

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 237 Legal Instruments
SPONSOR(S): Civil Justice Subcommittee, Altman and others
TIED BILLS: IDEN./SIM. BILLS: CS/SB 286

FINAL HOUSE FLOOR ACTION: 119 Y's 0 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/HB 237 passed the House on May 2, 2023, as CS/SB 286.

Section 117.285, F.S., specifically authorizes the use of remote online witnesses for the execution of estate planning documents if specified requirements are met. Most of these documents do not require notarization, but all must be witnessed by either two attesting or subscribing witnesses. Section 117.285(5), F.S., enumerates additional requirements applicable when fewer than two witnesses are physically present with the principal. However, the term “witness” is undefined, creating ambiguity as to whether these requirements still apply when persons are physically present with the principal and therefore “witnessing” – that is, observing – the document’s execution but not signing the document as a legally attesting or subscribing witness.

Section 697.07, F.S., authorizes a mortgage or separate instrument to provide for an assignment of rents of real property as security for repayment of the mortgage. If such an assignment is made, the mortgagee has a lien on the rents, allowing the mortgagee to collect rent payments from the mortgagor’s tenants should the mortgagor default on mortgage payments. Similarly, s. 702.10, F.S., provides that, in a foreclosure action, the plaintiff may generally request that the court direct the mortgagor defendant to show cause why an order to make payments during the pendency of the foreclosure proceedings or vacate the premises should not be entered. However, courts have held that these sections are unenforceable against third parties who acquire real property subject to a mortgage lien without assuming the mortgage loan’s obligations. Thus, the mortgagee may be unable to collect payments from the third party during the foreclosure action but may still be obligated under the mortgage contract to pay taxes on and insurance premiums for the subject property.

The Florida Supreme Court has long held that a junior lienholder may not foreclose a senior lienholder’s lien. However, in 2021, the Fourth DCA decided *Wells Fargo Bank, N.A. v. Tan*, in which the court held that a junior lienholder can foreclose the lien of a senior lienholder if it serves the senior lienholder with process and the senior lienholder fails to appear or file responsive pleadings in court. The *Tan* court then applied s. 702.036, F.S., which provides that, where a mortgage lien is improperly foreclosed, the only remedy is a claim for monetary damages against the party responsible for the improper action if certain conditions are met, including that the mortgagee was properly served and a final judgment of foreclosure was entered.

The bill:

- Amends s. 117.201, F.S., to define “witness” as someone whose electronic signature is affixed to an electronic record to attest or subscribe to a principal’s signature on such record.
- Amends ss. 697.07 and 702.10, F.S., to define “mortgagor” to include third parties who acquire title to or an interest in a mortgaged property, with exceptions. This may allow a mortgagee to collect payments from a third party who is not subject to the mortgage during a mortgage lien foreclosure.
- Amends s. 702.036, F.S., to provide that this section applies to final judgments of foreclosure of any lien and authorize the award of prevailing party attorney fees. This may disincentive a junior lienholder from attempting to improperly foreclose a senior lienholder’s lien after the *Tan* decision.

The bill does not appear to have a fiscal impact on state or local governments. The bill was approved by the Governor on June 12, 2023, ch. 2023-223, L.O.F., and takes effect on July 1, 2023.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Witnessing of Electronic Legal Documents

General Provisions

2019 CS/CS/HB 409 created Part II of ch.117, Florida Statutes, to authorize the online notarization of electronic documents if specified requirements are met. However, an online notary public's failure to comply with these requirements does not invalidate the notarial act or the electronic record; instead, such failure may be introduced for evidentiary purposes, including to establish ch. 117 violations or to prove fraud, forgery, or impersonation.¹

Under this part, a notary public performing an online notarization must verify the principal's identity at the time the principal's signature is taken by using audio-video communication technology and record the entire audio-video conference session during which the electronic document is executed.² Identity verification must be by:

