

# IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 11- **9215**

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## ORDER ADOPTING AMENDMENTS TO TEXAS RULES OF CIVIL PROCEDURE 735 AND 736

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**ORDERED** that:

1. Pursuant to section 22.004 of the Texas Government Code, and in accordance with the Act of May 26, 2011, 82nd Leg., R.S., ch. 1282 (HB 1228), Rules of Civil Procedure 735 and 736 are amended as follows.

2. Amended Rules of Civil Procedure 735 and 736, with any modifications made after public comments are received, take effect January 1, 2012. Any interested party may submit written comments before January 1, 2012, directed to Marisa Secco, Rules Attorney, at P.O. Box 12248, Austin, TX 78711 or [marisa.secco@txcourts.gov](mailto:marisa.secco@txcourts.gov).

3. The Clerk is directed to:

- a. file a copy of this Order with the Secretary of State;
- b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;
- c. send a copy of this Order to each elected member of the Legislature; and
- d. submit a copy of the Order for publication in the *Texas Register*.

Dated: October 17, 2011.

*Wallace B. Jefferson*

Wallace B. Jefferson, Chief Justice

*Nathan L. Hecht*

Nathan L. Hecht, Justice

*Dale Wainwright*

Dale Wainwright, Justice

*David M. Medina*

David M. Medina, Justice

*Paul W. Green*

Paul W. Green, Justice

*Phil Johnson*

Phil Johnson, Justice

*Don R. Willett*

Don R. Willett, Justice

Eva M. Guzman, Justice

*Debra H. Lehmann*

Debra H. Lehmann, Justice

## PART VII. RULES RELATING TO SPECIAL PROCEEDINGS

### SECTION 1. PROCEDURES RELATED TO FORECLOSURES OF CERTAIN LIENS

#### RULE 735. FORECLOSURES REQUIRING A COURT ORDER

- (a) *Liens Requiring a Court Order.* A party seeking to foreclose a lien for:
- (1) a home equity, reverse mortgage, or home equity line of credit under article XVI, sections 50(a)(6), 50(k), and 50(t) of the Texas Constitution;
  - (2) a transferred or property tax loan under sections 32.06 and 32.065 of the Tax Code; or
  - (3) a property owners' association assessment lien under section 209.0092 of the Property Code

may obtain a judgment for judicial foreclosure or an expedited order under Rule 736 from a district court in a county where all or part of the real property encumbered by the lien sought to be foreclosed is located or from a court with equivalent jurisdiction.

- (b) *Other Statutory and Contractual Foreclosure Provisions Unchanged.*
- (1) Obtaining an expedited order under Rule 736 does not change any foreclosure requirement or duty imposed under applicable law or the terms of the loan agreement, contract, or lien sought to be foreclosed.
  - (2) The only issue to be determined in a Rule 736 proceeding is whether a party may obtain an order under Rule 736 to proceed with foreclosure under applicable law and the terms of the loan agreement, contract, or lien sought to be foreclosed.

#### RULE 736. EXPEDITED ORDER PROCEEDING

##### 736.1. Application

- (a) A party seeking an expedited order allowing the foreclosure of a lien listed in Rule 735 to proceed must file an application styled "In re: Order for Foreclosure Concerning [state: property's mailing address] under Tex. R. Civ. Proc. 736" that identifies each person described in subparagraph (b)(1). An application may not be filed until the opportunity to cure under applicable law and the loan agreement, contract, or lien sought to be foreclosed has expired.
- (b) The application shall:
- (1) Identify by name and last known address each of the following parties:
    - (A) "Petitioner" – any person legally authorized to prosecute the foreclosure;
    - (B) "Respondent" – according to the records of the servicer of the lien sought to be foreclosed:

