NO RIGHT TO JURY TRIAL IN FORECLOSURE, EVEN WHERE LENDER SEEKS MONEY JUDGMENT ON PROMISSORY NOTE

Given the choice, a borrower in foreclosure may prefer that a jury determine her fate, rather than a judge. But by statute, **"[A]LL MORTGAGES SHALL BE FORECLOSED IN EQUITY" AND "FORECLOSURE CLAIM[S] SHALL, IF TRIED, BE TRIED TO THE COURT WITHOUT A JURY." § 702.01, FLA. STAT. (2012)**. This is consistent with the concept that, with rare exceptions, "equitable" actions are the province of a judge, not a jury. **ON THE OTHER HAND, PARTIES HAVE A CONSTITUTIONAL RIGHT TO DEMAND A JURY AS TO "LEGAL" ACTIONS, SUCH AS MONEY DAMAGES CLAIMS FOR BREACH OF PROMISSORY NOTES**. *Cheek v. McGowan Elec. Supply Co*., 404 So. 2d 834, 836 (Fla. 1st DCA 1981).

So what happens when a lender simultaneously sues not just for foreclosure but also for a money judgment on the promissory note? Is the borrower entitled to a jury as to the note count?

Kinney v. Countrywide Home Loans Servicing, L.P., 165 So.3d 691 (Fla. 4th DCA 2015) says "No." There, Countrywide bought the Kinney's loan from the original lender then sued the Kinneys to foreclosure on their property for non-payment. But the complaint also included a separate count for a money judgment on the promissory note. After the Kinneys' request for a jury was denied, the case was tried non-jury and foreclosure granted.

In general, in the absence of an enforceable jury waiver, a borrower would be entitled to a jury on a "legal" claim, such as one seeking a money judgment on a note. *See, Padgett v. First Federal Savings & Loan Association of Santa Rosa County*, 378 So. 2d 58, 64 (Fla. 1st DCA 1979), where First District considered "the perplexing problem presented by cases . . . when there are both equitable (non-jury) and legal (jury) claims made in the same proceeding." *Padgett* held that "the mixture of the two kinds of claims in the same case, regardless of the parties by whom or the sequence in which they are raised by their respective pleadings, cannot deprive either of the parties of a right to a jury trial of issue traditionally triable by jury as a matter of right."

On appeal, the 4th District rejected the Kinneys' argument that they were entitled to a jury trial. Here's why:

Countrywide sued for both foreclosure and a money judgment in the same lawsuit. These two remedies overlap. Florida's foreclosure statute, Chapter 702, Fla. Stat.,

provides for a two-step process. First, judgment of foreclosure is entered and the property is sold. But a money judgment does not automatically result. Only after the foreclosure sale can it be determined whether, and if so in what amount, any amount is still owed to the lender. If it turns out that the value received by the lender from the sale is less than the debt owed, the second step can be triggered – i.e., the lender seeking a deficiency judgment for the balance still owed.

Florida's foreclosure statute expressly provides that both foreclosure and deficiency proceedings are the province of the court, not a jury. (Section 702.06, Fla. Stat.) The First District held that a foreclosure defendant does not have "a constitutional right to a jury trial in a chancery foreclosure action when a deficiency has resulted from the foreclosure sale of the property." *Bradberry v. Atl. Bank of St. Augustine*, 336 So. 2d 1248, 1250 (Fla. 1st DCA 1976). A promissory note count brought in the same suit as a foreclosure count is really just an action for a deficiency judgment. Hence, there is no right to a jury on that claim.

The Kinneys also lost because their mortgage had a provision waiving their right to a jury trial. They argued that because the foreclosing plaintiff was not the original lender but rather its assignee, the plaintiff had no right to enforce this jury waiver since it was not a party to the mortgage. The 4th District had little difficulty rejecting this argument, in fact needing only a single paragraph to do so, explaining that as the holder of the note and mortgage by endorsement, the assignee/plaintiff was entitled to enforce the loan documents. For this proposition, the court cited its decision in *Riggs v. Aurora Loan Servs., LLC,* 36 So.3d 932, 934 (Fla. 4th DCA 2010).