FORECLOSURE DEFENSES, by Kendall Coffey

➢ PLEADING AND PRACTICE CONSIDERATIONS

▪ Introduction Foreclosure Defenses

The starting point for defenses is pleading them properly. As in plaintiff's statement of claim, the requirement of certainty will be insisted upon in the pleading of a defense; and the certainty required is that the pleader must set forth the facts in such a manner as to reasonably inform his adversary of what is proposed to be proved in order to provide the latter with a clear opportunity to meet it and prepare his evidence. Zito *v. Washington Fed. Sav. & Loan Ass'n of Miami Beach*, 318 So.2d 175, 176 (Fla. 3d DCA 1975), *citing Citizens Nat. Bank of Orlando v. Youngblood*, 296 So.2d 92 (Fla. 4th DCA 1974); *Walker v. Walker*, 254 So.2d 832 (Fla. 1st DCA 1971); *Bliss v. Carmona*, 418 So.2d 1017, 1019 (Fla. 3d DCA 1982) ("certainty is required when pleading defenses and claims alike . . ."). As with complaints for affirmative relief, when defenses are insufficiently pled, courts generally permit them to be amended, as occurred in *Zito*. As a matter of analysis, deficient defenses can be disregarded for summary judgment purposes. The rule that defective defenses can simply be ignored is demonstrated in decisions such as *Cady v. Chevy Chase Savings and Loan, Inc.*, 528 So.2d 136 (Fla. 4th DCA 1988); *Thompson v. Bank of New York*, 862 So.2d 768 (Fla. 4th DCA 2003). Therefore, rather than run the risk that a conclusory defense might be disregarded and lead to a summary judgment in favor of the lender, prudence dictates that a borrower set forth the ultimate facts to support any defenses with reasonable particularity.

➢ CONTRACTURAL DEFENSES

▪ Lack and Failure of Consideration

Like other executory contracts, mortgages require consideration to be enforceable. *Kremser v. Tonokaboni*, 356 So.2d 1331 (Fla. 3d DCA 1978); *Uwanawich v. Gaudini*, 334 So.2d 116 (Fla. 3d DCA 1976); *Chaykin v. Kant*, 327 So.2d 793 (Fla. 3d DCA 1970).

A pre-existing debt even standing alone will suffice. *Lawyers Title Insurance Company, Inc. v. Novastar Mortgage, Inc.*, 862 So.2d 793 (Fla. 4th DCA 2004); *Aksomitas v. Maharaj*, 771 So.2d 541 (Fla. 4th DCA 2000); *Manufacturers and Traders Trust Co. v. First Nat'l Bank in ''Ft.' ''Lauderdale*, 113 So.2d 869 (Fla.2d DCA. 1959); *Crum v. United States Fid. & Guar. Co*., 468 So.2d 1004, 1007 (Fla. 1st DCA 1985), *citing Kitchens v. Kitchens*, 142 So.2d 343 (Fla. 2d DCA 1962); *Ocklawaha River Farms Co. v. Young*, 73 Fla. 159, 74 So. 644 (1917). *See also In re Abraham*, 33 B.R. 963 (Bankr. M.D. Fla. 1983).

Even when a failure of consideration is established, it does not ordinarily entitle the borrower to rescind the note and mortgage and discard all obligations to the mortgagee. If only part of the consideration fails, an action for damages should properly remedy the mortgagee's breach of contract. *Duncan Properties, Inc. v. Key Largo Ocean View, Inc.,* 360 So.2d 471 (Fla. 3d DCA 1978).

When a mortgagor shows that no funding was ever advanced, a mortgage given to secure that loan suffers a complete failure of consideration invalidating the mortgage in its entirety. Since no funds were advanced by the Murphys pursuant to mortgage number one there are no sums to be reimbursed to them thereunder and there being no debt there can be no valid mortgage lien. *Silver Waters Corp. v. Murphy*, 177 So.2d 897, 899 (Fla. 2d DCA 1965).

