

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 11-9256

FINAL APPROVAL OF AMENDMENTS TO TEXAS RULES OF CIVIL PROCEDURE 735 AND 736

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. By Order dated October 17, 2011, in Misc. Docket No. 11-9215, the Court proposed amendments to Rules 735 and 736 of the Texas Rules of Civil Procedure and invited public comment. Following public comment, the Court made additional revisions to the rules. This Order contains the final version of amended Rules 735 and 736.
3. Amended Rules 735 and 736 apply in all proceedings filed on or after January 1, 2012. Proceedings filed before that date continue to be governed by the rules prior to these amendments.
4. 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: December 12th, 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

Eva M. Guzman, Justice

Debra H. Lehrmann

Debra H. Lehrmann, Justice

PART VII. RULES RELATING TO SPECIAL PROCEEDINGS

SECTION 1. PROCEDURES RELATED TO FORECLOSURES OF CERTAIN LIENS

RULE 735. FORECLOSURES REQUIRING A COURT ORDER

735.1. Liens Affected

Rule 736 provides the procedure for obtaining a court order, when required, to allow foreclosure of a lien containing a power of sale in the security instrument or declaration creating the lien, including a lien securing any of the following:

- (a) a home equity loan, reverse mortgage, or home equity line of credit under article XVI, sections 50(a)(6), 50(k), and 50(t) of the Texas Constitution;
- (b) a transferred or property tax loan under sections 32.06 and 32.065 of the Tax Code; or
- (c) a property owners' association assessment under section 209.0092 of the Property Code.

735.2. Other Statutory and Contractual Foreclosure Provisions Unaltered

A Rule 736 order does not alter any foreclosure requirement or duty imposed under applicable law or the terms of the loan agreement, contract, or lien sought to be foreclosed. 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.

735.3. Judicial Foreclosure Unaffected

A Rule 736 order is not a substitute for a judgment for judicial foreclosure, but any lien that may be foreclosed using Rule 736 procedures may also be foreclosed by judgment in an action for judicial foreclosure.

RULE 736. EXPEDITED ORDER PROCEEDING

736.1. Application

- (a) *Where Filed.* An application for an expedited order allowing the foreclosure of a lien listed in Rule 735 to proceed must be filed in a county where all or part of the real property

encumbered by the lien sought to be foreclosed is located or in a probate court with jurisdiction over proceedings involving the property.

- (b) *Style.* An application must be styled “In re: Order for Foreclosure Concerning [state: property’s mailing address] under Tex. R. Civ. Proc. 736”.
- (c) *When Filed.* An application may not be filed until the opportunity to cure has expired under applicable law and the loan agreement, contract, or lien sought to be foreclosed.
- (d) *Contents.* The application must:
 - (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 holder or 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, whether as the servicer, beneficiary, lender, investor, property owners' association, or other person with authority to prosecute the 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 to 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) if the default is monetary, the amount required to cure the default,
 - (iii) if the default is non-monetary, the facts creating the default, and
 - (iv) if applicable, 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)(l) 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 the petitioner or the servicer describing 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 are costs of court and must be 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 must 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 must 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 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 must 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 must complete a return of service in accordance with Rule 107, except that the return of service need not contain a return receipt.
- (3) The clerk must 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 must 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, if applicable, 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 must, 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 must 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 has 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 may file a motion and proposed order to obtain a default order. For the purposes of obtaining a default order, all facts alleged in the application and supported by the affidavit of material facts constitute prima facie evidence of the truth of the matters alleged.
- (b) The court must grant the application by default order no later than 30 days after a motion is filed under (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 must issue an order granting the application if the petitioner establishes the basis for the foreclosure. Otherwise, the court must deny the application.
- (b) An order granting the application must 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 must be abated.

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 must 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 must dismiss a pending proceeding. If an order has been signed, the court must 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 must 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.

Comment to 2011 change

Rules 735 and 736 have been rewritten and expanded to cover property owners' associations' assessment liens, in accordance with amendments to chapter 209 of the Property Code. Rule 735.1 makes the expedited procedures of Rule 736 available only when the lienholder has a power of sale but a court order is nevertheless required by law to foreclose the lien. Rule 735.2 makes clear that Rule 736 is procedural only and does not affect other contractual or legal rights or duties. Any lien which can be foreclosed under Rule 736 may also be foreclosed in an action for judicial foreclosure, as Rule 735.3 states, but no lienholder is required to obtain both a Rule 736 order and a judgment for judicial foreclosure.

The requirement of conspicuousness in Rule 736.1(d)(5) has reference to section 1.201(b)(1) of the Business and Commerce Code.