- Remote presentation of a government-issued identification credential;
- Credential analysis of each government-issued identification credential; and
- Identity proofing in the form of knowledge-based authentication or another method of identity proofing that conforms to statutory standards.³

Part II of ch. 117 also allows an online notary public to supervise the witnessing of electronic documents by the same audio-video communication technology used for online notarization.⁴ The witness may be physically present with the principal or remote from the principal if the witness and principal use audio-video communication technology.⁵ In either case, the online notary public must verify the witness's identity in the same manner as the principal's identity, and the witness must be present (whether in person or remotely) at the time the principal affixes the electronic signature and hear the principal make a statement to the effect that the principal has signed the electronic record.⁶

Application to Estate Planning Documents

Florida law specifically authorizes the use of remote online witnesses for estate planning document execution, including wills, if specified requirements are met.⁷ Most of these documents do not require notarization, but all must be witnessed by either two attesting or subscribing witnesses, and Florida law enumerates additional requirements that apply when fewer than two such witnesses are physically present with the principal.⁸ However, the term "witness" is undefined, creating ambiguity as to whether these additional requirements still apply when persons are physically present with the principal and therefore "witnessing" – that is, merely observing – the estate planning document's execution but not signing the document as an official attesting or subscribing witness.⁹

¹ S. 117.265(9), F.S.

² S. 117.265(2), F.S.

³ S. 117.265(4), F.S.

⁴ S. 117.285, F.S.

⁵ S. 117.285(1), F.S.

⁶ S. 117.285(3), F.S.

⁷ S. 117.285(5), F.S.

⁸ *Id.*

⁹ Real Property, Probate, & Trust Law Section of the Florida Bar ("RPPTL"), *White Paper: Amendment to Section 117.201, Florida Statutes, Clarifying Who is a Witness for Purposes of Electronic Estate Planning Documents* (Jan. 2023).

Assignment of Rents and Payments During Foreclosure

Assignment of Rents

Florida law authorizes a mortgage or separate instrument to provide for an assignment of rents of real property or any interest therein as security for the mortgage's repayment.¹⁰ If such an assignment is made, the mortgagee has a lien¹¹ on the rents, which lien shall be perfected and effective against third parties upon recording of the mortgage or separate instrument in the public records of the county in which the real property is located.¹²

An assignment of rents is generally enforceable when the mortgagor defaults on mortgage payments and the mortgagee makes written demand for rents to the mortgagor.¹³ The mortgagor must then turn over to the mortgagee all rents in his or her possession or control at the time of the written demand or collected thereafter ("collected rents").¹⁴ Further, in the foreclosure action, upon the mortgagee's or mortgagor's application, the court may require the mortgagor to deposit the collected rents into the court registry or other court-designated depository.¹⁵ The court may authorize the use of collected rents, before deposit into the court registry or other depository, to pay:

- The reasonable expenses solely to protect, preserve, and operate the real property, including real estate taxes and insurance;
- Escrow sums required by the mortgage or separate assignment of rents instrument; and
- The mortgagee.¹⁶

The court must require the mortgagor to account to the court and the mortgagee for the collected rents' receipt and use and may also impose other conditions on such use.¹⁷

All moneys received by the mortgagee under this section must be applied by the mortgagee in accordance with the mortgage, separate assignment of rents instrument, or promissory note, and the mortgagee must account to the mortgagor for such application.¹⁸ Any undisbursed collected rents remaining in the mortgagor's possession, or in the court registry or other depository, must be disbursed at the foreclosure action's conclusion in accordance with the court's final judgment.¹⁹

Payments During Foreclosure Action

Florida law generally authorizes the plaintiff in a foreclosure action to request that the court enter an order directing the mortgagor defendant to show cause why an order to make payments during the pendency of the foreclosure proceedings or an order to vacate the premises should not be entered.²⁰ A mortgagor defendant's:

- Right to be heard at the hearing to show cause is waived if the mortgagor defendant, after being served with an order to show cause, engages in conduct that clearly shows that he or she has relinquished the right to be heard on that order; and
- Failure to file defenses or to appear at the hearing presumptively constitutes conduct that clearly shows that the mortgagor defendant has relinquished the right to be heard.²¹

¹⁰ S. 697.07(1), F.S.