- **Failure to Comply with Notice Provisions**

With any assertion of default, compliance with notice provisions can be critical. Thus, in *Gomez v. American Sav. & Loan Assn*, 515 So.2d 301 (Fla. 4th DCA 1987), the court reversed a summary judgment in favor of the lender finding, an issue as to whether American gave written notice of appellants breach of the mortgage agreement as provided in paragraph eighteen thereof. 146 So.2d 910, 913 (Fla. 3d DCA 1962).

Along the same line, in *Rashid v. Newberry Federal S & L Assn*, 502 So.2d 1316 (Fla. 3d DCA 1987), appeal after remand, 526 So.2d 772 (Fla. 3d DCA 1988), the court reversed a summary judgment in favor of the lender finding that the bank had failed to provide a thirty-day notice of default prior to foreclosing. Following remand, the court further held, implicit in our opinion was the requirement that upon remand the proceeding be dismissed.

- **Failure to Comply with Release Provisions**

Among the contract-based defenses that can often be the subject of litigation are allegations that the lender failed to honor an obligation to release portions of mortgaged property from the mortgage lien. These provisions are common in construction loans that contemplate sales of individual units or parcels, and provide that a portion of the property will be released upon the occurrence of a specific event.

- **Electing the Fraud Remedy**

As with other contracts, fraud is a valid defense to enforcement of a mortgage. When a mortgage is procured by fraud, the instruments can be canceled and foreclosure denied. *Meyerson v. Boyce*, 97 So.2d 488 (Fla. 3d DCA 1957). As with other claims of fraud, the victim has the choice of seeking either to affirm the contract and claim money damages, or claim rescission. Therefore, a party seeking to avoid the obligation under loan documents must pursue a remedy of cancellation. *Second National Bank of North Miami v. G.M.T. Properties, Inc.*, 364 So.2d 59 (Fla. 3d DCA 1978).

- **Nonjustified Threats of Physical Harm, Criminal Prosecution or Financial Ruin**

To establish duress, it must be shown that one party exerted so much pressure over another as to have robbed the other of the ability to exercise free will. The Florida Supreme Court has explained this principle saying that duress "practically destroys the free agency of a party and causes him to do an act or make a contract not of his own volition." *Herold v. Hardin*, 95 Fla. 889, 116 So. 863, 864 (1928). *See*

also Francavilla v. Francavilla, 969 So.2d 522, 525 (Fla. 4th DCA 2007) (duress "practically destroys the free agency of a party…")

In addition to threats of physical harm or criminal prosecution, duress can also be inflicted through threats of financial ruin. *City of Miami v. Kory*, 393 So.2d 494 (Fla. 3d DCA), *rev. den*., 407 So.2d 1104 (Fla. 1981). Even the fact that advice of counsel is obtained in signing a document does not preclude finding that such consent was obtained through duress. *Corporacion Peruana de Aeropuertos y Aviacion Comercial v. Boy*, 180 So.2d 503, 506 (Fla. 2d DCA 1965). The premise of duress is the virtual destruction of the victim's free will. *Cooper v. Cooper*, 69 So.2d 881 (Fla. 1954); *Herald v. Hardin*, 95 Fla. 889, 116 So. 863 (1928). Also described as economic or business compulsion, a claim of economic duress generally necessitates a showing that the coercive party had no legal right to pressure the other in a particular fashion, *Fuller v. Roberts*, 35 Fla. 110, 17 So. 359 (1895); *City of Miami v. Kory*, 394 So.2d 494 (Fla. 3d DCA), *rev. den*., 407 So.2d 1104 (Fla. 1981); *Scutti v. State Road Dept*., 220 So.2d 628 (Fla. 4th DCA 1969); *Corporacion Peruana de Aeropuertos y Aviacion Comercial v. Boy*, 180 So.2d 503 (Fla. 2d DCA 1965); *Marcus v. Sullivan*, 701 So.2d 660 (Fla. 3d DCA 1997), and also that the threatened action would financially destroy the borrower. *City of Miami v. Kory*, 394 So.2d 494, 498 (Fla. 3d DCA 1981). Florida law recognizes economic duress only as a defense or avoidance of contractual obligation.

