

Substantial Compliance is Now Law of the Land for Florida Breach Letters

For many years now, mortgage servicers and their counsel have been engaged in a battle with borrowers in Florida over compliance with conditions precedent to foreclosure. Specifically, the battle has involved compliance with Paragraph 22 of the uniform Fannie Mae and Freddie Mac mortgage and whether the mortgage servicer needs to strictly or substantially comply with the terms of this paragraph. Basic Florida contract law states that “[c]ourts require there to be at least substantial compliance with conditions precedent in order to authorize performance of a contract.” Allstate Floridian Ins. Co. v. Farmer, 104 So.3d 1242, 1246 (Fla. 5th DCA 2012) (citing Seaside Cmty. Dev. Corp. v. Edwards, 573 So.2d 142, 145 (Fla. 1st DCA 1991)). Despite longstanding Florida case law in favor of substantial compliance, however, the waters were muddied by the Fifth District Court of Appeal's opinions of Samaroo v. Wells Fargo Bank, N.A., 137 So.3d 1127 (Fla. 5th DCA 2014), and Haberl v. 21st Mortgage Corp., 138 So.3d 1192 (Fla. 5th DCA 2014), which borrowers interpreted as rejecting the notion that substantial compliance applies to a mortgage contract and that strict compliance should be the standard. In the wake of the chaos caused by Samaroo and Haberl, the Florida District Courts of Appeal (of which there are five and are only inferior to the Florida Supreme Court) have examined the issue of whether strict or substantial compliance with Paragraph 22 of the mortgage is required in Florida and until recently, all five were not clearly in alignment.

The First District Court of Appeal has long held that “no recovery can be had with regard to performance of [a] contract absent substantial compliance with [a] condition precedent.” Seaside Cmty. Dev. Corp., 573 So.3d at 145. Although Seaside clearly supports substantial compliance, the opinion there was not issued in the context of a Paragraph 22 challenge. Indeed, the Second District Court of Appeal in Green Tree Servicing, LLC v. Milam, 177 So.3d 7 (Fla. 2d DCA 2015), was the first to address the standard in relation to this specific factual context. **In Milam, the court held that it was clear that the court must “interpret and apply the provisions of mortgages the same way [the courts] interpret and apply the provisions of any other contract”** and “[i]n Florida, a party's adherence to contractual conditions precedent is evaluated for substantial compliance or substantial performance.” See id at 13. The court in Milam specifically reviewed the lender's breach letter in comparison to the mortgage's requirement that the borrower be advised of his/her right to reinstate after acceleration and to raise defenses to the foreclosure proceedings. In discussing the standard of review for the breach letter, the court stated that “[w]hen the content of a lender's notice letter is nearly equivalent to or varies in only immaterial respects from what the

mortgage requires, the letter substantially complies, and a minor variation from the terms of paragraph twenty-two should not preclude a foreclosure action.” See id at 14-15.

The Third District Court of Appeal issued a similar opinion in Bank of New York Mellon v. Nunez, 180 So.3d 160, 163 (Fla. 3d DCA 2015), holding that “the lender's default notice to the borrower must only substantially comply with the conditions precedent set forth in the mortgage.” Indeed, since Nunez, the Third District Court of Appeal has consistently issued opinions that substantial compliance is the standard for compliance with conditions precedent in a mortgage. See Bank of America v. Cadet, 183 So.3d 477 (Fla. 3d DCA 2016), SunTrust Mortgage Inc. v. Garcia, 2016 WL 538618 (Fla. 3d DCA February 10, 2016), and Bank of New York v. Mieses, 2016 WL 1173599 (Fla. 3d DCA March 16, 2016).

Not to be left in the dust, the Fifth District Court of Appeal recently distinguished its holdings in Samaroo and Haberl with its opinion in Bank of New York Mellon v. Johnson, 2016 WL 347355, 2 (Fla. 5th DCA January 29, 2016), holding that “[w]hen the content of a lender's notice letter is nearly equivalent to or varies in only immaterial respects from what the mortgage requires, the letter substantially complies, and a minor variation from the terms of paragraph twenty-two should not preclude a foreclosure action.” citing Miliam, 177 So.3d at 14-15. The court in Johnson stated that the breach letter substantially complied with Paragraph 22 of the mortgage and caused no prejudice to the borrower as the borrower did not contend that the breach letter completely omitted any required elements under Paragraph 22, as was the case in Samaroo and Haberl. See id at 3.

To add the final missing link in the chain, the Fourth District Court of Appeal last month issued its opinion in Ortiz v. PNC Bank, Nat. Ass'n, 2016 WL 1239760 (Fla. 4th DCA March 30, 2016), holding “substantial compliance with conditions precedent is all that is required in the foreclosure context” and “we join our sister courts in applying a substantial compliance standard.” citing Miliam, 177 So.3d at 13-14 and Nunez 180 So.3d at 162-63. The court further explained that “substantial compliance is ‘that performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the [party] the [benefit].’” citing Casa Linda Tile & Marble Installers, Inc. v. Highlands Place 1981, Ltd., 642 So.3d 766, 768 (Fla. 4th DCA 1994) (quoting Ocean Ridge Dev. Corp. v. Quality Plastering, Inc., 247 So.2d 72, 75 (Fla. 4th DCA 1971)). Specifically, the court in Ortiz was asked to review whether the lender's breach letter complied with Paragraph 22 of the mortgage

wherein the breach letter stated that “[y]ou ... have the right to bring a court action if you claim that the loan is not in default or if you believe that you have any other defense to the foreclosure.” See id at 1. The court found that the purpose of the Paragraph 22 notice is “to ensure that the borrowers are informed ... that they are not required to take a foreclosure complaint lying down and can defend the case if so inclined.” See id at 2. Using the Johnson opinion in particular, the court found that the language was substantially compliant with Paragraph 22 of the mortgage and noted that there was no evidence that the borrower was prejudiced by the language as the borrower retained legal counsel and vigorously defended the foreclosure action. See id at 3.

Based on the opinions from each of the Florida District Courts of Appeal, it appears that the battle as to whether strict or substantial compliance with Paragraph 22 of a mortgage is the law of the land in Florida is now settled. **Per all five District Courts of Appeal, substantial compliance with the terms of Paragraph 22 of the mortgage is all that is required in the foreclosure context.** While mortgage servicers and their counsel will need to continue to prove that their breach letter in each individual case does in fact substantially comply with Paragraph 22 (particularly that it contains all required terms); thankfully, half of the fight appears to now be over with the courts universally setting substantial compliance as the operative standard.

The Johnson opinion will not be final until the Supreme Court of Florida completes its review on appeal. The Ortiz opinion will not be final until the disposition by the Fourth District Court of Appeal on any timely filed motion for rehearing. We will continue to monitor these cases to determine if the opinions become final and let you know of any changes. Until then, mortgage servicers can breathe a sigh of relief as one more obstacle to a successful foreclosure in Florida appears to have been overcome.