¹¹ A lien is a claim against property that evidences a debt, obligation, or duty. Fla. Jur. 2d Liens s. 37:1.

¹² S. 697.07(2), F.S.

¹³ S. 697.07(3), F.S.

¹⁴ *Id.*

¹⁵ S. 697.07(4), F.S.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ S. 697.07(8), F.S.

¹⁹ S. 697.07(5), F.S.

²⁰ S. 702.10(2), F.S.

²¹ *Id.*

If the court finds that a mortgagor defendant has waived the right to be heard, the court may promptly enter an order requiring payment in the amount specified or an order to vacate the property.²² However, if the court finds that a mortgagor defendant has not waived the right to be heard, the court must, at the hearing on the order to show cause, determine the probable validity of the underlying claim against the mortgagor defendant and his or her defenses, if any.²³ If the court determines that the plaintiff is likely to prevail in the foreclosure action, the court must order the mortgagor defendant to make payments to the plaintiff.²⁴ Under such an order:

- Payments are payable at such intervals and in such amounts provided for in the mortgage instrument before acceleration or maturity;
- The payment obligation commences from the date of the motion filed under s. 702.10(2), F.S.; and
- Payments must be credited against the mortgage obligation in accordance with the loan's terms but do not cure any default or constitute a waiver or any other defense to the foreclosure.²⁵

Further, such court order:

- Must be served upon the mortgagor defendant no later than 20 days before the first payment is owed;
- May permit, but may not require, the plaintiff to take all appropriate steps to secure the premises during the pendency of the foreclosure action;
- Must provide that the plaintiff is entitled to possession of the premises upon the mortgagor defendant's failure to make the required payments unless, at the hearing, the court found good cause to order some other enforcement method;²⁶ and
- Must be stayed until the foreclosure action's completion if the mortgagor defendant files with the court a written undertaking executed by a court-approved surety²⁷ in an amount equal to the unpaid balance of the lien being foreclosed, including all principal, interest, unpaid taxes, and insurance premiums paid by the plaintiff.²⁸

However, the provisions relating to payments during a foreclosure action do not apply to the foreclosure of an owner-occupied residence.²⁹ There is a rebuttable presumption that a residential property for which a homestead exemption³⁰ was granted according to the latest county property appraiser's assessment, before the filing of the foreclosure action, is an owner-occupied residential property.³¹

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Should payments not be made and the premises not be vacated in violation of the order, upon the filing of an affidavit with the clerk stating these facts, the clerk must issue to the sheriff a writ for possession. *Id.*

²⁷ A surety guarantees the performance or obligations of a second party (the principal - here, the mortgagor) to a third party (the obligee - here, the plaintiff) under a three-party contract. National Association of Security Bond Providers, *What are Surety Bonds*, [https://www.nasbp.org/getabond/about-surety#:~:text=A%20surety%20bond%20is%20a,third%20party%20\(the%20obligee\)](https://www.nasbp.org/getabond/about-surety#:~:text=A%20surety%20bond%20is%20a,third%20party%20(the%20obligee)) (last visited May 2, 2023).

²⁸ *Id.*

²⁹ *Id.*

³⁰ A homestead exemption is a property tax break offered based on the assessed value of a home which is the homeowner's permanent residence and where the homeowner was living as of January 1 of the tax year in question. Art. X, s. 4, Fla. Const.