- **Waiver of Right Privilege, Advantage or Benefit**

Conduct by the lender evidencing a knowing acquiescence in the borrower's failures of compliance may waive any right of the lender to assert violations of the provisions in order to establish a default, acceleration and foreclosure. Florida law generally defines waiver not as an accident triggered by the lender's inadvertence, but rather as the intentional relinquishment of a known right.

A waiver of a default requires an action by the mortgagee which misleads the mortgagor so that the mortgagor acts in a way that he would not have acted if he had known that the mortgagee would require performance under the strict terms of the mortgage agreement. *Gordon v. Flamingo Holding Partnership*, 624 So.2d 294, 296, *quoting Flagler Center Building Loan Corp. v. Chemical Realty Corp*., 363 So.2d 344, 347 (Fla. 3d DCA 1976), *citing Kreiss v. Potassium Phosphate Co. v. Knight*, 98 Fla. 1004, 124 So. 751 (1929). *See also New England Mut. Life Ins. Co. v. Luxury Home Builders, Inc*., 311 So.2d 160 (Fla. 3d DCA 1975); *Harrell v. Lombard*, 122 So.2d 625 (Fla. 2d DCA 1960).

To substantiate a waiver, the relinquishment of a prerogative by the lender must either be supported by consideration or else it can be validated "when based upon conduct and when acted upon by the defendant."

- **Non-Waiver Provisions**

Documents commonly contain non-waiver provisions that explicitly provide that failure to act in response to a default or to assert a right or remedy cannot be deemed a waiver of the prerogative to act subsequently upon that default. As one case illustrated this scenario, "Although the Bank

previously accepted LRB's late payments, the note specifically provided that the lender may delay or forgo enforcing its rights or remedies under the note without losing them, and that the Bank could enter a default without providing the borrower notice. It was LRB's repeated failure to make timely payments that led to the Bank's decision to accelerate the note." *LRB Holdings Corp. v. Bank of America, N.A.,* 944 So.2d 1113, 1114 (Fla. 3d DCA 2007).

Although arising in a different setting, the issue of waiver of a non-waiver provision was discussed in *City of Miami Beach, Florida v. Carner*, 579 So.2d 248 (Fla. 3d DCA 1991), a complex lease dispute. In that case, conduct such as filing suit and a written demand for eviction was alleged to have "waived the non-waiver provision."

- **Estoppel**

Though estoppel is recognized as a defense in foreclosure actions and is often referred to interchangeably with waiver, *Parker v. Dinsmore Co*., 443 So.2d 356, 358 (Fla. 1st DCA 1983) (defining waiver in terms of misleading conduct by mortgagee and reliance by mortgagor), analytic differences exist. As discussed earlier, waiver is an intentional relinquishment of a known right existing in favor of the lender. The essence of estoppel, on the other hand, is a justifiable reliance prompting a change in conduct by the mortgagor. To be effective, a waiver must apparently be accompanied by either a consideration or conduct manifesting reliance by the mortgagor, and so, the issue of reliance may also arise in waiver analysis. *Flagler Center Building Loan Corp. v. Chemical Realty Corp*., 363 So.2d 344, 347 (Fla. 3d DCA 1978), appeal after remand, 382 So.2d 848 (Fla. 3d DCA (1980). "A mortgagee may by his conduct, inducing others to believe and act upon the belief that he will not enforce his mortgage, be estopped as to them from so doing." *Kreiss v. Potassium Phosphate Co. v. Knight*, 98 Fla. 1004, 124 So. 751, 756 (1929). *Compare Parker v. Dinsmore Co.*, 443 So.2d 356 (Fla. 1st DCA 1983) (defining waiver in similar terms). *See also Tompkins v. Jim Walter Homes, Inc.*, 656 So.2d 963, 964 (Fla. 5th DCA 1995)("To establish an estoppel defense, the mortgagor must make a clear showing that the mortgagee engaged in misleading conduct that the mortgagor relied upon…").

