

Checklist Of The Major Ways Homeowners Can Defeat Motions For Summary Judgment In A Foreclosure Case (REVISED)

The most important event in every judicial foreclosure case is the summary judgment hearing, where a lender seeks to convince a foreclosure judge that there are no material issues in genuine dispute and hence no need for a trial.

If a homeowner defeats a lender's summary judgment motion, expect an attractive loan modification offer to follow, even if you have previously been turned down for a loan modification as supposedly not qualifying.

If a homeowner loses a summary judgment motion on the other hand, expect little more than a cash-for-keys offer, whereas it becomes very difficult to stop a subsequent sale and eviction.

Yet most homeowners and their counsel, if any, are unaware of all of the many proven ways most summary judgments can be avoided.

The purpose of today's show is to arm borrowers (and their attorneys) facing foreclosure with a checklist of the many ways that adverse summary judgments specifically in foreclosure cases can be defeated.

John and I group such summary judgment defenses around ten major headings, each of which defense, time permitting, we discuss on today's show.

1. DEFECTS IN PERSONAL JURISDICTION — depriving a foreclosure court from having any power over a homeowner, due to a lack of personal service of process of the summons and complaint, improper substitute service of process of the summons and complaint, ineffective out-of-state service of process of the summons and complaint, or statutory and/or due process violations in service of the summons and complaint by publication.

2. DEFECTS IN SUBJECT MATTER JURISDICTION — depriving a foreclosure court from having any power over the case, due to a lack of original statutory jurisdiction where, for instance, the lawsuit was filed in the wrong court, or where the foreclosing plaintiff has suffered no discernible harm or injury.

3. DEFECTS IN VENUE — depriving a foreclosure court from hearing a case based upon a statutory mandate for the case to be heard in another state court, due to the location of the parties and/or the location of the property being foreclosed on.

4. DEFECTS IN LEGAL STANDING — depriving a foreclosure court from deciding a case where the loan documents do not entitle the plaintiff to foreclose on the borrowers

or on the specific property, due to void transfers or breaks in the ownership of the note or mortgage or trust deed, lack of capacity to sue, and/or misdescription of transferors, transferees, mortgagees, or the property.

5. DEFECTS IN CONTRACTUAL CONDITIONS PRECEDENT — depriving a foreclosure court from granting a summary judgment where a foreclosing plaintiff has failed to satisfy its pre-foreclosure contractual obligations pursuant to the loan agreement including the promissory note and the mortgage or deed of trust, due to the failure to provide all homeowners and borrowers prior to suit with a proper default notice, wrongful rejection of the tender of payment, and/or failure of its loan general ledger to show an actual payment default or being consistent with the numerical contents of an alleged served default notice.

6. DEFECTS IN CONTRACTUAL CONDITIONS SUBSEQUENT — depriving a foreclosure court from granting a summary judgment where a foreclosing plaintiff is unable to satisfy its projected post-foreclosure contractual obligations pursuant to the loan agreement including the promissory note and the mortgage or deed of trust, due to inability to return the original negotiable promissory note marked paid, and/or other grounds for anticipatory breach of contract.

7. DEFECTS IN EVIDENCE — depriving a foreclosure court from granting a summary judgment where the plaintiff's evidence violates prescriptive provisions of a jurisdiction's Evidence Code, due to its supporting declarations being incomplete or not being based on personal knowledge but upon inadmissible hearsay or otherwise being contradictory and/or untrustworthy and/or self-serving, or without proof of ownership and possession of the promissory note and mortgage or deed of trust at the exact time the foreclosure lawsuit was first filed, known as "standing upon inception."

8. DEFECTS IN EQUITABLE STANDING — dissuading a foreclosure court from granting a summary judgment where the conduct of the foreclosing plaintiff has been inequitable, due to fraud and misrepresentation, illegality, laches, over-reaching, breach of fiduciary duty, a prejudicial lack of prosecution, adhesion, unilateral and mutual mistake, unclean hands, unconscionability, equitable estoppel, promissory estoppel, coercion, duress, unjust enrichment, force majeure, and/or a lack of good faith and fair dealing that prevented the borrower's timely performance.

9. DEFECTS RESULTING FROM FEDERAL PREEMPTION — depriving a foreclosure court from granting a summary judgment due to controlling federal laws overriding private loan agreements, such as the Truth-in-Lending Act (TILA), the Home Ownership and Equity Protection Act (HOEPA), the Racketeering Influenced and Corrupt Organizations Act (RICO), the Fair Debt Collection Practices Act (FDCPA), the Real Estate Settlement Procedures Act (RESPA), the Home Equity Conversion Mortgage Act (HECM), potentially federal securities laws and regulations, and various Rules and Codified Regulations of HUD, the VA, the Consumer Financial Protection Bureau (CFPB), the Federal Reserve Board (Fed) and other federal agencies.

10. DEFECTS RESULTING FROM STATE PREEMPTION — depriving a foreclosure court from granting a summary judgment due to controlling state laws overriding private loan agreements, such as state legislation pertaining to the statute of limitations, unfair and deceptive acts and practices, monopolistic practices, usury, potentially securities fraud, and credit inequalities including marital status discrimination.

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