³¹ *Id.*

Application to Third Parties

Borrowers who default on their mortgage payments often default on other financial obligations, leading to the sale of the property through a foreclosure action or other sale.³² For example, borrowers living in a homeowners', condominium, or cooperative association may default in paying association assessments; such assessments become a lien on the property, which if unsatisfied, may result in the association bringing a foreclosure action against the borrower.³³ Such borrowers may also file for bankruptcy, resulting in the property's sale by the bankruptcy trustee.³⁴

An investor may buy such properties for a low price because the investor takes title to the property subject to the existing mortgage lien. In other words, the investor is not obligated to pay on the mortgage, but, if the investor does not pay off the mortgage lien, the mortgagee may foreclose on the lien.³⁵ Some such investors may vigorously fight mortgage lien foreclosure actions where the property they purchased has a rent-paying tenant in order to maximize the rental income they can collect before the action's conclusion.³⁶ However, courts have held that ss. 697.07 and 702.10, F.S., are unenforceable against third parties who acquire real property subject to a mortgage lien without assuming the obligations of the existing mortgage loan. Thus, the mortgagee is unable to collect any payments from the third-party investor during the foreclosure action but is still obligated to pay taxes on and insurance premiums for the property.³⁷

Finality of Mortgage Foreclosure Judgment

The Florida Supreme Court has long held that a junior lienholder may not foreclose a senior lienholder's lien.³⁸ If somehow a junior lienholder were to improperly include a senior lienholder as a party to its foreclosure suit and obtain a judgment purporting to extinguish the senior interest, such foreclosure would be void *ab initio* as to such lienholder.³⁹ Thus, a senior lienholder has traditionally been free to ignore a junior lienholder's foreclosure action, and whoever acquired the property through the junior lienholder's foreclosure action would take title to the property subject to the senior lienholder's lien.

However, in 2021, the Fourth DCA decided *Wells Fargo Bank, N.A. v. Tan*, in which the court held that a junior lienholder can foreclose the lien of a senior lienholder if it serves the senior lienholder with process and the senior lienholder defaults.⁴⁰ The *Tan* court then applied s. 702.036, F.S., which provides that, where a mortgage lien is improperly foreclosed, the only remedy for the senior lienholder is a claim for monetary damages against the party responsible for the improper action if:

- The party seeking relief from the final judgment of foreclosure of the mortgage was properly served in the foreclosure lawsuit.
- The final judgment of foreclosure of the mortgage was entered as to the property.
- All applicable appeals periods have run as to the final judgment of foreclosure of the mortgage with no appeals having been taken or any appeals having been finally resolved.
- The property has been acquired for value, by a person not affiliated with the foreclosing lender or the foreclosed owner, at a time in which no lis pendens regarding the suit to set aside, invalidate, or challenge the foreclosure appears in the official records of the county where the property was located.

³² RPPTL, *White Paper: Proposal to Expand Applicability of § 697.07 and § 702.10 to Third Parties Who Acquire Properties Subject to a Mortgage* (Jan. 2023).

³³ For more on assessment liens, see ss. 718.116, 719.108, and 720.3085, F.S.

³⁴ For more on bankruptcy, see Chapters 7 and 13 of the federal Bankruptcy Code.

³⁵ RPPTL, *supra* note 32.

³⁶ *Id.*

³⁷ *Id.*; *Green Emerald Homes, LLC v. Residential Credit Opportunities Trust*, 256 So. 3d 211 (Fla. 2d DCA 2018).

³⁸ *Cone Bros. Const. Co., v. Moore*, 141 Fla. 420 (1940).

³⁹ *Id.*

⁴⁰ 320 So. 3d 782 (4th DCA 2021).

This Fourth DCA decision effectively changed the business expectations of Florida lenders by creating a significant risk that senior lienholders may have their liens foreclosed by junior lienholders if they do not litigate the dispute, which litigation may be costly.⁴¹

Effect of the Bill

Witnessing of Electronic Legal Documents

The bill amends s. 117.201, F.S., to define “witness,” when used as a noun in Part II of ch. 117, as someone whose electronic signature is affixed to an electronic record to attest or subscribe to a principal’s signature on such record. This clarifies that the requirements set out in s. 117.285(5), F.S., apply when fewer than two persons who will affix their signature to the electronic document as an attesting or subscribing witness are physically present with the principal, regardless of how many other individuals may be physically present with the principal and observing the document’s execution.