- (i) each person who breached an obligation secured by the lien;
  - (ii) each mortgagor, if any, of the lien sought to be foreclosed; and
  - (iii) for a transferred or property tax lien or contract, each owner of the property and the holder of any recorded preexisting first lien secured by the property.
- (2) Identify the property encumbered by the lien sought to be foreclosed by its commonly known street address and legal description.
- (3) Describe or state:
- (A) the type of lien listed in Rule 735 sought to be foreclosed and its constitutional or statutory reference;
  - (B) the authority of the party seeking foreclosure;
  - (C) each person obligated to pay the lien sought to be foreclosed;
  - (D) each mortgagor, if any, of the lien sought to be foreclosed who is not a maker or assumer of the underlying debt;
  - (E) as of a date that is not more than sixty days prior the date the application is filed:
    - (i) the number of months the obligation secured by the lien sought to be foreclosed is in default,
    - (ii) the amount required to cure the default, and
    - (iii) the amount required to pay off the lien;
  - (F) that the requisite notice or notices to cure the default has or have been mailed to each person as required under applicable law and the loan agreement, contract, or lien sought to be foreclosed and that the opportunity to cure has expired; and
  - (G) that before the application was filed, any other action required under applicable law and the loan agreement, contract, or lien sought to be foreclosed was performed.
- (4) For a transferred or property tax lien or contract, state all allegations required to be contained in the application in accordance with section 32.06(c-1)(1) of the Tax Code.
- (5) Conspicuously state that if the petitioner obtains a court order, the petitioner will proceed with a foreclosure of the property in accordance with applicable law and the terms of the lien sought to be foreclosed.

- (6) Include an affidavit of material facts in accordance with Rule 166a(f) signed by petitioner or the servicer of the petitioner establishing the basis for foreclosure and, depending on the type of lien sought to be foreclosed, attach a legible copy of:
- (A) the note, original recorded lien or pertinent part of a property owners' association declaration establishing the lien, and current assignment of the lien, if assigned;
  - (B) each notice required to be mailed to any person under applicable law and the loan agreement, contract, or lien sought to be foreclosed before the application was filed and proof of mailing of each notice; and
  - (C) for a transferred or property tax lien or contract, the sworn document and certified statement attesting to the transfer of the lien.

**736.2. Costs**

All filing, citation, mailing, service, and other court costs and fees shall be costs of court and paid by petitioner at the time of filing an application with the clerk of the court.

**736.3 Citation**

(a) *Issuance.*

- (1) When the application is filed, the clerk shall issue a separate citation for each respondent named in the application and one additional citation for the occupant of the property sought to be foreclosed.
- (2) Each citation that is directed to a respondent shall state that any response to the application is due the first Monday after the expiration of 38 days from the date the citation was placed in the custody of the U.S. Postal Service in accordance with the clerk's standard mailing procedures and shall clearly state the date that the citation was placed in the custody of the U.S. Postal Service by the clerk.

(b) *Service and Return.*

- (1) The clerk of the court shall serve each citation, with a copy of the application attached, by both first class mail and certified mail. A citation directed to a respondent must be mailed to the respondent's last known address that is stated in the application. A citation directed to the occupant of the property sought to be foreclosed must be mailed to Occupant of [state: property's mailing address] at the address of the property sought to be foreclosed that is stated in the application. For a citation mailed by the clerk in accordance with this subparagraph, the date of service is the date and time the citation was placed in the custody of the U.S. Postal Service in a properly addressed, postage prepaid envelope in accordance with the clerk's standard mailing procedures.

- (2) The clerk shall complete a return of service in accordance with Rule 107, except that, if service by certified mail is unsuccessful, the return of service need not contain a return receipt.
- (3) The clerk shall only charge one fee per respondent or occupant served under this rule.

#### **736.4. Discovery**

No discovery is permitted in a Rule 736 proceeding.

#### **736.5. Response**

- (a) *Generally.* A respondent may file a response contesting the application.
- (b) *Due Date.* Any response to the application is due the first Monday after the expiration of 38 days from the date the citation was placed in the custody of the U.S. Postal Service in accordance with the clerk's standard mailing procedures, as stated on the citation.
- (c) *Form.* A response shall be signed in accordance with Rule 57 and may be in the form of a general denial under Rule 92, except that a respondent must affirmatively plead:
  - (1) why the respondent believes a respondent did not sign a loan agreement document that is specifically identified by the respondent;
  - (2) why the respondent is not obligated for payment of the lien;
  - (3) why the number of months of alleged default or the reinstatement or pay off amounts are materially incorrect;
  - (4) why any document attached to the application is not a true and correct copy of the original; or
  - (5) proof of payment in accordance with Rule 95.
- (d) *Other Claims.* A response may not state an independent claim for relief. The court shall, without a hearing, strike and dismiss any counterclaim, cross claim, third party claim, intervention, or cause of action filed by any person in a Rule 736 proceeding.

