanuel*, 388 So.2d 28 (Fla. 3d DCA, 1980). In *Sepler* the court discussed the effect of not requiring the contract to specify the percentage of the fee:

It is often the case that where there is an agreement to pay a reasonable attorney's fee, it is shown that a fee of more than 10% is reasonable. Plaintiff would retain that right but deny to the defendant an opportunity to be heard when the defendant could show that a fee of less than 10% was reasonable. In our view such an interpretation of the statute would render it unconstitutional.

Dean, supra., applied this in the circumstance where the mortgage stated a fee of 10% or more. The court found based on the provisions of s. 687.06, F.S., that there was also a right of the appellee to show that the fee was excessive. The court stated that if the statute was not construed in that manner it could be found to be unconstitutional as violative of the appellee's right to equal protection or access to the courts. *Dean, at 577.*

Further, where a contract provides for the payment of reasonable attorney fees the courts have found those fees to be unliquidated damages which must be proved at trial. *Parker v. Dekle*, 35 So. 4(1903), *Bowman v. Kingsland Dev., Inc.*, 432 So. 2d 660(Fla. 5th DCA, 1983), *Roggerman v. Boston Safe Deposit & Trust Co.*, 670 So.2d 1073(Fla. 4th DCA, 1996).

The Florida Bar Rules, which regulate the practice of law in Florida, discuss the enforceability of a contract provision which provides for a "reasonable attorney fee." Rule 4-1.5 provides for fees for legal services and discusses what is a clearly excessive fee and sets out factors to be considered in determining a reasonable fee. Finally, the rule provides that all the factors should be considered in establishing a reasonable attorney fee.

III. Effect of Proposed Changes:

The Committee Substitute for Senate Bill 2594 amends section 702.10, F.S., to require that the hearing on the order to show cause must be held within 90 days of the date of service. This provides a period of 60 days in which the hearing may be held since the hearing may not be set less than 30 days after notice.

The section is amended to add that if the defendant files an answer that does not contest the foreclosure the defendant may be deemed by the court to have waived the right to a hearing. Then the court may enter a final judgment of foreclosure.

The section is also amended to provide a definition of reasonable attorney's fees which the court may use when a default judgement has been entered. Where the note or mortgage provides for reasonable attorney's fees and a default judgment has been entered against the mortgagor the court is not required to hold a hearing or to adjudge the requested attorney fees as reasonable where the fees do not exceed 3 percent of the principal amount owed on the note or mortgage at the time of filing. This provision applies even if the note or mortgage does not specify the percentage that would be paid as liquidated damages. Notice of this provision must be provided in the order to show cause.

The provisions related to the attorney fees would provide a statutory definition of "reasonable attorney's fees" which would allow for the fee to be determined and dealt with as liquidated damages when there is a default judgment. This would remove the necessity of a hearing on attorney fees when there were no objections filed by the defendant. However, the provision does not remove the court's right to hold a hearing.

Finally, the bill removes the statement in the section which provides that nothing in the section will preclude the entry of a deficiency judgment and requires the court to promptly enter final judgement.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The provisions of the bill would eliminate the need for parties obtaining a default judgment on a mortgage foreclosure to request a hearing on attorney fees in each case.

C. Government Sector Impact:

The Court will no longer be required to review awards of attorney fees that do not exceed 3 percent of the principal amount owed on the note or mortgage at the time where there is a default judgment in the underlying mortgage foreclosure. There is no information regarding how often this is done by the courts so the exact savings can not be calculated.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None

VIII. Amendments:

None.

