

**FLORIDA'S SECOND DCA REVERSES FORECLOSURE DISMISSAL
BORROWERS FAILED TO PROPERLY ALLEGE CONDITION PRECEDENT**

For years, counsel for borrowers have successfully argued that the bank failed to meet conditions precedent required under Section 559.715 of Florida's Consumer Collection Practices Act ("FCCPA"). Procedurally, this argument has been raised in the borrower's answer to the mortgage foreclosure complaint. Rather than simply alleging it as a well-pled affirmative defense, the borrower generally denies that the lender complied with all conditions precedent required to bring a mortgage foreclosure action. The borrowers' strategy is to then move for summary judgment denying that the bank met conditions precedent and requesting dismissal of the case.

In the case of *Deutsche Bank National Trust Company v. Quinion*, the borrowers' counsel took the same strategic approach. The borrowers Wanda and Jim Creson generally denied Deutsche Bank met conditions precedent. The Cresons' answer stated, "Plaintiff failed to comply with the requirements of §559.715, Fla. Stat." The litigation proceeded to a hearing on the Cresons' motion for summary judgment. The circuit court was persuaded that Deutsche Bank had failed to comply with a condition precedent the court construed from section 559.715, Florida Statutes (2014). On February 25, 2014, the circuit court entered its order of dismissal, which stated simply that "Plaintiff did not comply with Fla. Stat. 559.715." The court dismissed Deutsche Bank's complaint, but without prejudice to file a new lawsuit. Because the order of dismissal both disposed of Deutsche Bank's complaint and required it to initiate a separate lawsuit, Deutsche Bank appealed the order of dismissal. On appeal, the parties took divergent positions as to whether Section 559.715 creates a condition precedent and its applicability to residential mortgage loans. However, this opinion addressed the narrow procedural requirement of how a defendant should properly raise a denial of a condition precedent.

The Second District Court of Appeal reversed the trial court's order of dismissal. It reiterated Florida's pleading standard governing conditions precedent. 2D14-1560, 2016 WL 166648 (Fla. 2d DCA Jan. 15, 2016). The court explained that, assuming, as the trial court did, that section 559.715 imposed a condition precedent to Deutsche Bank's foreclosure action, the burden fell to the Cresons to first frame that issue, specifically and with particularity, in their answer. Specifically, the appellate court found Florida

Rule of Civil Procedure 1.120(c) imposes a heightened pleading requirement upon a litigant who wishes to challenge the fulfillment of a condition precedent; under this rule, a “denial of performance or occurrence must be made “specifically and with particularity.” Therefore, the appellate court rejected the Cresons’ argument that a general allegation of noncompliance with the condition precedent is sufficient. Relying on *Godshalk v. Countrywide Home Loans Servicing, LP*, 81 So. 3d 626, 626 (Fla. 5th DCA 2012), the *Quinion* court stated this rule is intended to force a defendant to show his hand in advance to avoid surprise and to put the burden on the defendant to identify the specific condition the plaintiff failed to perform. The court further reasoned that Rule 1.120(c) was designed to ameliorate pleading ambiguity.

The takeaway from this case is that borrowers are no longer permitted to ambiguously plead failure to comply with Section 559.715, and then seek dismissal of the lender’s case. The Cresons had the burden of identifying both the nature of the condition precedent and the nature of its alleged failure before the trial court could dismiss Deutsche Bank’s complaint on any such basis.

We can expect that borrowers’ counsel will continue to allege this as an affirmative defense. In that regard, the Second District Court of Appeal ruled earlier this month that lenders are required to refute the FCCPA’s 559.715 argument as an affirmative defense. See *Amstone v. Bank of New York Mellon*, 2D14-5480, 2016 WL 56696, at *3 (Fla. 2d DCA Jan. 6, 2016) (reversing final judgment in favor of the bank and finding it failed to sufficiently refute Amstone’s failure to comply with Section 559.715, Florida Statutes affirmative defense.). The pleading requirements for an affirmative defense are not the same as alleging compliance with a condition precedent. While the Second DCA recently held that compliance with 559.715 is not a condition precedent to filing a mortgage foreclosure, the *Amstone* case still allows the borrower to continue to allege it as an affirmative defense that must be refuted. See *blog post on Brindise v. U.S. Bank Nat’l Assoc.*, 2D1403316, (Fla. 2d DCA Jan. 20, 2016). However, the bank can always argue that a Section 559.715 affirmative defense is factually and legally insufficient on summary judgment. See *Zito v. Washington Fed. Save. & Loan Assoc.*, 318 So. 2d 175, 176–77 (Fla. 3d DCA 1975).

Copies of the *Quinion* and *Amstone* opinions can be found [here](#) and [here](#), respectively.