

The 68 Mostly Under Used Affirmative Defenses That Can Save Your Home From Foreclosure And You And Your Family From Eviction

The importance of defensive pleadings is often overlooked by homeowners in foreclosure and by foreclosure defense attorneys.

In court, Pleadings consist of Plaintiff's Complaint, the Defendant's Answer including Affirmative Defenses, any Defendant's Counterclaims and Defendant's Cross-Claims against other Defendants and any Defendant's Third-Party Complaints, and opposing Answers and Replies.

Today we concentrate on the many Affirmative Defenses that can be included in Defendant's Answer that in individual foreclosure cases may be available to homeowners sued for foreclosure.

Affirmative Defenses are those sets of facts not contained in the Complaint that if proven will either diminish or completely block the foreclosure relief requested by the Plaintiff in the Complaint.

The pleading rules in different jurisdictions importantly differ, especially in federal courts which have abandoned "notice pleading" in favor of more detail demanding "plausibility pleading" requirements. Determine which pleading rules apply to your case.

However, in most but not all federal district courts, Affirmative Defenses are still governed by notice pleading standards, which means that in most state courts and in most federal district courts a homeowner need only to list by name without elaborating on his or her Affirmative Defenses.

All Affirmative Defenses relied upon by homeowner Defendants will need to be proven however in court during the duration of a foreclosure case, and generally Defendants have the burden of proof regarding Affirmative Defenses, which moreover if not plead in the Answer are generally considered waived.

Also, courts have the discretion generally to consider Affirmative Defenses as Counterclaims and Counterclaims as Affirmative Defenses despite how they may be formally labeled, and the burden of proof regarding some Affirmative Defenses is placed on the Plaintiff and not on the Defendant by statute or by caselaw, depending on the jurisdiction.

For all of the above reasons, it is important for homeowners sued for foreclosure or for eviction following a nonjudicial foreclosure to prepare their defense well in advance and to be as specific and as complete in their defensive pleadings.

That means that a foreclosure Defendant must carefully determine based on his or her facts which Affirmative Defenses fit his or her facts and can be proven perhaps with the aid of discovery before listing them in his or her Answer.

Several of the Affirmative Defenses overlap in their defensive scope, the better procedure being in such situations to list all that apply notwithstanding potential duplication.

Third-Party Complaints and how they might improve chances of defeating foreclosures will be the topic of a future Foreclosure Hour.

Listed before are at least 68 Affirmative Defenses available in most jurisdictions in defense against foreclosure, discussed, time permitting, on this Sunday's radio broadcast.

1. Statute of limitations
2. Standing
3. Breach of contract
4. Promissory estoppel
5. Adhesion
6. Mutual mistake
7. Unilateral mistake
8. Breach of covenant of good faith and fair dealing
9. Unfair and deceptive acts and practices
10. Unconscionability
11. Illegality
12. In pari delecto
13. Breach of fiduciary duty
14. Unclean hands
15. Equitable estoppel
16. Coercion
17. Duress
18. Usury
19. Fraud
20. Fraud in the factum
21. Intentional misrepresentation
22. Negligent misrepresentation
23. Fraudulent concealment
24. Anticipatory breach and repudiation
25. Securities fraud
26. Unjust enrichment
27. Recoupment
28. Offset
29. Setoff
30. Failure of consideration
31. Force majeure

32. Merger doctrine
33. Restraint of trade
34. Improper venue
35. Lack of subject matter jurisdiction
36. Lack of personal jurisdiction
37. Parole evidence rule
38. Payment
39. Insufficiency of service of process
40. Release
41. Novation
42. Res judicata
43. Collateral estoppel
44. Undue influence
45. Discharge in bankruptcy
46. Lack of capacity
47. Lack of exhaustion of administrative remedies
48. Splitting of causes of action
49. Lack of consideration
50. Accord and satisfaction
51. Failure to mitigate damages
52. Lack of necessary parties
53. Lack of indispensable parties
54. Absence of contractual conditions precedent
55. Statute of frauds
56. Laches
57. Impossibility of performance
58. Waiver
59. Marital status discrimination
60. Truth in Lending Act (TILA) violations
61. Home Ownership and Equity Protection Act (HOEPA) violations
62. Racketeering Influenced and Corrupt Organizations Act (RICO) violations
63. Fair Debt Collection Practices Act (FDCPA) violations
64. Real Estate Settlement Procedures Act (RESPA) violations
65. Home Equity Conversion Mortgage (HECM) violations
66. Attorney abandonment
67. Failure to state a claim upon which relief can be granted
68. All other affirmative defenses listed in all other pleadings in the case