The defense of estoppel to foreclose a mortgage requires a clear showing of action by the mortgagee which misleads the mortgagor so that he acts in a way that he would not have acted if he had known that the mortgagee would require performance under the strict terms of the mortgage agreement. *Lambert v. Dracos*, 403 So.2d 481, 482 (Fla. 1st DCA 1981), *citing Flagler Center Building Loan Corp. v. Chemical Realty Corp.*, 363 So.2d 344 (Fla. 3d DCA 1978), *cert. den*., 372 So.2d 467 (Fla. 1979); *see also Tompkins v. Jim Walter Homes, Inc*., 656 So.2d 963 (Fla. 5th DCA 1995).

- **Statute of Limitations and Laches**

The basic principles were set forth in one case: "Section 95.11(2)(c), Florida Statutes (1979), provides that an action to foreclose a mortgage shall be commenced within five years. Section 95.03(1) provides that generally a cause of action accrues when the last element constituting the cause of action 'on a negotiable or non-negotiable note payable on demand ... is a first written demand for payment.'"

Smith v. Branch, 391 So.2d 797, 798 (Fla. 2d DCA 1980), *citing Ruhl v. Perry*, 390 So.2d 353 (Fla. 1980); *see also Jones v. Rainey*, 386 So.2d 1319 (Fla. 2d DCA 1980).

For a mortgage without an acceleration clause, an action is timely where the mortgagee files more than five years after default, but less than five years after final maturity. *Locke v. State Farm Fire & Cas. Co.*, 509 So.2d 1375 (Fla. 1st DCA 1987); *Conner v. Coggins*, 349 So.2d 780 (Fla. 1st DCA 1977); *see also Smith v. Federal Deposit Ins. Corp.*, 61 F.3d 1552, 1561 (11th Cir. 1995) (when promissory note secured by mortgage contains optional acceleration clause, foreclosure action accrues, and statute of limitations begins to run on the earlier of the date when acceleration clause is invoked or stated date of maturity). If the maturity of a mortgage is not ascertainable from the record, the mortgage lien terminates 20 years after the date of the mortgage.

Even before the statute of limitations has expired on a foreclosure claim, the lender can, in exceptional circumstances, forfeit the right to foreclose by virtue of delay and resulting prejudice to the borrower that constitutes laches. Laches can arise in the foreclosure context when the mortgagee inexcusably delays in bringing its action, resulting in circumstances making it inequitable to permit the plaintiff to enforce its claim against the defendant.

- **Unclean Hands Doctrine**

Because mortgage foreclosures are equitable proceedings, *See, e.g., Cross v. Federal Nat'l Mtg. Ass'n,* 359 So.2d 464 (Fla. 4th DCA 1978); *Family Bank v. Able Realty of Am. Corp*., 702 So.2d 1322 (Fla. 4th DCA 1997), traditional equitable defenses generally apply. For facts to meet the test for the equitable doctrine of unclean hands, courts almost always require a showing of the mortgagee's active participation in illegal or fraudulent conduct. In a decision that appeared to lower the culpability threshold for an unclean hands defense, the court in *Adam Smith Enterprises, Inc. v. Barnes*, 539 So.2d 549 (Fla. 2d DCA 1989), reversed summary judgment of foreclosure. In that case, the allegation was made that the mortgagee thwarted efforts to repay the mortgage by refusing to provide pay-off information needed for the exercise of an option. At least for purposes of creating a triable fact question, the court found that unclean hands was set forth in sufficient terms.

