

NO NEW NOTICE REQUIRED IF CASE DISMISSED WITHOUT PREJUDICE BUT REQUIRED WHEN DISMISSED WITH PREJUDICE

The Florida courts have recently clarified that, where a complaint is dismissed without prejudice and the dismissal does not operate as an adjudication on the merits, plaintiff may not have to send a new breach letter prior to instituting a subsequent action to foreclose the mortgage.

Foreclosure can be a complex legal area because of the nuance involved in the practice. Strategic decisions need to be made to minimize cost and exposure. A great counselor steps in the shoes of the opposing attorney, analyzing the case from both sides and always staying a chess move ahead. Such strategies can be simple as proactively seeking additional relief in orders, how you conduct motion practice, or dropping certain parties that will delay the cases if deficiency is not an option.

The case law surrounding how a plaintiff can limit its exposure to attorney's fees liability is growing. Decisions about whether to voluntarily dismiss a claim or ask that it be dismissed without prejudice can be important. In *HSBC Bank USA v. Leone*, 2019 Fla. App. LEXIS 6753, 2019 WL 1967650, No. 2D17-2851 (Fla. 2d DCA May 3, 2019), plaintiff appealed an involuntary dismissal of its foreclosure case. Plaintiff had filed a second foreclosure case after the first was dismissed without prejudice. The trial court dismissed the claim on the basis that no new notice of default was sent. The trial court found that a "new default notice was required to be mailed prior to filing the second foreclosure action." The court's order was appealed and the appellate court reversed.

The Second District Court of Appeal provided that the issue was one of contract interpretation, specifically, one must look to the plain meaning of the mortgage. Analyzing paragraph twenty-two (22) of the standard form mortgage, the court looked to the phrase "on or before the date specified in the notice." The court discounted the position that cases questioning the application of the statute of limitations would require that a second notice be sent.

Where a foreclosure case had been dismissed without prejudice and a subsequent complaint to enforce the note and foreclose the mortgage has been filed, there is no need to send a new breach letter prior to filing if the default was never cured. However, in the event that the dismissal was with prejudice, a new notice may be required.