#### **736.6 Hearing Required When Response Filed**

The court shall not conduct a hearing under this rule unless a response is filed. If a response is filed, the court must hold a hearing after reasonable notice to the parties. The hearing on the application must not be held earlier than 20 days or later than 30 days after a request for a hearing is made by any party. At the hearing, the petitioner shall have the burden to prove by affidavits on file or evidence presented the grounds for granting the order sought in the application.

**736.7. Default When No Response Filed**

- (a) If no response to the application is filed by the due date, the petitioner must file a motion and proposed order to obtain a default order. For the purposes of the motion, all facts alleged in the application and supported by the affidavit of material facts shall constitute prima facie evidence of the truth of the matters alleged.
- (b) The court shall grant the application by default order no later than 30 days after a motion is filed under subparagraph (a) if the application complies with the requirements of Rule 736.1 and was properly served in accordance with Rule 736.4.
- (c) The return of service must be on file with the clerk of the court for at least 10 days before the court may grant the application by default.

**736.8 Order**

- (a) The court shall issue an order granting the application if the petitioner establishes the basis for the foreclosure. Otherwise, the court shall deny the application.
- (b) An order granting the application shall describe:
  - (1) the material facts establishing the basis for foreclosure;
  - (2) the property to be foreclosed by commonly known mailing address and legal description;
  - (3) the name and last known address of each respondent subject to the order; and
  - (4) the recording or indexing information of each lien to be foreclosed.
- (c) An order granting or denying the application is not subject to a motion for rehearing, new trial, bill of review, or appeal. Any challenge to a Rule 736 order must be made in a suit filed in a separate, independent, original proceeding in a court of competent jurisdiction.

**736.9. Effect of the Order**

An order is without prejudice and has no res judicata, collateral estoppel, estoppel by judgment, or other effect in any other judicial proceeding. After an order is obtained, a person may proceed with the foreclosure process under applicable law and the terms of the lien sought to be foreclosed.

**736.10. Bankruptcy**

If a respondent provides proof to the clerk of the court that respondent filed bankruptcy before an order is signed, the proceeding under this rule shall be dismissed.

**736.11. Automatic Stay and Dismissal if Independent Suit Filed**

- (a) A proceeding or order under this rule is automatically stayed if a respondent files a separate, original proceeding in a court of competent jurisdiction that puts in issue any matter related to the origination, servicing, or enforcement of the loan agreement, contract, or lien sought to be foreclosed prior to 5:00 p.m. on the Monday before the scheduled foreclosure sale.
- (b) Respondent must give prompt notice of the filing of the suit to petitioner or petitioner's attorney and the foreclosure trustee or substitute trustee by any reasonable means necessary to stop the scheduled foreclosure sale.
- (c) Within ten days of filing suit, the respondent shall file a motion and proposed order to dismiss or vacate with the clerk of the court in which the application was filed giving notice that respondent has filed an original proceeding contesting the right to foreclose in a court of competent jurisdiction. If no order has been signed, the court shall dismiss a pending proceeding. If an order has been signed, the court shall vacate the Rule 736 order.
- (d) If the automatic stay under this rule is in effect, any foreclosure sale of the property is void. Within 10 business days of notice that the foreclosure sale was void, the trustee or substitute trustee shall return to the buyer of the foreclosed property the purchase price paid by the buyer.
- (e) The court may enforce the Rule 736 process under chapters 9 and 10 of the Civil Practices and Remedies Code.

**736.12. Attachment of Order to Trustee's Deed**

A conformed copy of the order must be attached to the trustee or substitute trustee's foreclosure deed.

**736.13. Promulgated Forms**

The Supreme Court of Texas may promulgate forms that conform to this rule.