

ORAL MODIFICATION VIOLATES STATUTE OF FRAUDS

The District Court of Appeal of the State of Florida, Fourth District, recently reversed a final judgment in favor of a borrower based on an alleged oral modification of the mortgage and the doctrine of promissory estoppel, holding that because the mortgage fell within the statute of frauds, it could not be orally modified, and that the trial court misapplied the doctrine of promissory estoppel.

A copy of the opinion is available at: [Link to Opinion](#)

A mortgagee sued to foreclose in April of 2008. The borrower's answer raised as an affirmative defense that the plaintiff mortgagee was estopped from foreclosing because it promised the borrower that he did not have to make mortgage payments while the mortgagee processed a loan modification.

An assignee was substituted as plaintiff and the case went to trial. At trial, plaintiff mortgagee called an employee, a senior litigation analyst, who testified that plaintiff mortgagee had offered a loan modification to the borrower, but the paperwork was never signed and returned. The borrower countered that after the foreclosure case was filed, he was offered a loan modification by phone and told that if he made a payment of \$6,200 followed by payments of \$2,000 per month, the foreclosure would be halted.

On cross examination, the borrower admitted that he had never signed a written loan modification agreement, but denied ever receiving any documents to sign.

The trial court ruled in the borrower's favor and entered a final judgment declaring that the note and mortgage were unenforceable.

The plaintiff mortgagee moved to vacate the final judgment, arguing that the mortgage could not be modified orally because it fell within Florida's so-called "Banking Statute of Frauds" set forth in Florida Statutes section 725.01.

Although the trial court agreed the Statute of Frauds applied because the mortgage was an agreement not intended to be performed within one year, it nonetheless denied the plaintiff mortgagee's motion to vacate, finding that the case presented special circumstances and the mortgage had been modified by oral agreement. The trial court then entered a second final

judgment in borrower's favor, stating that the note and mortgage had been orally modified, reforming the terms to require borrower to pay \$2,000 per month beginning March 1, 2014.

The plaintiff mortgagee appealed. On appeal, the Court noted that under settled Florida law, the statute of frauds bars enforcement of an oral contract if the parties intended that both parties' performance would take longer than one year to complete, and the parties' intent can be inferred from the surrounding circumstances or object to be accomplished.

The Appellate Court then concluded that it was apparent from the face of the note and mortgage that neither party intended for the loan to be repaid within one year, pointing to the express language of the note and mortgage stating that the borrower promised to repay the loan by the maturity date of February 1, 2036. This showed the parties intended the loan to be paid back over 30 years in installments, not within one year of signing the documents. Accordingly, because the mortgage fell within the Statute of Frauds and any modification was required to be in writing, the Appellate Court held that the trial court erred in finding the mortgage was modified orally.

The Court also agreed with the plaintiff mortgagee's argument that the trial court erred in finding that the oral modification was enforceable based on the doctrine of promissory estoppel because the Florida Supreme Court has ruled that "the Statute of Frauds cannot be circumvented by application of the doctrine of promissory estoppel." "[A]pplication of the Statute of Frauds is a matter of legislative prerogative; the judicial doctrine of promissory estoppel may not be used to circumvent its requirements."

The part of the final judgment that ordered a modification of the note and mortgage pursuant to the alleged oral agreement was reversed, and the case remanded for further proceedings consistent with the Appellate Court's opinion.