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Florida's Second District Court of Appeal Confirms Substantial Compliance is the Standard for Evaluating Conditions Precedent to Mortgage Foreclosures

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Earlier this week, the Second District Court of Appeal issued a long-awaited opinion in *Green Tree Servicing v. Milam*, Case No. 2D14-660 (Fla. 2nd DCA July 29, 2015). Until this decision, the district courts in Florida had not spoken directly on the issue of whether strict compliance or substantial compliance applied to evaluating contractual conditions precedent in the mortgage foreclosure context.

Borrowers' counsel argued fervently that absolute strict compliance with the notice provisions in paragraph 22 of the mortgage is required as a condition precedent to a foreclosure action and that failure to comply should result in dismissal of the action. They were thus successful in having literally hundreds of foreclosure actions in Florida dismissed on motion practice before trial or sometimes even at trial. The basis for these dismissals were notice letters that varied – sometimes only very slightly – from the literal requirements in paragraph 22. On the other hand, counsel for servicers and lenders argued that the standard for evaluating contractual conditions precedent has long been substantial compliance and that mortgage foreclosures and the requirements of paragraph 22 should be evaluated no differently.

While a few appellate opinions issued in the recent past had touched on this issue and even ruled on the sufficiency – or lack thereof – of these letters, none had expressly announced the standard. Until this week. The *Milam* opinion not only confirms that substantial compliance is the applicable standard, but, in a thorough, well-reasoned, and scholarly fashion walks through a handful of typical borrower arguments that rely on technical defects and explains why those cannot be the basis for delaying or dismissing otherwise proper foreclosures.

Prior to *Milam*, the key opinions on paragraph 22 were: *Samaroo v. Wells Fargo Bank, N.A* ., 137 So. 3d 1127 (Fla. 5th DCA 2014); *U.S. Bank National Ass'n v. Busquets* , 135 So. 3d 488 (Fla. 2nd DCA 2014); *Gorel v. The Bank of New York, Mellon*, 165 So. 3d 44 (Fla. 5th DCA 2015); and *Vasilevskiy v. Wachovia Bank, N.A* ., -- So. 3d --, 2015 WL 2414502 (Fla. 5th DCA 2015).

The *Samaroo* court addressed a notice letter that failed to inform the borrower of the right to reinstate and was thus missing one of the elements required by paragraph 22. The lender argued that the letter nevertheless substantially complied with paragraph 22, but the court held that, under the circumstances, that was an argument it could not countenance.

In *Busquets*, the court addressed a notice letter that advised that the borrower "may" have the right to reinstate. Borrower's counsel argued that the notice did not comply because, by implying the right was conditional, the notice did not comply with

paragraph 22. The court found the right was in fact conditional and not absolute and that "may" appropriately described it. As with *Samaroo*, however, the *Busquets* court did not expressly identify the standard for evaluating compliance with the requirements in paragraph 22.

In *Gorel*, the court noted in dicta that "[a]sent some prejudice, the breach of a condition precedent does not constitute a defense to the enforcement of an otherwise valid contract." While not holding that prejudice is required or expressly confirming that the standard is substantial compliance, the *Gorel* court thus suggested that a defect in the notice that does not prejudice the borrower is not a defense to a foreclosure. In *Vasilevskiy*, the court went further and held that the lender breached the contractual condition precedent by failing to give a full 30 days for the borrower to cure the default. Nevertheless, the *Vasilevskiy* court held the breach was not material because the borrowers never sought to cure the default, and, as a result, could not make a credible claim that the breach prejudiced them. Citing to *Gorel*, the court held that, absent prejudice, a breach of conditions precedent does not constitute a defense to a foreclosure.

In *Milam*, the court held that mortgages are to be interpreted and applied just like other contracts. Because contractual conditions precedent are evaluated by a substantial compliance standard, the court held that standard applied equally to mortgages and, particularly, the notice requirements in paragraph 22 of the standard residential mortgage at issue in that case.

The court then turned to the specific notice letter at issue and noted that, unlike the letters that are the subject of other opinions, it spoke to each of the five items required by paragraph 22: (i) the default, (ii) the action required to cure the default, (iii) a deadline to cure 30 days out from the date of the letter, (iv) failure to cure may result in acceleration, foreclosure, and sale, and (v) the right to reinstate and assert defenses.

The court first addressed the trial court's reason for granting summary judgment in favor of the borrowers, which was that the letter informed the borrowers that they "may" have the right to reinstate and assert defenses. Relying on *Busquets*, the court found that case dispositive, held that these rights are contingent, and that the letter adequately informed the borrowers of them. The court also noted that the borrowers' actions belied their argument that the letter was misleading because, after the foreclosure had been filed, they first actively sought a modification and then retained counsel and vigorously defended the case.

The court then addressed the additional reasons offered by the borrowers for affirming the trial court's order on appeal. The borrowers argued that the letter failed to specify the default, accurately calculate the payment required to cure by including a future payment, and give an address where payment was to be sent. The court addressed each argument independently. As to the default, it held that notifying the borrowers that their November monthly payment had been missed was sufficiently explicit to comply with paragraph 22. As to the action required to cure the default, the court held that inclusion of a payment that had not yet come due but would come due within the required 30 day notice period was an immaterial variation from the requirement of paragraph 22. Finally, the court rejected the argument that the absence of an address where payment could be sent constituted a failure to provide notice of the action required to cure the default. It found that the action to cure was clear: bring the loan current. The borrowers could easily obtain a payment address from at least two independent sources, the court noted, and the failure to provide an address was no more of a failure of the obligation to give notice of the action to cure than the absence of detailed instructions on how to mail the payment.

The *Milam* opinion brings significant clarity, reason, and cohesion to the line of cases discussed above and to this aspect of the mortgage foreclosure debate. Once it is final, it will provide a useful tool in effecting the prompt adjudication of foreclosure cases on the merits rather than technicalities, and, importantly, restore to borrowers the important responsibilities of being free and reasonable agents capable of understanding basic notice letters.