The bill also provides that this amendment applies retroactively to January 1, 2020, as it clarifies existing law.

Assignment of Rents and Payments During Foreclosure

Assignment of Rents

The bill amends s. 697.07, F.S., to define “mortgagee” as a person entitled to enforce an obligation secured by a mortgage and “mortgagor” as a person who grants a mortgage or a successor in ownership of the real property described in the mortgage. The bill also amends this section to:

- Allow the court to authorize the use of collected rents, before deposit into the court registry or other depository, to pay homeowners’, condominium, or cooperative assessments that come due after the entry of the court’s order.
- Specify that this section does not apply to a homeowners’, condominium, or cooperative association that:
 - Takes title to the property through the foreclosure of its assessment lien, or a deed in lieu of foreclosure, if the title remains vested in the association and any rents collected are applied to the assessments owed; or
 - Collects rents from tenants in a parcel or unit where the owner is delinquent in paying assessments owed to the association.

This allows an assignment of rents provision to be enforceable against third party investors who buy or otherwise acquire title to real property subject to a mortgage lien without assuming the obligations of the existing mortgage loan but creates an exception for homeowners’, condominium, and cooperative associations so that they can continue to collect assessments owed where they would otherwise be impacted by these changes.

Payments During Foreclosure Action

The bill amends s. 702.10, F.S., to define “mortgagor” as a person who grants a mortgage or a successor in ownership of the real property described in the mortgage but specifies that the term does not include a homeowners’, condominium, or cooperative association that:

- Takes title to the property through the foreclosure of its assessment lien, or a deed in lieu of foreclosure, if the title remains vested in the association and any rents collected are applied to the assessments owed; or
- Collects rents from tenants in a parcel or unit where the owner is delinquent in paying assessments owed to the association.

⁴¹ RPPTL, *White Paper: Proposal to Clarify the Finality of Foreclosure Judgments – Revising § 702.036* (Jan. 2023).

This gives the mortgagee the ability to seek a court order to collect payments from third party investors who buy or otherwise take possession of real property subject to a mortgage lien without assuming the obligations of the existing mortgage loan. It also creates an exception for homeowners', condominium, and cooperative associations so that they can continue to collect assessments owed where they would be otherwise impacted by these changes.

Finality of Mortgage Foreclosure Judgment

The bill amends s. 702.036, F.S., to:

- Provide that it applies to final judgments of foreclosure of any lien, not just a mortgage lien; and
- Create a two-way attorney fee provision authorizing the prevailing party in an action based on the allegedly improper foreclosing of a senior lien to recover his or her attorney fees from the losing party.

These changes may disincentivize a junior lienholder from attempting to improperly foreclose the lien of a senior lienholder, whether or not the senior lien is a mortgage lien, thus preserving the business expectations of mortgage lenders and other senior lienholders in the State.

The bill was approved by the Governor on June 12, 2023, ch. 2023-215, L.O.F., and takes effect on July 1, 2023.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate impact on local government expenditures to the extent it reduces litigation in the state court system.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may give mortgagees the ability to recover payments from third parties during a foreclosure action to help meet their financial obligations as to the mortgaged property while:

- Preventing third-party investors from benefitting financially from delaying foreclosure actions; and
- Protecting the ability of a homeowners', condominium, or cooperative association to recover assessments owed to the association even where such association would otherwise be impacted by these changes.

The bill may also preserve the business expectations of mortgage lenders and other senior lienholders in the State and reduce their litigation exposure by disincentivizing junior lienholders from attempting to improperly foreclose their liens, which could result in cost savings to mortgage lenders and other senior lienholders.

D. FISCAL COMMENTS:

None.