- **Absence of Impairment of Security**

With non-monetary defaults, however, are governed by a fundamentally different perspective. In this environment, the borrower can often defeat acceleration and foreclosure by showing that the default does not impair security. A leading case explaining this doctrine is *Delgado v. Strong*, 360 So.2d 73 (Fla. 1978), in which the Supreme Court of Florida said: "Consistent with this principle, courts have denied foreclosure of a mortgage where breach of the mortgage was merely a technical one and such breach did not place the security in jeopardy."

- **Tender of Payment**

When properly and timely accomplished, tender realizes a satisfaction of the mortgagor's pending obligations to the mortgagee.

A tender that precedes acceleration results in a reinstatement of the mortgage loan to a current status, through payment of the unpaid installments rather than the entire accelerated balance of principal and accrued interest. For demand obligations or for loans that are otherwise fully matured, tender must be made of the entire obligation.

- **Junior Lienors and Marshalling of Assets**

Marshalling of assets is an equitable doctrine available when the foreclosing mortgagee has a superior lien in property that is otherwise unencumbered as well as in property subject to inferior liens. Under these circumstances, equity will require that the superior lienholder look first to the property in which it has an exclusive right so that the other lienholders will have an opportunity to foreclose their own liens on the other properties.

- **Construction Mortgages and Equitable Liens**

For the construction lender foreclosing its mortgage, the priority that should be enjoyed over subordinate mechanic's lien holders is occasionally contested upon grounds loosely described as equitable lien theory. As is commonly understood in this setting, the doctrine has at least two facets. First, equitable lien theory can be a challenge to the lender's lien priority in which the mechanic's lienor seeks to leapfrog the otherwise superior position of the construction mortgage due to the lender's inequitable conduct. A second facet of this doctrine can be described as a counterclaim against the lender to the extent of construction loan funding that is yet undisbursed.

➢ THE COUNTERCLAIM AS A DEFENSE TO ACCELERATION AND FORECLOSURE

- **Counterclaim for Damages and Reduction of Mortgage Debt**

Along with defending upon grounds like waiver, estoppel and laches to contend that no right of acceleration exists in favor of the mortgage holder, the defending borrower may also often claim that the conduct of the mortgagee caused it substantial damages. In some instances, such as usury, the validation of the borrower's counterclaim may establish a basis of discretion for the trial judge to refuse to enforce the mortgage. In general, however, the effect of a successful claim by the borrower for damages is to reduce the mortgage debt which the lender is foreclosing.

➢ AVOIDANCES TO FORECLOSURE DEFENSES

- **Assignees and Holders in Due Course**

As to parties who acquire a mortgage and mortgage note from the original mortgagee, the general rule is that an assignee of a mortgage has all the rights of the original mortgagee/assignor, but stands in the shoes of that party and enjoys no greater rights and benefits.

For the bona fide assignee of a mortgage and note without notice of infirmities or defenses, however, a different rule may apply. As one court explained this basic proposition: "Assuming as we must that

Consumers is a holder in due course of the questioned note and mortgage involved in this case, the mortgage is not susceptible to attack either on the ground of fraud or usury." *Harrison v. Savers Fed. Sav. & Loan Ass'n,* 154 So.2d 194, 195-96 (Fla. 1st DCA 1963).

To establish holder in due course status, holder must "take an instrument in good faith and without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." *Barnett Bank of Palm Beach County, N.A. v. Regency Highland Condo. Ass'n*, 452 So.2d 587, 589 (Fla. 4th DCA), *pet. rev. dismissed*, 458 So.2d 273 (Fla. 1984) (applying Fla. Stat.671.201(1a). (1991).

Assuming that a negotiable instrument is the object of enforcement, the holder must also show his good faith and lack of notice of a defense to enforcement or other infirmity. In addition to acting in good faith, a holder in due course must also be free from notice that the loan is overdue, that it has been dishonored or that a defense or claim to it exists.